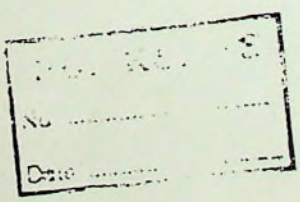
RF_DIS_2_T_SUDHA

THE HIV/AIDS BILL 2004

ICTLY NOT FOR CIRCULATION



1/3/04.

THE GAZETTE OF INDIA

EXTRAORDINARY

PART II — Section 1

PUBLISHED BY AUTHORITY

NO. 12 NEW DELHI, [Day], [Month, Date, Year] / PAUSA 24, 1924

Separate paging is given to this Part in order that it may be

filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the [Date] /Pausa [ ] (Saka)

The following Act of Parliament received the assent of the President on the [ ]

and is hereby published for general information:—

THE HIV/AIDS BILL 2004

No. [ ] OF 2004

[Date]

CHAPTER I

PRELIMINARY

Short title, extent and commencement

CHAPTER II

Protection, Promotion and Recognition of Certain Rights

CHAPTER III

Prohibition of Unfair Discrimination

Chapter IV

Consent

Chapter V

Disclosure of Information

Chapter VI

Right of Access to Treatment

Chapter VII

Right to Safe Working Environment

Chapter VIII

Promotion of Strategies for Reduction of Risk

Chapter IX

Prohibition of Quackery

Chapter X

Social Security

Chapter XI

Information, Education and Communication

Chapter XII

Appointment of Health Ombudspersons

Chapter XIII

Establishment of HIV Commissions

Chapter XIV

Institutional/Healthcare Workers Obligations

Chapter XV

State Obligations

Chapter XVI

Special Provisions

Chapter XVII

Special Procedures in Court

Chapter XVII

[Penalties]

Chapter XIX

Miscellaneous

THE GAZETTE OF INDIA

EXTRAORDINARY

PART II — Section 1

PUBLISHED BY AUTHORITY

NO. 12 NEW DELHI, [Day], [Month, Date, Year] / PAUSA 24, 1924

Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the [Date] /Pausa 24, 1924 (Saka)

The following Act of Parliament received the assent of the President on the [ ] and is hereby published for general information:—

THE HIV/AIDS BILL, 2004

No. [ ] OF 2004

[Date]

[A Bill to provide, keeping in view the social, economic and debilitating effects of the HIV epidemic in India, for [prevention and control of the HIV epidemic in India, the protection and promotion of human rights in relation to HIV/AIDS, for the establishment of National, State and Union Territory Commissions to promote such rights and promote prevention and awareness programmes [treatment?] to control the spread of HIV, and for matters connected therewith or incidental thereto.]

Whereas HIV/AIDS is assuming ever-increasing proportions in the country, and

Whereas there is a need to prevent and control the spread of HIV/AIDS, and

Whereas there is a need to protect and promote the rights of those who are HIV-positive, those who are affected by HIV/AIDS and those who are most vulnerable to HIV/AIDS in order to secure their human rights and prevent the spread of HIV/AIDS, and

Whereas HIV/AIDS has been declared a global health emergency

Whereas there is a need to protect the rights of other persons including healthcare providers in relation to HIV/AIDS, and

Whereas the Union of India has signed various treaties and declarations relating to HIV/AIDS, the protection of rights of those who are HIV-positive, those who are affected

by HIV/AIDS and those who are most vulnerable to HIV/AIDS in order to secure their human rights and prevent the spread of HIV/AIDS. and

Whereas it is necessary to give effect to those treaties and declarations under Article 253 of the Constitution of India.]

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement. - (1) This Act may be called the HIV/AIDS Act, 2004.

(2) It extends to the whole of India

[(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.]

2. Definitions. – In this Act, unless the context otherwise requires, -

(a) "capacity to consent" means an individual's ability, determined on an objective basis [keeping in mind factors of...] irrespective of an individual's age, to understand and appreciate the nature and consequences of a proposed health care service, treatment, or procedure or research, or of a proposed disclosure of confidential HIV related information, and to make an informed decision concerning the service, treatment, procedure or disclosure.

(b) "discrimination" means and includes any act or omission including a policy, law, rule, practice, condition or situation which directly or indirectly:

(i) imposes burdens, obligations, liabilities, disabilities or disadvantages on,

(ii) withholds benefits, opportunities or advantages, from,

any person based on one or more HIV related grounds

Explanation: HIV related Grounds are:

(i) HIV status, actual or perceived; or

(ii) actual or perceived association with an HIV positive person; or

(iii) actual or perceived risk of exposure to HIV infection; or

any other ground where discrimination based on that ground – (1) causes or perpetuates or has a tendency to perpetuate systemic disadvantage in respect of a category of persons, (2) undermines human dignity or (3) adversely affects the equal enjoyment of a protected person's rights and freedoms [in relation to HIV/AIDS.]

[(c) "health care provider" means an individual who's vocation or profession is (a) directly or indirectly related to the maintenance of the health of another individual and (b) whose duties require a specified amount of formal education and may require a special certification or license or membership in a regional or national organisation including any physician, nurse, paramedic, psychologist, counsellor or other person providing medical, nursing, psychological, or other health care services of any kind.]

(d) "HIV-related information" means any information concerning the undertaking, performing and/ or result of an HIV test, including the HIV or HIV antibody status or any other [private/ personal] information concerning another person, collected, received, accessed and/or recorded in connection with an HIV test, HIV related treatment or HIV related research or which may identify the person? or any information relating or connected thereto or any other [private/ personal] information collected, received, accessed and/or recorded in connection with the HIV status of an individual].

(e) "HIV Test" means a test to determine the presence of the antibody or antigen of HIV, or of HIV infection.

(f) "informed Consent" means consent given without any force, fraud or threat, obtained after disclosing to the person concerned adequate information including risks and benefits of, and alternatives to, the proposed intervention in a language and manner understood by the person. [specific to the proposed intervention]

(g) "protected person" means a person who is:

(i) HIV+; and/or

(ii) Actually, or perceived to be, associated with an HIV positive person; and/or

(iii) Actually, or perceived to be, at risk of exposure to HIV infection.

(iv) Actually or perceived to be a member of a group actually or perceived to be vulnerable to HIV/AIDS.

(h) "reasonable accommodation" means any modification of or adjustment to the job or working environment that will enable the qualified applicant or employee to participate in the job application process, to perform the essential functions of the job or to enjoy benefit and privileges of employment equal to those enjoyed by other employees.

[(i) "significant risk" means:

(i) the presence of a significant risk body substance; and

(ii) a circumstance which constitutes significant risk for transmitting or contracting HIV infection; and

(iii) the presence of an infectious source and a non-infected person.

Explanation 1: "Significant risk body substances" are blood, semen, vaginal secretions, breast milk, tissue and the following body fluids: cerebrospinal, amniotic, peritoneal, synovial, pericardial and pleural.

Explanation 2: "Circumstances which constitute significant risk of transmitting or contracting HIV infection" are:

i) sexual intercourse (e.g. vaginal, anal, oral) which exposes a non-infected individual to blood, semen or vaginal secretions of an infected individual;

ii) sharing of needles and other paraphernalia used for preparing and injecting drugs between infected and non-infected individuals;

iii) the gestation, birthing or beast feeding of an infant when the mother is infected with HIV;

iv) transfusion or transplantation of blood, organs or other tissues from an infected individual to an uninfected individual, provided such blood, organs or other tissues have not tested conclusively (negatively) for antibody or antigen and have not been rendered non-infective by heat or chemical treatment;

v) other circumstances not identified above during which a significant risk body substance (other than breast milk) of an infected individual contacts or may contact mucous membranes (e.g. eyes, nose, mouth), non-intact skin (e.g. open wound, skin with a dermatitis condition, abraded areas) or the vascular system of a non-infected person. Such circumstances include

but are not limited to needlestick or puncture wound injuries and direct saturation or permeation of these body surfaces by the infectious body substance.

Provided that "significant risk" shall not include:

(i) exposure to urine, faeces, sputum, nasal secretions, saliva, sweat, tears or vomit that does not contain blood that is visible to the naked eye;

(ii) human bites where there is no direct blood to blood, or blood to mucous membrane contact;

(iii) exposure of intact skin to blood or any other blood substance;

(iv) occupational settings where individuals use scientifically accepted barrier techniques and preventive practices in circumstances which would otherwise pose a significant risk and such barriers are not breached and remain intact.]

Other possible definitions:

Adolescence	Adoption Agency	AIDS
AIDS Related Complex	Cd4 Test	Child [Minor/Major]
Company	Indian Company	Contact
Contact Tracing	Confidentiality	Counsellor
Counselling	Consent	Court
Donor	Drug Use Paraphernalia	Enterprise
person	Pre/Post-Test Counselling	Establishment
Guardian	Health Condition	HealthCare Services/system
HealthCare Institution	HIV/Status/Test/Infection	HIV Related Illness
Institution	Informed/written Consent	Media
Medical Waste	Opportunistic Infection	Partner
Pathology Laboratory	Person/ Protected Person	Personal Information
Post Exposure Prophylaxis	Privacy	
Property	Quacks/Quackery	Reasonable Acco.
Registration Of Marriages	Safe Sex Information	Screening
Sentinel Testing	Sexual Intercourse	Sex Work
Significant Risk	STD	Undue Hardship

Undertaking	Universal Precautions	Vaccine
Viral Load Test	VCTC	Window Period

3. General Declaration of Principles and Interpretation. – [Constitution of India/India's Commitments to International Conventions/Gender and rights of protected persons.]

CHAPTER II

PROTECTION, PROMOTION AND RECOGNITION OF CERTAIN RIGHTS

4. Right to Equality. - No person shall be subject to unfair discrimination in any form by the State or any other person.

5. Right to Privacy. - Every person has the right to privacy.

6. Right to Health. – (1) Every person has the right to enjoy the highest attainable standard of physical and mental health.

[(2) Every [protected] person has the right to equal access to treatment.]

7. Right to Safe Working Environment. - Every person has the right to a safe working environment

8. Right to Information. – Every person has the right to accurate, scientific and evidence-based information and education relating to health and the protection of health.

9. Right to Marry and found a family. - Every person of marriageable age has the right to marry and to found a family.

10. Right to autonomy. Every person has the right to bodily and psychological integrity including the right not to be subject to medical treatment, interventions or research without her/his informed consent.

[**11. Right to Work.** - Every [protected] person has the right to work, which includes the right of everyone to the opportunity to gain his living by work, which he freely chooses or accepts.]

Chapter III

Prohibition of Unfair Discrimination

12. Prohibition of Unfair Discrimination. – (1) No person shall be subject to unfair discrimination in any form by the State or any other person.

[*Explanation:* Discrimination based on rational and objectively determinable criteria intrinsic to the activity concerned or for a legitimate purpose, shall not be considered unfair discrimination.]

(2) For the purposes of Section 12, unfair discrimination against a person includes:

(a) Denial of, unfair treatment in or dismissal from employment;

Provided that a person, who is otherwise qualified shall not be terminated from, or denied, employment unless:

(i) s/he poses a significant risk of transmission of HIV to other persons in the workplace, or

(ii) s/he has been assessed as unfit to fulfill the duties of the job; and

(iii) in the case of termination, the employer is unable to provide reasonable accommodation due to undue administrative or financial hardship and along with the letter of termination, provides a written statement to the person stating the nature and extent of such hardship.

Provided further that if the employer fails to provide the written statement of undue hardship it will be presumed that there is no such hardship.

Provided further that any question arising as to the fitness of a person shall be determined by an independent and qualified healthcare provider.

Explanation: For the purposes of this clause 'unfair treatment' includes but is not limited to denial of terms and conditions or benefits and privileges of services that other persons in the same position would enjoy including provident fund, gratuity and health insurance, non-renewal of employment contract, pressure to leave the employment, insistence for resignation/VRS, being asked not to report for duty, denial of promotions, arbitrary suspension or disciplinary action, creation of a non-conducive atmosphere for work, prejudicial comments and behaviour, public identification, mandatory isolation or segregation.

(b) Denial of, unfair treatment in or discontinuation of, health care services;

Explanation: For the purposes of this clause 'unfair treatment' includes but is not limited to providing medically inappropriate treatment for the condition diagnosed, untimely or arbitrary discharge, charging higher rates for the same or similar services provided to another person at any stage (conditional treatment), [imposing conditions in the form of research], prejudicial comments and behaviour, public identification, isolation or segregation unless medically indicated, pressure to leave the healthcare institution, and undignified treatment of a corpse

(c) Denial of, unfair treatment in or discontinuation of educational services;

[*Provided that* a person shall not be discontinued from, or denied, educational services unless:

(i) s/he poses a significant risk of transmission of HIV to other persons in the educational institution, or

(ii) s/he has been assessed as unfit to fulfill the requirements of the course or programme; and

(iii) in the case of discontinuation, the educational institution is unable to provide reasonable accommodation due to undue administrative or financial hardship and along with the letter of termination, provides a written statement to the person stating the nature and extent of such hardship.

Provided further that if the educational institution fails to provide the written statement of undue hardship it will be presumed that there is no such hardship.

Provided further that any question arising as to the fitness of a person shall be determined by an independent qualified healthcare provider.]

Explanation: For the purposes of this clause 'unfair treatment' includes but is not limited to arbitrary suspension by or disciplinary action from an educational institution, prejudicial comments and behaviour, public identification, isolation or segregation unless medically indicated . denial of participation in benefits or services or pressure to leave an educational institution.

(d) Denial of, unfair treatment in, or restrictions on the access to, or provision or enjoyment or use of any goods, service, facility, benefit, privilege or opportunity

customarily available to other persons in the public domain, including [*possible additions*:

(i) Denial of or restrictions on the right of movement;

(ii) Denial of the right to reside, purchase, rent or otherwise occupy any property, [Pressure to sell or get out];

(iii) Denial of the opportunity to stand for or hold public or private office;

(iv) Unfair treatment of protected persons in the custody of a State/public or private institution (Prisons, Juvenile homes, Rehab Centres, Mental homes, Adoption homes, Hospices, NGOs, Night shelters);

(v) Denial of access to, removal from or unfair treatment in a State/public or private institution in whose care and/or custody a protected person may be (Prisons, Juvenile homes, Rehab Centers, Mental homes, Adoption homes, Hospices, NGOs, Night shelters);

(vi) any disability, liability, restriction or condition with regard to –

a) Access to shops, public restaurants, hotels and places of public entertainment or

b) The use of wells, tanks, bathing ghats, roads and places of public resort or

c) Any other accommodation, service or facility dedicated to the use of the general public or customarily available to the public, whether or not for a fee, including but not limited to (ADA categories) [including denial of burial or funeral ceremonies and/or services]; and

(vii) denial of or unfair treatment in insurance coverage/superannuation benefits

Provided that denial of insurance coverage shall include non renewal, termination,

Provided further that unfair treatment in insurance coverage/superannuation benefits shall not be considered discrimination if

it is based on actuarial studies that support such treatment reasonable discrimination?]

Explanation: unfair treatment in insurance coverage shall include but not be limited to higher premiums, AIDS caps, delay in processing of claims, denial of claims, HIV/AIDS exclusion clauses, exclusion clauses based on actual or perceived association with an HIV+ person or of exposure to HIV]

(e) Isolation or segregation;

(f) Mandatory testing as a pre-requisite, for obtaining employment, or accessing healthcare services or education or, for the continuation of the same or, for [accessing/using] any other service or facility;

(g) Any threat, coercion, undue influence, fraud or imposition of conditions or liability or any other behaviour that compels or forces a person to adopt a particular course of action or that results in denial of or inability to access services.

(3) Nothing in this Act shall prevent the State or any other person from taking measures for the protection, benefit or advancement of protected persons.

13. Prohibition of Hate and Discriminatory Propaganda. – (1) No person shall, based on one or more [HIV related grounds] publish, propagate, advocate or communicate by words, either spoken or written, or by signs or by visible representations or otherwise against any other person (or group or category of persons, in general or specifically) anything that could reasonably be construed to demonstrate a clear intention to:

(a) be hurtful

(b) be harmful or to incite harm

(c) promote or propagate hatred

(d) be likely to expose protected persons to hatred or contempt

(2) No person may

(a) disseminate or broadcast any information

(b) publish or display any advertisement or notice

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person or [incite harm or physical violence].

CHAPTER IV

CONSENT

14. Right to autonomy. (1) Every person has the right to bodily and psychological integrity including the right not to be subject to medical treatment, interventions or research without her/his informed consent.

15. Informed Consent for HIV testing, treatment and research. (1) No HIV test, HIV related treatment or HIV related research of a person shall be undertaken or performed except with informed consent [recorded] in writing of that person or her/his representative in accordance with sub-Section (2) below.

(2) The informed consent of a person's representative may be taken [in writing] instead of the person's informed consent [in writing] only in the following circumstances:

(a) where the person has died, from that person's partner or relative or administrator or executor;

(b) where the person is under the age of 12 years, from that person's parent or legal or *de facto* guardian;

(c) where the person is between the ages of 12 and [18] years and, in the written opinion of the concerned healthcare provider, lacks the capacity to consent, from that person's parent or legal or *de facto* guardian;

(d) where, in the written opinion of the concerned healthcare provider, the person lacks the physical or mental capacity to consent, from that person's partner, or relative or legal or *de facto* guardian;

(e) In an emergency situation, where the person is unconscious, or otherwise unable to give consent, from that person's partner, or relative or legal or *de facto* guardian;

(f) In clauses (b) to (e) above, where a representative of the person is not available to give informed consent in writing, or in clause (e) above, in the opinion of the health care provider, is not acting in the best interest of the person, then the same shall be taken from an [authorised representative of the concerned institution/ independent health care provider] [in accordance with the Regulations under this Act.]

(g) [Within 30 days of the coming into force of this Act or the establishment of an institution whichever is later, all institutions involved in HIV testing, treatment or research shall ensure that the [treatment] protocols as prescribed in the Regulations are employed/used by all persons working in/employed by such institution.]

(3) Where a person or her/his representative is unable to give informed consent in writing in accordance with this chapter, informed consent may be taken verbally from that person and contemporaneous records of such informed consent shall be entered into records maintained in the regular course of business by the person taking the informed consent.

(4) For the purposes of this Chapter, informed consent for an HIV test shall not be valid unless the person who is being tested is provided pre-test and post-test counselling in accordance with the Regulations under this Act.

[*Provided that* where the person voluntarily chooses not to undergo pre-test and post-test counselling, it shall not invalidate the informed consent for an HIV test.] [*should this be deleted ?/option of graded system – mandatory counselling for 5 years after which voluntary?*]

(5) For the purposes of this Chapter, informed consent for HIV-related research shall not be considered valid unless the potential research subject is adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study, the discomfort it may entail and the right to abstain from participation in the research or to withdraw consent to participate in the research at any time.

(6) Informed consent is not required in the following situations:

(a) when an HIV test is ordered by a court; *Provided* that no court shall order an HIV test to be carried out either as part of a medical examination or otherwise, unless the court:

(i) is satisfied that the carrying out of the HIV test is necessary for the determination of the issues in the cause or matter and in the interests of justice; and

(ii) ensures that pre-test and post-test counselling is available for the person being tested and that confidentiality of HIV status of the person being tested is maintained

(b) when HIV testing without informed consent is authorised by any other law for the time being in force;

Provided that no person shall direct the undertaking of an HIV test either as part of a medical examination or otherwise without ensuring that pre-test and post-test counselling is available for the person being tested and that confidentiality of HIV status of the person being tested is maintained.

[*Provided further that* no HIV test shall be carried out by a person either as part of a medical examination or otherwise, whether under direction of the police investigating an offence or under the orders of a Court, or any person, without ensuring that pre-test and post-test counselling is provided to the person being tested and confidentiality of HIV status of the person being tested is maintained.]

(c) for HIV testing related to procuring, processing, distribution or use of a human body or any part there of, including organs, tissues, blood, semen or other body fluids for use in medical research or therapy or for transplantation, transfusion to, or artificial insemination of persons;

Provided that if the test results are communicated to a donor, post-test counselling shall be provided to her/him and confidentiality of her/his HIV status shall be maintained in accordance with the provisions of this Act and the Regulations prescribed thereunder.

(d) for epidemiological surveillance/surveillance purposes where the HIV test is anonymous and unlinked and does not determine the HIV status of the person;

Provided that at the time of HIV testing of blood, persons will be informed by general notice, that their blood unit may be tested for epidemiological surveillance/surveillance purposes in accordance with Regulations under this Act.

16. HIV Testing. (1) Notwithstanding any law for the time being in force, no person shall be subject to an HIV test except in accordance with the provisions of this Act.

(2) [Subject to Section 15], no HIV test may be recommended or performed except:

(a) for the voluntary determination of the HIV status of a person; or

(b) if it is medically necessary/indicated for the appropriate treatment or care and in the interest of the person being tested

(3) No person shall perform an HIV test unless that person is: [regulations for each?]

(a) a licensed/*registered(?)* VCTC; or

(b) a licensed/*registered* pathology laboratory, either independent or attached to a healthcare institution or is a healthcare provider licensed to provide pathology services; or

(c) a licensed/registered blood bank] [*Do we need this here?*]

(4) [A person who [wants] to get an HIV test done and who wishes to remain anonymous shall have the right to do so, and to provide informed consent [in writing] by using a coded system that does not link her/his individual identity with the request or result of the HIV test.]

CHAPTER V

DISCLOSURE OF INFORMATION

17. Right to Privacy. Every person has the right to privacy.

18. [Disclosure of Information]. (1) No person shall be compelled to disclose HIV-related information or any other private/personal information concerning themselves except:

(a) when a court determines by an order that the disclosure of such information is in the interest of justice and necessary for determination of issues in a cause or matter; or

(b) if such disclosure is required by any law for the time being in force]

(2) No person shall disclose or be compelled to disclose HIV related information and/or [private/personal] information of another person, imparted in confidence in a relationship of [fiduciary nature], except in the following circumstances, viz.:

(a) with the written informed consent of that person;

(b) with the written informed consent of a representative of the person in accordance with Section 15;

(c) in case the disclosure is being made by a health care provider to another health care provider who is [directly] involved in the treatment or counselling of a person, when such disclosure is necessary to provide appropriate care or treatment in the best interest of that person;

(d) by an order of a court when it is satisfied that the disclosure of such information is necessary for the determination of issues and in the interest of justice in a cause or matter;

(e) [if such disclosure is required by any law for the time being in force] [protocols for this?];

(f) when written informed consent is not given, disclosure of HIV- positive status may be made:

(i) by a health care provider to another person being a partner/ [contact] of that person to protect the partner/ [contact] when:

- the health care provider bona fide and reasonably believes that the partner/ [contact] is at significant risk of being infected; and
- the HIV positive person has been counselled to inform her/ his partner; and

- the health care provider [bona fide believes]/ satisfied that the HIV-positive person will not inform her/ his partner; and
- the health care provider has informed the HIV- positive person of her/ his intention to disclose the HIV-positive status to the partner/ [contact];

Provided that such disclosure to a partner/ [contact] shall be made in person and with appropriate counselling or referrals for counselling as provided in Section (....) [of the chapter on Consent];

(ii) [by an authorised person in an adoption agency of a child in its care and custody, may be made to prospective adoptive parents, by an adoption agency, for the proper care and in the best interests of the child]?;

(g) [in any other case, when a court determines that such disclosure is required in the public interest, and that such public interest overrides the public interest in maintaining confidentiality/ non-disclosure.]

(3) Any person to whom disclosure under sub-Sections (1) or (2) is made is prohibited from making further disclosure except as provided in this Chapter.

(4) Sub-Section (3) does not prevent a person from disclosing statistical or other information of a person that could not reasonably be expected to lead to the identification of that person

Provided that the person to whom such disclosure is made shall not use such information to identify the person to whom it pertains or present it in a manner whereby such identification is possible.

19. Duty to Inform. (1) [Every person who is HIV-positive, is aware of such status and, has been counselled in accordance with this Act or is aware of the nature of HIV and how it is transmitted, has a duty to inform his sexual or needle-sharing partner of such status and the risk of transmission].

[when to inform?]; [what is the consequence of not informing?]; [Surgeon – patient issue?] [other contact ?]

(2) [Every person who is HIV+ and is aware of such status and proposes to adopt or take in guardianship, a child, has a duty to inform the adoption agency from which such child is being adopted or taken of such status.]

20. Data Protection. (1) Every institution that records and/or stores HIV related information of a person shall, within 360 days of the coming into force of this Act, formulate and implement data protection measures as prescribed by Regulations under this Act, to ensure that such information is protected from [unauthorised] disclosure.

(2) [Such measures shall include procedures for protecting information from disclosure, access in exceptional circumstances, provisions for security systems to protect the information stored in any form and mechanisms to ensure staff accountability and liability.]

21. [Prohibition on publication.] [No person shall print or publish the name or any matter/information which may make identify a person as being HIV-positive without the written informed consent of that person.] [media restrictions?]

CHAPTER VI

RIGHT OF ACCESS TO TESTING, TREATMENT [AND COUNSELLING]

22. Right to Health. Every person has the right to enjoy the highest attainable standard of physical and mental health.

23. State to provide healthcare/duty of the State. (1) The State shall respect, protect and fulfill the right to the highest attainable standard of physical and mental health of all persons.

(2) Without prejudice to the generality of the aforementioned clause, the State shall provide:

(a) comprehensive HIV prevention and care information;

(b) universal availability of quality HIV prevention measures and services;

(c) quality voluntary testing and counselling services and centres in accordance with the Regulations under this Act;

(d) affordable and accessible healthcare;

(e) equal access to treatment for HIV/AIDS for all persons; and

(f) access to treatment for HIV/AIDS free of cost.

Explanation 1: For the purposes of this chapter 'treatment' includes quality health facilities, goods, services and information for preventive, curative and palliative care of HIV/AIDS and related opportunistic infections and conditions' including quality counselling, the effective and monitored use of medicines for opportunistic infections, post exposure prophylaxis for healthcare providers and victims of sex crimes, anti-retroviral therapy, nutritional supplements, prevention of mother-to-child transmission, infant milk substitutes and other safe and effective medicines, diagnostics and related technologies, [in accordance with WHO essential medicines list.]

24. Prescription of HIV-related treatment. - Nobody shall prescribe or administer HIV-related treatment and in particular anti-retroviral therapy except in accordance with the treatment protocols as prescribed in the Regulations.

25. Voluntary Counselling and Testing Facilities. - The State shall establish voluntary testing and counselling facilities in every district in the country in accordance with the Regulations under this Act.

26. Measures to be taken by State. – For the purposes of this Chapter, the State shall take effective legislative, administrative and fiscal measures including:

(a) training and capacity building of healthcare providers to provide quality treatment with appropriate counselling for prescribing and monitoring the use of medications, diagnostics and related technologies;

(b) ensuring that all other laws are in consonance with the provisions of this Chapter and in particular that the right to health is not in any manner restricted or compromised on account of protection of intellectual property rights;

(c) introducing tax incentives and excise exemptions on HIV-related treatment in order to promote its affordability, accessibility and availability;

(d) ensuring that the pricing of medication pursuant to any statute, regulation or order is done in a transparent, accountable manner open to public scrutiny that promotes its affordability, accessibility and availability;

(e) ensuring that incentives to encourage investment in research and development are provided to entities, particularly those run by the state to develop, manufacture, market and distribute affordable and accessible preventive, curative and palliative care.

CHAPTER VII

RIGHT TO SAFE WORKING ENVIRONMENT

27. Right to Safe Working Environment. (1) Every person has the right to a safe working environment.

(2) Every healthcare institution and every institution where there is a significant risk of [occupational?] exposure to HIV, shall provide free of cost:

(a) universal precautions to all its employees [persons working there/interns] and appropriate training for the use of such universal precautions;

(b) post exposure prophylaxis to any of its employees who may be occupationally exposed to HIV, with appropriate counselling services;

(c) [HIV-related treatment [and appropriate compensation] to those employees/persons working in the institution who are acquire HIV infection through occupational exposure; and

(d) healthcare insurance for all its employees/persons working within the institution including for HIV.

Explanation: Every healthcare institution shall within 60 days of the notification of this Act ensure that the Universal Precautions protocols as prescribed in the Regulations are employed/used in the institution and inform all its employees/persons working in the institution of the details of availability of post exposure prophylaxis in the healthcare institution.

(4) Every healthcare worker shall employ/use Universal Precautions in accordance with the Regulations in the care and treatment of all persons in the course of their work. [Amendment of Bio-medical Waste (Management and Handling) Rules, 1998]

CHAPTER VIII

PROMOTION OF STRATEGIES FOR REDUCTION OF RISK

28. Strategies for Reduction of Risk. - (1) Notwithstanding anything contained in any other law for the time being in force,

(a) the implementation or use of any strategy for reducing risk of HIV transmission shall not, in any manner, be prohibited, impeded, restricted or prevented; and

(b) the possession of any tool or paraphernalia for reduction of risk of HIV transmission or any act pursuant thereto shall not amount to a criminal offence or attract civil liability.

Explanation: Strategies for reducing risk of HIV transmission means promoting actions or practices that minimise a person's risk of exposure to HIV and/or mitigate the adverse impacts related to HIV/AIDS and through:

(i) the provision of information, education and counselling services relating to HIV prevention and safe practices that do not promote gender and sexual stereotypes and are age-appropriate, non-stigmatising, non-discriminatory, scientific and evidence-based;

(ii) the provision and/or the use of safe sex tools, including condoms, lubricants, female-controlled barrier methods, and safe drug use paraphernalia, including clean needles, syringes, bleach and other appropriate sterilising equipment accompanied by adequate information on their correct use; and

(iii) drug substitution and needle exchange programmes in accordance with sub-Section 2

Illustrations

A, supplies condoms to *B*, a sex worker or to C, a client of B. Neither *A*, nor *B*, nor C can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the intervention.

M, an intervention project on HIV/AIDS and sexual health information, education and counselling for men who have sex with men provides safer sex information, material and condoms to *N*, a man who has sex with other men. Neither *M* nor *N* can be held

criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the intervention.

X, an intervention providing registered NEP services to injecting drug users, supplies a clean syringe/needle to *Y*, an injecting drug user who exchanges the same for a used needle/syringe. Neither *X* nor *Y* can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the intervention.

(2) No person shall implement a drug substitution or needle exchange programme unless that person is **[registered/certified/licensed/permit]** with **[NHC/SHC]** and such programmes are implemented in accordance with the Regulations under this Act.

(3) No law enforcement official/public servant shall arrest or detain, or in any manner harass, impede, restrict or otherwise prevent any person implementing or using strategies for reduction of risk of HIV transmission in accordance with the provisions of this Act.

CHAPTER IX

PROHIBITION OF QUACKERY

29. Prohibition of Quackery. (1) No person shall manufacture, market, distribute, provide, prescribe (practice?) or sell any substance service/ therapy to cure [prevent] or alleviate medical conditions associated with HIV/AIDS or claim such cure [prevention] or alleviation unless:

(a) the substance/ service has been tested and/or approved/authorised by the Indian Council of Medical Research, DCGI, (and the NHC) to have such effect; and

(b) the person is qualified and licensed/registered to manufacture, market, advertise, distribute, provide, prescribe or sell the substance/ service/therapy under law.

(2) The State shall take active measures through law reform and strict enforcement mechanisms to make those indulging in quackery accountable for violation of laws.

[Regulations for home test kits?]

CHAPTER X

SOCIAL SECURITY

30. Social Security Scheme. (1) The State shall by notification [within 360 days of the notification of this Act] frame/implement a health insurance/social security scheme to address inter alia HIV/AIDS and related illnesses/that mitigate the social and economic impact of HIV/AIDS and related illnesses/for protected persons/children/HIV-positive persons/healthcare workers/older persons.

[Health insurance to be made available to HIV-positive persons.]

CHAPTER XI

INFORMATION, EDUCATION AND COMMUNICATION

31. Right to Information. (1) Every person has the right to accurate, scientific and evidence-based information and education relating to health and the protection of health from the State.

(2) No person shall be denied access to and availability of HIV/AIDS Information, Education and Communication programmes, including sexual health and drug use related information by the State or any other person.

Provided that the person is qualified (capacity) and expenses

Provided that where the person is below the age of 12 years, and in the opinion of the provider of information, is incapable of understanding the nature of the sexual health and [reproductive health] and drug use related information, the provider may require the presence of an adult person of the child's choice (coercive relationships) before providing such information in the best interests of the child. [protocol for counselling – when info to children to determine when counselling is required]

[32. Obligation on every institution to have and communicate an IEC programme]

33. Responsibility of State to promote HIV Information, Education and Communication. (1) The State, [whose responsibility? Joint?] in consultation with the National HIV/AIDS Commission and State HIV/AIDS Commissions, protected persons and persons working in the field of HIV/AIDS, shall,

(a) formulate, institute and implement sustained multi-lingual, easily understood, national, state and local Information, Education and Communication programmes relating to HIV/AIDS which are accessible and available to all persons,

(i) based on experiential and evidence-based research and studies and scientific and accurate information, and

(ii) in a manner that does not promote gender and sexual stereotypes and is age-appropriate, gender-sensitive, non-stigmatising and non-discriminatory,

(b) be responsible for developing and conducting a multi-lingual national programme of public education and information designed to promote an understanding and acceptance of this Act; and

(c) make special efforts to ensure the mobilisation and participation of various members of the community, to provide information and education on HIV/AIDS at all levels throughout the country.

(2) Without prejudice to the generality of the aforementioned clauses, the State shall make special efforts to ensure:

(a) that women of all ages have access to accurate and comprehensive HIV/AIDS Information, Education and Communication programmes focussing on their needs;

(b) the right of every child and adolescent to access adequate and accurate sexual health information and education, including Information, Education and Communication Programmes related to HIV/AIDS prevention and care;

(c) that all teachers and instructors of HIV/AIDS courses shall be required to undergo annual training on HIV/AIDS prevention, care and treatment and sexual and reproductive health information in accordance with Regulations prescribed by the National HIV/AIDS Commission and State HIV/AIDS Commissions;

(d) that all boards of education shall, within 180 days of the coming into force of this Act, formulate and institute curriculum for HIV/AIDS education in accordance with the provisions of this Chapter and the Regulations under this Act;

(e) that, within 180 days of the coming into force of this Act, all curricula related to medical, health, state service, legal and social work education, incorporate HIV/AIDS education in accordance with the provisions of this Chapter, particularly in relation to HIV/AIDS, gender and sexuality, counselling and legal rights;

(f) that all State and private employers in the formal and informal employment sector, [including members of the Armed Forces] shall provide their employees with the minimum information and instruction on HIV/AIDS, particularly relating to confidentiality in the workplace and attitude towards infected employees;]

(g) that appropriate information on HIV/AIDS is attached to or provided with every prophylactic offered for sale, sold or supplied in any other manner to any person in English, Hindi, the respective regional language of the State where the same is supplied and by pictorial representation and containing literature on the proper use of the prophylactic device or agent, it's efficiency against HIV and sexually transmitted infection, and the importance of adopting safer sexual practices;

(h) that informational aids or materials on the cause, modes of transmission, prevention and consequences of HIV infection are adequately provided at all travel points including international ports of entry and exits, domestic airports, train stations, bus stations and other travel centres;

(i) that all overseas Indian workers and diplomatic military, trade and labour officials and personnel to be assigned overseas undergo training HIV/AIDS, particularly the cause, prevention, consequences, treatment of HIV/AIDS before certification for overseas assignment.

34. HIV/AIDS Information as a Health Service. (1) HIV/AIDS education and information dissemination shall form part of the delivery of health services by healthcare workers.

(2) It shall be the duty of all healthcare providers to make available to the public such information necessary to control the spread of HIV/AIDS and to correct common misconception about this disease.

(3) Every healthcare institution shall enhance the knowledge and capabilities of all healthcare workers working or employed by it to include skills for proper information dissemination and education on HIV/AIDS. The training of health workers shall include discussion on HIV related ethical issues such as confidentiality informed consent and the duty to provide treatment.

CHAPTER XII

APPOINTMENT OF HEALTH OMBUDSPERSONS

35. Appointment of Health Ombudsperson. - (1) The Central Government shall appoint by notification in the Official Gazette, one or more Health Ombudspersons for each [ ] of the Union Territories for the purposes of this Act, within 90 days of the coming into force of this Act.

(2) Every State Government shall appoint, by notification in the Official Gazette, one Health Ombudsperson for each district of the State for the purposes of this Act, within 90 days of the coming into force of this Act.

(3) The Officers appointed as Health Ombudspersons under sub-section (1) or sub-section (2) shall be,-

(a) when appointed for the whole of a Union Territory, of or above the rank of the Joint Director of Health and Family Welfare; and

(b) when appointed for each district of the State, of or above the rank of the Officer responsible for Health for such district.

36. Functions of Health Ombudsperson. - (1) The Health Ombudsperson shall inquire, suo motu, on the request of the appropriate government or its agencies or any court or on a petition presented to it by a protected person or any person on her/his behalf or any organisation representing or working with protected persons, into complaints or instances of violations and breaches of the provisions of this Act or the rules or the regulations made thereunder by a healthcare institution or a healthcare provider in her/his jurisdiction [including in relation to delivery of healthcare services, access to treatment and the use and provision of universal precautions.]

(2) The Health Ombudsperson shall settle/decide a complaint promptly and in any case within seven working days.

Provided that where the complaint relates to discrimination in the provision of or access to health care services [or provision of universal precautions], the Health Ombudsperson shall pass orders/settle the complaint within one day.

(3) All proceedings before the Health Ombudsperson shall be summary.

(4) The Health Ombudsperson shall pass reasoned orders.

(5) The Health Ombudsperson shall maintain records in accordance with the Regulations.

(6) The Health Ombudsperson shall be deemed to be public servant within the meaning of Section 21 of the Indian Penal Code, 1860.

(7) The Health Ombudsperson may appoint such number of persons as necessary to assist in her/his functioning and may delegate such of her/his functions in relation to the investigation of a complaint under sub-Section (1) to such persons.

37. Powers of Health Ombudsperson. - (1) The Health Ombudsperson shall, while inquiring into complaints under this Act, have all the powers of a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:

(a) summoning and enforcing the attendance of witnesses and examine them on oath;

(b) discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) any other matter which may be prescribed.

[Power to investigate?]

(2) The Health Ombudsperson shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Health Ombudsperson, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of section 176 and section 177 of the Indian Penal Code.

[(3) The Health Ombudsperson or any other officer, not below the rank of a Gazetted Officer, specially authorised in this behalf by the Health Ombudsperson may enter any building or place where the Health Ombudsperson has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies therefrom subject to the provisions of section 100 of the Code of Criminal Procedure, 1973, in so far as it may be applicable.]

(4) The Health Ombudsperson shall have the power to -

(a) pass orders in an emergent situation without hearing including directing admissions, operations, treatment, etc as may be appropriate

Provided that the Health Ombudsperson shall, as soon as may be after the passing of such orders, conduct/give an opportunity to both parties to be heard and pass appropriate orders;

(b) pass orders for the withdrawal and rectification of the breach complained of after considering representations made by the parties to the complaint

and such orders shall be binding on the parties. [?]

[Effect of non compliance of Health Ombudsperson Orders]

(5) The Health Ombudsperson, may, subject to any Rules made in this behalf, make such orders as to cost as it considers reasonable and any such order shall be executable as a decree of a civil court.[?]

38. **Report to Government.** – The Health Ombudsperson shall, every six months, report to the Appropriate Government, the number and nature of complaints received by her/him, the action taken and orders passed in relation to such complaints.

CHAPTER XIII

HIV/AIDS COMMISSIONS

39. Establishment of HIV/AIDS Commissions. – (1) The Central Government shall, on the notification of this Act, duly reconstitute in accordance with the provisions of this Act and establish/notify the National AIDS Control Organisation as the National HIV/AIDS Commission for the purposes of this Act.

(2) The Central Government for each Union Territory and the State Government for each State, shall, on the notification of this Act, establish a Commission to be called the "_____ HIV/AIDS Commission" for the purposes of this Act.

Provided that in any State or Union Territory in which a State AIDS Control Society exists, such society shall be the Commission for that State or Union Territory as the case may be and shall be duly reconstituted to meet the requirements of this Act.

[*Provided further* that where District AIDS Control Societies exist?]

(3) The Commission shall be a body corporate with the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property and to contract, and may, by the aforesaid name, sue or be sued.

(4) (a) The head office of the National HIV/AIDS Commission shall be at Delhi. The National HIV/AIDS Commission may establish offices at other places in India.

(b) The head office of State and Union Territory Commissions shall be at such places as the Appropriate Government may decide. The State/Union Territory HIV/AIDS Commission may establish offices at other places in the respective State/Union Territory.

40. Constitution of Commissions. (1) The National HIV/AIDS Commission shall comprise-

(a) a full-time Director, being a person with special knowledge or practical experience in matters relating to HIV/AIDS or a person having knowledge and experience in administering institutions dealing with the matters aforesaid, to be nominated by the Nomination Committee;

(b) such number of full time members, not exceeding five to be nominated by the Central Government;

(c) five persons, to be nominated by the Nomination Committee, from amongst the members of the State/Union Territory HIV/AIDS Commissions [or to be nominated from State HIV/AIDS Commissions of States on a rotating basis for 1 year, alphabetical order];

(d) five persons to be nominated by the Advisory Committee, to represent the interests of protected persons, healthcare providers, non-governmental organisations working in the field of HIV/AIDS or any other interest which, in the opinion of the Advisory Committee, ought to be represented; [corporate, PLHA, eminent legal person]

(e) a full time member-HIV/AIDS expert, being a person having special knowledge or practical experience in respect of matters relating health, human rights and HIV, nominated by the Advisory Committee;

(f) a full-time member-secretary, possessing qualifications, knowledge and experience of various aspects of [HIV/AIDS], to be made available by the Central Government.

(2) The State/Union Territory HIV/AIDS Commission shall comprise –

(a) a full-time Director, being a person having special knowledge or practical experience in respect of matter relating to HIV/AIDS or a person having knowledge and experience in administering institutions dealing with the matters aforesaid, to be nominated by the State Government;

(b) such number of full-time members, not exceeding five, to be nominated by the State/Union Territory Government;

(c) such number of members, not exceeding five, to be nominated by the State/Union Territory Government from amongst the members of the local authorities functioning within the State/ Union Territory;

(d) such number of non-officials not exceeding five, to be nominated by the State Government/ Union Territory to represent the interests of protected persons, healthcare providers, NGOs working in the field of HIV/AIDS or any other interest which, in the opinion of the State/Union Territory Government, ought to be represented [rotating – yearly basis] [eminent legal person] [PLHA];

(e) a full-time member-HIV/AIDS expert, being a person having special knowledge or practical experience in respect of matters relating health, human rights and HIV;

(f) a full-time member-secretary, possessing qualifications, knowledge and experience of various aspects of HIV/AIDS, to be appointed by the State Government/ Union Territory.

41. Nomination Committee. – (1) The Nomination Committee shall, upon the notification of this Act and subsequently to fill vacancies in the National HIV/AIDS Commission, meet to consider, determine and nominate persons for the National HIV/AIDS Commission as provided under Section () of this Act.

(2) The Nomination Committee shall comprise:

(a) The Prime Minister

(b) The leader of the Opposition

(c) [other parties?]

(d) [Two NGO representatives]

(e) [PLHA]

42. Advisory Committee. – (1) The National HIV/AIDS Commission shall be advised by an Advisory Committee on matters relating to the enforcement of this Act, the protection and promotion of rights of protected persons, the care, support and treatment of persons who are HIV+ and the prevention and control of HIV/AIDS.

(2) The Advisory Committee shall comprise:

(a) The Prime Minister

(b) The leader of the Opposition

(c) [other parties?]

(d) The Minister of Health and Family Welfare

(e) [Two NGO representative]

(f) A representative of the Indian Council of Medical Research

(g) A representative of healthcare workers

(h) A representative of HIV-positive persons

(i) [A representative of protected persons]

(j) A human rights activist

(k) An epidemiologist.

(3) The Advisory Committee shall meet once every six months to carry out its functions as provided under Section () of this Act.

[Advisory Committee for States?]

43. Meetings of Commission- (1) The Commission shall meet at such time and place and shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at its meetings) [as may be prescribed.]

(2) The Director of the Commission shall preside at the meetings of the Commission

(3) If for any reason the Director is unable to attend any meeting of the Commission, any member of the Commission chosen by the members present shall preside at the meeting.

(4) All questions which come before any meeting of the Commission shall be decided by a majority of votes of the members of the Commission present and voting and in the event of equality of votes, the Director of the Commission or in his absence, the person presiding shall have and exercise a second or casting vote.

(5) Every member who is in any way, whether directly, indirectly or personally, concerned or interested in a matter to be decided at the meeting shall disclose the nature of his concern or interest and after such disclosure, the member concerned or interested shall not attend that meeting.

(6) No act or proceeding of the Commission shall be invalid merely by reason of-

(a) any vacancy in, or defect in the constitution of, the Commission; or

(b) any defect in the appointment of a person acting as the Director or a member of the Commission; or

(c) any irregularity in the procedure of the Commission not affecting the merits of the case.

44. Committees. – (1) The Commission may appoint such committees as may be necessary for the efficient discharge of its duties and performance of its functions under this Act.

(2) The persons appointed as members of committee under sub-section (1) shall be entitled to receive such allowances or fees for attending the meetings of the committee as may be fixed by the Appropriate Government.

45. Officers and other employees of Commission. – Subject to such control and restriction as may be prescribed, the Commission may appoint such officers and other employees as may be necessary for the efficient performance of its functions and the

method of appointment, the salary and allowances and other conditions of service of such other officers and employees of the Commission shall be such as may be prescribed.

46. Director to be Chief Executive. – The Director shall be the Chief Executive of the Commission and shall exercise such powers and perform such duties as may be prescribed. [Security of tenure]

47. Functions of Commission. – (1) It shall be the function of the Commission to:

(a) Prevent and control the spread of HIV;

(b) Promote and protect the rights of protected persons;

(c) Provide care, support and treatment to those infected and affected by HIV/AIDS;

(d) Reduce the vulnerability of individuals and communities to HIV/AIDS;

(e) Promote awareness, information and education about HIV/AIDS; and

(f) Alleviate the socio-economic and human impact of HIV/AIDS;

in India or the State or the Union Territory as the case may be and [in co-ordination with the appropriate government] shall co-ordinate any such programmes undertaken by any other persons or authorities on behalf of the Appropriate Government.

[*Provided* that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country or any international organisation.]

(2) In particular, and without prejudice to the generality of the foregoing provisions, the National HIV/AIDS Commission for the whole or any part of India, a Union Territory HIV/AIDS Commission for the whole or any part of the Union territory and a State HIV/AIDS Commission for the whole or any part of the State, shall –

(a) Institute and implement HIV related Programmes [in accordance with the Schedule] and plan and organise the training of persons, engaged or to be engaged, in HIV related programmes and strengthen programme management capabilities of the Appropriate Government, municipal corporations, panchayat institutions and leading NGOs participating in HIV related programmes.;

(b) Prepare and publish guidelines for the avoidance of acts or practices in violation of this Act and as required by the provisions of this Act;

(c) Inquire, suo motu, on the request of the appropriate government or its agencies or any court or in the case of an State/ Union Territory HIV/AIDS Commission on the direction of the National HIV/AIDS Commission or on a petition presented to it by a protected person or any person on her/his behalf, into complaints or instances of violation of the provisions of this Act or abetment thereof or negligence in the prevention of such violation, by any person in accordance with the Rules [Rules for inquiry and for direction including time period, report to National HIV/AIDS Commission -power to give directions to police];

(d) institute or assist complainants in instituting and/or intervene in legal proceedings involving any allegation of violation of rights of protected persons or of the provisions of this Act in any court or challenge any order of a court or conduct investigations and make recommendations as directed by the court regarding persistent violations of this Act or cases of violations of rights of protected persons referred to them by a court;

(e) Advise and report to the Appropriate Government on any matter concerning HIV/AIDS and may suo moto or when requested by the Appropriate Government:

(i) review, the safeguards under the Constitution and recommend measures for their effective implementation,

(ii) review the provisions of any existing or proposed law or policy, treaties and other international instruments and recommend measures for their effective implementation or amendment to ensure their compliance with the provisions of this Act and report other results of any such examination;

(iii) review the factors that inhibit the enjoyment of rights of protected persons and recommend appropriate remedial measures;

(iv) report as to the laws that should be made by the Legislature, or action that should be taken by such Government, on matters relating to the rights of protected persons and [HIV prevention and awareness programmes];

(v) report on any matter arising in the course of the performance of its functions;

(vi) assess and recommend strengthening of the national, state or local healthcare system including on improving access to healthcare, primary

health care system, integrate HIV with existing national health programmes, improving health education

(e) undertake a review of all laws, [in particular personal laws] and determine the manner in, and extent to, which such laws discriminate against women and recommend the reform and repeal of such laws to the appropriate government;

(f) establish a committee/forum to examine the impact of the HIV/AIDS epidemic on women which shall examine *inter alia* the role of women at home and in public life, the sexual and reproductive rights of women and men, including women's ability ot negotiate safer sex and make reproductive choices, strategies for increasing educational and economic opportunities for women, sensitising service deliverers and improving healthcare and social support services for women and the impact of religious and cultural traditions on women;

(g) recommend [measures] to the Appropriate Government to ensure no harassment from law enforcement and institute programmes for law enforcement sensitisation on matters related to this Act [government to give answer];

(h) recommend and assist in the formulation and implementation of action plans by the Appropriate Government to ensure the proper provision of health care through public healthcare institutions;

(i) maintain, publish and disseminate in as wide a manner as possible a list of care and support centres and homes, doctors providing care and treatment for HIV/AIDS, helplines, testing facilities, legal assistance;

(j) encourage the efforts of non-governmental organisations and institutions working in the field of HIV/AIDS, human rights and public health;

(k) promote, commission and finance research in relation to HIV/AIDS;

(l) surveillance?

(m) liase and take the assistance of international, multilateral and bilateral agencies for support and co-operation in the field of research in vaccines, drugs, emerging systems of health care and other financial and managerial inputs.

(n) Provide material and human resources and allocate sufficient funding to support, sustain and enhance NGOs, AIDS service organisations, community organisations in

areas of core support, capacity-building and implementation of activities, in such areas as HIV-related ethics, human rights and law.

(o) collect information on HIV/AIDS, human rights and [ ] and use this information as a basis for policy and programme development and reform;

(p) promote the understanding, acceptance and public discussion of rights of protected persons and of the provisions of this Act;

(q) formulation of five year action plan for each commission – open to public scrutiny

(r) do anything incidental or conducive to the performance of any of the preceding functions.

48. Additional Functions of National HIV/AIDS Commission. – In addition to the above, the National HIV/AIDS Commission shall –

(a) formulate and implement a National HIV/AIDS Policy which shall be reviewed and amended if necessary every three years after widespread consultation;

(b) in relation to State and Union Territory Commissions–

(i) supervise their functioning;

(ii) provide technical assistance and guidance to carry out and [sponsor] investigations and research relating to HIV/AIDS;

(iii) co-ordinate their activities and resolve disputes among them;

(iv) lay down or modify, in consultation with them, standards for HIV tests, blood safety, medication, [ ];

(v) budgetary allocations for State HIV/AIDS Commissions- does this happen now or are they independent? Monitor use of funding and resources

(c) determine and publish guidelines for the registration and support of NGOs by State/Union Territory Commissions and shall ensure that such NGOs adopt and follow good practices/ethical guidelines in the running and management of their affairs. For this purpose the Commission shall provide advice and basic training on the practical management of NGOs. Guidelines for registration and support of NGOs to be open to public scrutiny. Evaluation of NGOs

49. Additional Functions of State/UT HIV/AIDS Commission. – In addition to the duties/functions set out in section ( ), State/Union Territory Commissions shall –

(a) translate Guidelines issued by the National HIV/AIDS Commission into local and regional languages, shall ensure their widespread dissemination and monitor their implementation;

(b) report to National HIV/AIDS Commission

(c) acting under Section (inquiry) –

(i) where it considers it appropriate to do so—endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and

(ii) where it is of the opinion that the act or practice is violative of the provisions of this Act, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement— report to the Appropriate Government in relation to the inquiry;

(d) coordinate with the National HIV/AIDS Commission and other State and Union Territory Commissions for the purposes of this Act;

(e) translate into local and regional languages and ensure the widespread dissemination of the National HIV/AIDS Policy and shall ensure its effective implementation;

(f) establish HIV/AIDS helplines in each district;

(g) Counselling: VCTC, Registration of Counsellors, Full time Counselling center at Commission Office, Training of counsellors, List of registered counsellors and VCTC to be maintained and available free of cost to all HCWs and public.

50. Authentication of orders of Commission. – All orders and decisions of the Commission shall be authenticated by the signature of the Director or any other member authorised by the Commission in this behalf.

51. Power of Commission. – In all proceedings under this Act before the Commission-

(a) the Commission shall have all the powers of a civil court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, compelling the discovery and production of documents and issuing commissions for the examination of witnesses;

(b) the Commission, may, subject to any Rules made in this behalf, make such orders as to cost as it considers reasonable and any such order shall be executable as a decree of a civil court.

52. Commission to Consult. – (1) For the purposes of the performance of its functions, the Commission shall work with and consult appropriate persons, governmental organisations and non-governmental organisations.

(2) The Commissions may/shall call upon such experts, from the fields of [public health, human rights, law and/or HIV] or from any other discipline as it deems necessary, to assist the Commission in the conduct of any inquiry or proceeding before it.

(3) The Commission shall ensure, through political and financial support, that community consultation occurs in all phases of HIV/AIDS policy design, programme implementation and evaluation and that community organisations are enabled to carry out their activities, including in the fields of ethics, law and human rights, effectively.

Explanation: Community consultation shall include consultation with protected persons, community based organisations and, AIDS service organisations, human rights NGOs and representatives of vulnerable groups.

(4) The National HIV/AIDS Commission in consultation with the State and Union Territory Commissions shall establish formal and regular mechanisms to facilitate ongoing dialogue with and input from such community representatives into HIV-related government policies and programmes including through regular reporting by community representatives to the various government, parliamentary and judicial branches, joint workshops with community representatives on policy, planning and evaluation of State responses and through mechanisms for receiving written submissions from the community.

(5) The Commission shall support a greater involvement of protected persons, and of persons living with HIV/AIDS in particular, through an initiative to strengthen the capacity and co-ordination of networks of people living with HIV/AIDS and community based organisations. [Paris Declaration-GIPA]

53. State to consider Commission reports. – The Appropriate Government shall consider the reports and recommendations of the Commission, in particular under section

[ ] and together with comments thereon, shall lay the same before the concerned legislature for their action.

54. Budgetary Provisions. – (1) The Appropriate Government **MAY**, after due appropriation made by the [Parliament or the concerned legislature as the case may be] by law in this behalf, make in each financial year such contributions to the Commission as it may think necessary to enable the Commission to perform its functions under this Act.

(2) Each Commission shall have its own fund, and all sums which may, from time to time, be paid to it by the Appropriate Government and all other receipts (by way of gifts, grants, donations, benefactions fees or otherwise) of that Commission shall be carried to the fund of the Commission and all payments by the Commission shall be made from there.

(3) The Commission may expend such sums as it thinks fit for performing its functions under this Act, and, where any law for the time being in force relating to the protection of rights of protected persons or for the prevention and promotion of awareness in relation to HIV provides for the performance of any function under such law by the Commission, also for performing its functions under such law and such sums shall be treated as expenditure payable out of the fund of that Commission.

(4) A Commission may, with the consent of, or in accordance with, the terms of any general or special authority given to it by the Appropriate Government borrow money from any source by way of loans or issue of bonds, debentures or such other instruments, as it may deem fit, for the performance of all or any of its functions under this Act.

(5) The Commission shall during each financial year, prepare, in such form and at such as may be prescribed, a budget in respect of the financial year next ensuing showing the estimated receipt and expenditure, and copies thereof shall be forwarded to the Appropriate Government.

CHAPTER XIV

INSTITUTIONAL OBLIGATIONS

[55. **General Responsibility of Institutions** – All persons in charge of an institution shall ensure compliance with the provisions of this Act, upon its notification.]

56. Grievance Redressal Mechanism. (1) Every institution shall appoint a full time [officer] of senior rank, as the Complaints Officer, who shall deal with complaints of violations of the provisions of this Act by or in the institution on a day to day basis in accordance with the Regulations.

(2) Every person with a grievance about the violation of the provisions of this Act by or in an institution has the right to approach the Complaints Officer to attend to her/his grievance and shall be informed of such right by healthcare institution?

[officer or committee?] [if committee who should be on it?] [one person for internal and external complaints? Only healthcare institution concern?]

57. HIV/AIDS Policy. (1) Upon notification of this Act the model HIV/AIDS Policies contained in Schedule I of this Act, as may be applicable, shall be deemed to be adopted by every institution.

(2) The text of the HIV/AIDS Policy shall be prominently posted by the employer/person in charge of an institution in English and in the language understood by the majority of persons working in or accessing such institution on special boards to be maintained for the purpose at or near the entrance through which the majority of the persons employed or accessing the institution enter such institution [and in all departments thereof .]

(4) [Such notice shall state the manner in which copies of the HIV/AIDS policy may be obtained and employees or persons accessing the institution shall be entitled to a copy of such policy free of charge. The HIV/AIDS policy of all institutions shall be available to all members of the public for a nominal fee.

(5) The institution shall conduct an annual training for persons employed by it in understanding and implementing the HIV/AIDS Policy of the institution.

For the purposes of Part institution means

a) any venture/organisation/establishment carrying on any systematic activity by co-operation between 20-50 or more persons (for wages or otherwise) for the

production, supply or distribution of goods and services with a view to satisfy human wants or wishes

Exceptions:

- any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity referred to in the foregoing provisions of this clause) and such other activity is predominant one. Explanation: for the purposes of this sub clause agr. oper does not include any activity carried on in a plantation as defined in Section 2(f) of the Plantations Labour Act 1951.
- any domestic service

[Institutions with 20 or more persons in the past year/10 months?/carrying on activity in one place?

Incentive for employers to do this?

Effect of non-compliance?

Religious institutions?

Clubs?

Charitable institutions?

CONTRACTORS?]

CHAPTER XV

DUTIES OF STATE

[58. **State obligations.** – (1) In compliance with India's commitments under the Constitution of India and the international conventions to which it is party, the State has an obligation:

(a) Tto ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;

(b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;

(c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;

(d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;

(e) To ensure equitable distribution of all health facilities, goods and services;

(f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed [every five years], on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

(g) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;

(h) To provide immunization against the major infectious diseases occurring in the community;

(i) To take measures to prevent, treat and control epidemic and endemic diseases;

(j) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them; and

(k) To provide appropriate training for health personnel, including education on health and human rights.

(2) The State shall extend to every person full protection of her/his rights as contained in this Act [Promotion and Protection of Constitutional Obligations/Promotion and Protection of the Right to Health]

(3) In order to fulfill its obligations under this Act the State shall -

(a) Take measures to develop and promote awareness among protected persons of their rights and duties under this Act;

(b) Take measures to develop and promote awareness in the general public/ all persons of the rights and duties under this Act;

(c) Take measures to develop and implement programmes in order to promote the rights of protected persons under this Act including:

(i) develop action plans to address any violation of the rights of protected persons under this Act;

(ii) develop effective and appropriate redressal mechanisms to address complaints of the violations of rights of protected persons under this Act;

(iii) enact, review and amend legislation to promote the rights of protected persons and to establish a legislative framework in consonance with the objectives of this Act;

(iv) promote and ensure the greater involvement of protected persons/ PLHA in programmes, action plans, policy formulation, decision-making processes and implementation of plans under this Act particularly and in the field of HIV/AIDS in general;

(v) develop and implement effective and stringent monitoring and reporting mechanisms to oversee the implementation and enforcement of this Act by all persons;

(vi) develop codes of practice as contemplated in this Act in order to promote the rights of protected persons;

(vii) provide assistance, advice and training to protected persons, non-governmental organisations, healthcare workers and institutions, workers organisations, employers associations and law enforcement agencies on issues related to the rights of protected persons and the provisions of this Act;

(viii) conduct effective, multi-lingual information campaigns to increase awareness of the provisions of this Act; and

(ix) support the work of non-governmental organisations working in the field of HIV/AIDS.

59. Review of Laws. - (1) In carrying out its duties under this Act, particularly section 2(iii) of this Part/Chapter, the State shall:

(a) audit laws, policies and practices with a view to eliminating all discriminatory aspects thereof and making them consistent with the objectives and the rights and duties enunciated under this Act;

(b) enact, review and amend laws and develop policies and codes of practice in order to eliminate discrimination on prohibited grounds;

(c) consider and review the recommendations of the National HIV/AIDS Commission or the State HIV/AIDS Commission as the case may be

(d) consult the HIV/AIDS Commissions, protected persons and their representatives and NGOs/persons working in the field, in the formulation of laws and policies relating to HIV/AIDS;

ensure the education, training, capacity building and sensitisation of law enforcement agencies, state officials and the judiciary on provisions of this Act, issues relating to protected persons and in particular the benefit of harm reduction measures and their protection and promotion;

60. Programmatic and Implementational Obligations. (1) The State shall, in co-ordination with the HIV/AIDS Commissions establish an effective national framework to respond to HIV/AIDS which ensures a co-ordinated, participatory, transparent and accountable approach, integrating HIV/AIDS policy and programme responsibilities, across all branches of government.

(2) Each Central, State and local ministry shall ensure that HIV/AIDS and human rights are integrated into all its relevant plans and activities, including:

(a) Education;

(b) Law and justice, including police and corrective services;

(c) Science and research;

(d) Employment and public service;

(e) Welfare, social security and housing;

(f) Immigration, indigenous populations, foreign affairs and development cooperation;

(g) Health;

(h) Treasury and finance;

(i) Defence, including armed services.

(3) The Central and State Government and other authorities shall ensure that each government department devises clear guidelines on the extent to which its policies and practices reflect HIV-related human rights norms and their enforcement in formal legislation and regulations, at all levels of service delivery. Coordination of these standards should occur in the national framework and be publicly available, after involvement of community and professional groups in the process.

61. International. – (1) The State shall initiate and ensure the ongoing interaction with neighbouring and other States to ensure that governmental responses to the HIV/AIDS epidemic will continue to make the best use of assistance available from the international community. Such interaction shall, *inter alia*, reinforce cooperation and assistance to areas related to HIV/AIDS and human rights, in particular relating to access to treatment.

(2) The State shall promote HIV-related human rights in international forums and ensure that they are integrated into the policies and programmes of international organizations.

(3) The State shall consider international guidelines as they develop in the formulation of policies etc.

62. Legal Support for Protected Persons. The State shall ensure legal support and other activities including training seminars, workshops, networking, developing promotional and educational materials, advising clients of their human and legal rights, referring clients to relevant grievance bodies, collecting data on human rights issues and human rights advocacy.

63. Strengthening, training and equipping public health. The State shall ensure that all public health authorities are trained and equipped to provide a comprehensive range of services for the prevention and treatment of HIV/AIDS, including relevant

information and education, access to voluntary testing and counselling, STD and sexual and reproductive health services for men and women, condoms and drug treatment, services and clean injection materials, as well as adequate treatment for HIV/AIDS-related illnesses, including pain prophylaxis.

CHAPTER XVI

SPECIAL PROVISIONS

64. Women and gender. – (1) The State shall integrate a gender-based approach that recognises that biological and socio-cultural factors play a significant role in influencing the health of men and women, in its health-related policies, planning, programmes and research in order to promote better health for both women and men.

The State shall ensure the disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.

(2) The State shall develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.

(3) The State shall undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

65. Women/Right of Residence. Every protected person who is a woman shall have the right to reside in her matrimonial home and the right to use the facilities of such home.

66. Registration of Marriages and Pre-marital HIV counselling. (1)All persons intending to get married shall receive HIV related information/undergo HIV related counselling/information sessions?

(2) Notwithstanding anything contained in any other law for the time being in force:

(a) all marriages solemnised after the coming into force of this Act shall be registered [in accordance with the Regulations]; and

(b) a marriage that is not registered after [2 years from the notification of this Act/1 year from the date of its solemnisation], shall be voidable at the option of the woman; and

(c) a woman whose marriage has been declared void under this section, shall have all rights to maintenance as if the marriage had been dissolved under the applicable law. [Will this affect children?]

(3) The State shall appoint [Registration Officers] in every district in the country. [State to ensure widespread dissemination of these provisions through Doordarshan – Cable TV]

(4) No marriage shall be registered unless the [Registering Officer] is satisfied that the persons intending to marry have undergone pre-marital HIV counselling in accordance with the Regulations under this Act.

Explanation: Pre-marital counselling includes counselling related to sexual health, contraception, condom usage, [the benefits of a small family, fidelity], sexuality the methods of transmission of HIV and other STDs, voluntary HIV testing and the importance of communication and health relationships.

[Regulations: What kind of counselling? Only information and referral services?

[Every VCTC established under Section [·]/Chapter VI (Access) of this Act shall within 90 days of the notification of this Act:

(a) formulate protocols for pre-marital HIV counselling, which shall include counselling related to sexual health, contraception, condom usage, the benefits of a small family, the methods of transmission of HIV and other STDs, voluntary HIV testing and the importance of communication and healthy relationships; and

(b) set up and [run] a Counselling Centre at the Marriage Office in its district, which shall implement the protocols formulated under (a) above.

67. **Pregnant Women.** [*Routine testing*] (1) No pregnant woman who is a protected person shall be subject to forced sterilisation [hysterectomy?] or abortion [is this treatment?].

(2) Notwithstanding anything contained in any law for the time being in force, an HIV- positive pregnant woman shall have the right to be given proper counselling to enable her to make an appropriate decision about her pregnancy.

(3) Every healthcare institution shall within 60 days of the notification of this Act, develop protocols for the testing, treatment and counselling of HIV positive pregnant women [including relating to counselling in relation to care and treatment for the HIV+

woman and her child, that informed consent must form the basis for the woman's individual decision, recognition of the right of the woman to decide, the decision to use any anti-retroviral drugs during pregnancy should be made by the woman following discussion with her health care provider regarding the known and unknown benefits and risks to her and her foetus, counselling on alternatives to breast-feeding and infant milk substitutes to reduce MTCT] and every institution providing services relating to women and/or pregnancy shall provide information on MTCT.

(3) Notwithstanding anything contained in any law for the time being in force, information and advertisements [leaflets?] relating to alternatives to breast feeding and infant milk substitutes to reduce mother-to-child transmission of HIV shall be permitted. [Milk substitutes Act] [IEC?] [Research into safe methods for HIV+ persons to conceive.]

68. **Sexual assault Protocols.** (1) Every healthcare institution shall in consultation with an NGO [?] within 30 days of the notification of the Act formulate, notify and implement protocols for the counselling, testing and treatment of any person against whom a sex crime is alleged to have been committed. [Such protocols shall provide inter alia for sensitive counselling procedures to make the victim aware of the risk of HIV, where the person is a child, follow guidelines of consent/confidentiality of this law, provide for PEPs, testing, treatment, holistic counselling?]

(2) The Central Government for each Union Territory and the State Government for every district in its respective State shall establish 'sexual assault crisis centers' in consultation with the National Commission for Women/NGOs? HIV focus? Each will have HIV counselling.

(3) Any person against whom a sex crime is alleged to have been committed shall, upon reporting such crime be referred/advised by the police without any delay to a state run healthcare institution. In such cases the requirements of the provisions of Sections 154 or 155 of the Code of Criminal Procedure, as the case may be, shall be fulfilled at such institution.

(3) Every police station shall within 90 days of the notification of this Act, identify a state run healthcare institution in its jurisdiction providing HIV testing, counselling and

treatment services. The police station shall display the name and address of such institution in a prominent place with a notice in accordance with the Regulations.

Explanation: For the purposes of this section, a 'sex crime' includes any non-consensual contact with a sexual purpose that may expose a person to the risk of HIV transmission including an offence against any person under Section 376, section 376A, section 376B, section 376C, section 376D and section 377 whether or not such an act is recognised as a crime by law for the time being in force and whether or not it is reported to the police. [Non consensual sex between husband and wife? Any other crime? 269/270?]

69. Persons in the Care and/or Custody of the State. (1) Within 6 months of the coming into force of this Act, the State shall introduce strategies for harm reduction including sexual health information, condoms, needle exchange and drug substitution programmes for all persons in its care and custody.

(2) Every person who is in the care and/or custody of the State shall have the right to HIV counselling, testing and treatment services.

(3) A person in the care and/or custody of the State against whom a sex crime is alleged to have taken place or who has otherwise been exposed to the risk of HIV transmission while in the care and custody of the State, shall be referred immediately to a State healthcare institution for HIV counselling and if recommended shall be entitled to PEP from the State.

[Right of HIV+ person in custody to medicines, special lock up, nutrition?]

Explanation: for the purposes of this section persons in the care and custody of the State means any person detained, arrested or otherwise in the care and custody of the State and includes persons convicted of a crime serving a sentence, persons awaiting trial in the custody of the State, persons detained under preventive laws, persons under the Juvenile Justice Act, ITPA, persons in State run institutions,[who else?]

70. Children. (1) The State shall take measures to reduce infant mortality and promote the healthy development of infants and children.

(2) The State shall ensure access to essential health services for every child and his or her family, including pre- and post-natal care for mothers.

(3) The State shall ensure access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices.

(4) The State shall ensure that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services.

(5) The State shall adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, preferential feeding and care of male children.

(6) The State shall ensure that children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.

(7) The State shall provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make.

(8) The State shall ensure the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.

(9) In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration and in the formulation of such policies and programmes, the State shall consult children and NGOs working with children at national, state and local levels.

CHAPTER XVII

SPECIAL PROCEDURES IN COURT

71. Suppression of Identity. - (1) In any legal proceeding in which an HIV-positive person is a party or in which he is an applicant, the court, on an application by such person that it is in the interest of justice and that case would not be [conducted/prosecuted] may pass any or all of the following orders:

(a) that the proceeding or any part thereof be conducted by suppressing the identity of the HIV-positive person by substituting the name of such person with a pseudonym in the records of the proceedings in accordance with Regulations under this Act;

(b) that the trial in the proceeding or any part thereof may be conducted *in camera*;

(c) restraining any person from in any manner publishing any matter leading to the disclosure of the name or status or identity of the HIV-positive person.

(2) In any proceeding where an order of suppression of identity of an HIV-positive person is passed, all subsequent applications and [ ] shall be in the pseudonym.

Notwithstanding any other action that may be taken against any person disobeying an order in sub-section (c) of section (1) under any provision of law for the time being in force, such a person shall be punishable with fine of up to Rs. One Lakh or with imprisonment of up to one year. [Offence cognisable etc.]

72. Priority. (1) In any legal proceedings concerning (or relating) to an HIV-positive person, the court shall take up and dispose off the proceeding on a priority basis.

(2) In such a legal proceeding, the court shall, as soon as possible, but not later than ninety days of the institution of the proceedings, fix a timetable for the final hearing and disposal of the proceeding in consultation with the parties.

(3) The timetable so fixed shall take into account any arbitration, mediation or settlement that may be ordered or the evidence that may be taken and the final oral and written arguments and judgement that may be pronounced such that the time taken for disposing of the entire proceeding, from the date of its institution till final disposal shall not, in a proceeding which requires evidence to be taken, be more than three years, and in any other case not more than two years.

(4) The timetable for a trial in any legal proceeding concerning (or relating) an HIV-positive person shall be so fixed that it is conducted on a daily basis.

(5) Evidence in such proceedings shall, to the extent possible, be taken before a commissioner as provided in Order XVIII of the Code of Civil Procedure, 1908.

(6) Any interim application made in such a proceeding shall not affect the timetable or be a basis of enlarging the time fixed for final disposal of the proceeding.

(7) Any party not adhering to the timetable, except in cases of illness of the HIV-positive person who is party to or a witness in the proceedings, shall be liable to pay the costs not less than Rs. 1000 per day of the delay to the legal aid fund of the concerned court

(8) All interlocutory applications in any such proceedings shall be disposed off in a summary manner on the basis of document before the court without prejudicing the rights of the parties or delaying the final disposal of the main proceedings.

(9) In a proceeding in which an HIV-positive person is a party, [if the judge presiding over the matter is transferred, retires or otherwise vacates the court?], the matter shall be transferred to another court/judge within 30 days.

73. Maintenance. (1) In any maintenance application filed by or on behalf of a protected person under any law for the time being in force, the court shall on the first date [of hearing?], after the application is filed, have the power to grant prima facie ad hoc maintenance on the basis of the application alone until the disposal of the application or further orders in the application.

(2) In passing any order of maintenance the court shall take into account medical costs and other HIV-related costs that may be incurred by the applicant.

74. Bail Applications. In any application for bail or anticipatory bail made by a person, HIV-positive status of the person will be a relevant factor to be considered by the court in passing an order on such an application.

75. Sentencing. In passing any orders relating to sentencing or fine or suspension, remission or commutation of a sentence, the HIV-positive status of the person in respect of whom such an order is passed shall be a relevant factor to be considered by the court in passing an order in that behalf.

76. Powers of Court. (1) Notwithstanding any other law for the time being in force, a court may pass appropriate orders in the circumstances of the case to:

(a) prevent breaches of the provisions of this Act;

(b) redress the breaches of the provisions of this Act by directing:

i. specific steps, special measures and/or affirmative actions to be taken;

ii. the award of damages including specific, general and exemplary damages;

iii. the withdrawal of and/or ceasing and desisting of commission of the breaches of this Act;

iv. the respondent to undergo an audit of specific policies or practices as determined by the court;

v. an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;

vi. any party make regular progress reports to the court regarding the implementation of the court's order; and

vii. the Registrar of the court to report the matter to the concerned police station having jurisdiction for the possible institution of criminal proceedings.

(2) In a proceeding relating to discrimination in employment under this Act, the court shall, without prejudice to other powers that it may have, have the power to pass any or all of the following orders:

(a) the employment including reasonable accommodation under Section [ ] and reinstatement of a protected person.

(b) payment of wages/salary/income, allowances, benefits, perquisites and privileges that may have been lost on account of non-employment or termination;

(c) award special, general and exemplary damages on account of the non-employment or termination.

(3) In any proceeding relating to discrimination under this Act, the Court shall have the power to pass orders for [social work/community service] by the person proved to have discriminated under this Act.

77. Presumption as to Discrimination. (1) When the question is whether a protected person has been discriminated against under this Act and it is shown that the person against whom such discrimination is alleged to have taken place is a protected person and that the act or omission alleged as being discriminatory took place, the Court shall presume, that such act or omission is unfair discrimination under this Act and

(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or

(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds

78. Jurisdiction of Courts. Nothing contained in this law prohibits, limits or otherwise restricts the jurisdiction of civil and criminal courts to address violations of the provisions of this Act.

CHAPTER XVIII

PENALTIES

[Should there be penalties?]

[Options to punishment?]

79. Failure to Comply with orders of Health Ombudsperson under Section [ ] - (1) Whoever fails to comply with any direction given under section [ ] within such time as may be specified in the direction shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both and in case the failure continues, with an additional fine which may extend to five thousand rupees for every day during which such failure continues after the conviction for the first such failure.

(2) Whoever fails to comply with any order issued under section [ ] or any direction issued by court under section [ ], in respect of each such failure and on conviction, be punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and with fine, and in case the failure continues, with an additional fine which may extend to five thousand rupees for every day during which such failure continues after the conviction for the first such failure.

(3) If the failure referred to in sub-section (2) continues beyond a period of one year after the date of conviction, the offender shall, on conviction, be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine.

80. Penalty For Contravention Of Provisions Of Section [ ]. Whoever contravenes the provisions of section [ ] shall be punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and with fine.

Provided that where HCW discrimination is likely to lead to cause his death or is likely to cause such harm on her/his body as would amount to grievous hurt within the meaning of Section 320 of the IPC...

81. Enhanced Penalty After Previous Conviction. If any person who has been convicted of any offence under section [ ] or section [ ] or section [ ] is again found guilty of an offence involving a contravention of the same proviso, he shall, on the second and

on every subsequent conviction be punishable with imprisonment for a term which shall not be less than two years but which extend to seven years and with fine :

Provided that for the purpose of this section no cognizance shall be taken of any conviction made more than two years before the commission of the offence which is being punished

82. Penalty For Contravention Of Act By Law Enforcement. A public servant/ law enforcement official who contravenes the provisions of [harm reduction measures] shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or both.

A law enforcement official who violates the provisions of this part, harasses, arrests etc, s/he shall be subject to misconduct proceedings under the relevant Police Act

NACO/SACS to investigate and report on law enforcement harassment – appropriate government to take action – report to form part of confidential records. District Commissioner of Police.

83. Penalties for Misleading Information. Misinformation on HIV/AIDS prevention and control through false and misleading advertising and claims in any media or the promotional marketing of drugs, devices, agents, or procedures without prior approval from the Drugs Controller General of India and the requisite medical and scientific basis, including markings and indications in drugs and devices and agents, purporting to be a cure or fail safe prophylactic for HIV infection is punishable with a penalty of imprisonment for two months to two years, without prejudice to the imposition of administrative sanctions such as fines and suspensions or revocation of professional or business license.

84. Penalty For Contravention Of Certain Provisions Of The Act. Whoever contravenes any of the provisions of this Act or fails to comply with any order or direction given under this Act, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment which may extend to three months or with fine which may extend to ten thousand rupees or with both, and in the case of a continuing contravention or failure, with an additional fine which may extend to five

thousand rupees for every day during which such contravention or failure continues after conviction for the first such contravention or failure.

85. Publication Of Names Of Offenders. If any person convicted of an offence under this Act commits a like offence afterwards if shall be lawful for the court before which the second or subsequent conviction takes place to cause the offender's name and place of residence, the offence and the penalty imposed to the published at the offender's expense in such newspapers or in such other manner as the court may direct and the expenses of such publication shall be deemed to be part of the cost attending the conviction and shall be recoverable in the same manner as a fine.

86. Offences By Companies. (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offences and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if the proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation : For the purposes of this section –

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director" in relation to a firm means a partner in the firm.

Section [ ]

87. Offences By Institutions

88. Offences By Government Departments. Where an offence under this Act has been committed by any Department of Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this section shall render such Head of the Department liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

89. Cognizance of Offences. (1) No court shall take cognizance of any offence under this Act except on a complaint made by –

CHAPTER XX

MISCELLANEOUS

90. Act to have overriding effect. – (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting pr by its board of directors, whether the same be registered, passed or executed, as the case may be, before or after the commencement of this act;

(3) Any provision contained in the memorandum, articles, agreement or resolution aforesaid shall to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be.

91. Member and Staff of Commissions etc. to be public servants – the Chairperson, members, officers and other employees of the Commission shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

92. Exemption from tax on wealth and income- Notwithstanding anything contained in the Wealth Tax Act, 1957 (27 of 1957), the Income-tax Act, 1961 (43 of 1961), or any other enactment for the time being in force relating to tax on wealth, income, profits or gains, the Commission shall not be liable to pay wealth-tax, income-tax or any other tax in respect of their wealth, income or profits or gains derived.

93. Report of the Commission to be placed before Legislature. -The Appropriate Government shall cause to be placed before both Houses of the concerned legislature once a year a report regarding the performance of the Commission under this Act.

94. Government to be bound. - The provisions of this Act shall be binding on the Government.

95. Protection of action taken in good faith. - No suit, prosecution or other legal proceeding shall lie against the Central Government, or against the Chairperson, or members or any person acting under such Government, or Authority

96. Delegation of powers.- The Appropriate Government may, by general order, direct that any power exercisable by it under this Act shall, in such circumstances and under such conditions, if any as may be prescribed in the order, be exercisable also by an officer subordinate to that Government or the local authority.

97. Power to make Rules. – (1) The Central/State Government [may/shall], by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-

- the term of office of the members of the Commission and the manner in which such member may resign under sub-section ( ) of section [];
- the time of the meetings of the Commission and rules of procedure in regard to the transaction of business at its meeting under sub-section ( ) of section [];
- the qualifications of the Director of the Commission and members, and the tenure for which they may be appointed under sub-section ( ) of section [ ];

(3) Every rule made by a State Government under this Act shall be laid, as soon as may be after it is made, before the Legislature of that State.

98. Power to remove difficulties.- (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, not inconsistent with the provisions of this Act, remove the difficulty.

Provided that no such order shall be made after the expiry of the period of two years from the commencement of this Act.

(2) However, orders made under this section shall be laid, [as soon as may be after it is made/within 30 days], before each House of Parliament.

99. Review of Act. The Appropriate Government in consultation with the Commission shall undertake a review of the working of this Act every three years to ensure that it adequately addresses the issues raised by the HIV epidemic, is successful in promoting and protecting the rights of protected persons and in preventing and controlling the HIV epidemic and it is consistent with constitutional and international human rights obligations.

Power of Central Government to give directions?

ADDENDUM: Proposed amendments in other laws

1. Special Marriages Act
2. Indian Penal Code
   (a) Section 375
   (b) Section 377
   (c) Reform of sexual assault law in accordance with the 172nd Law Commission Report

Promotion of Risk Reduction

Draft Legislation on HIV/AIDS
Lawyers Collective HIV/AIDS Unit

What is Risk Reduction?

Risk Reduction is the promotion of actions or practices that:

- **minimise a person's risk of exposure to HIV/AIDS**
- and/or **mitigate adverse impacts related to HIV/AIDS**

Specifically applied in the context of populations that are considered vulnerable to HIV/AIDS like ***Sex Workers, Men who have sex with Men*** **and** ***Injecting Drug Users.***

Strategies for Risk Reduction

- Provision of IEC on safer sexual & injection practices, counselling, testing & support services.
- Provision of safe sex tools - male & female condoms, lubricants, microbicides etc.
- Provision of clean needles, syringes, bleach & sterilising equipment

Within an 'enabling' environment which encourages adoption of safer practices among populations at risk.

Existing laws impeding risk reduction

Sex workers

- ITPA criminalises organised prostitution without penalising individual sex workers except for practicing and soliciting in public. Used by police to routinely harass sex workers.
- *Impact on HIV Interventions* - Peer educators & outreach staff harassed by police while distributing condoms & safer sex information.
- *Impact on Public Health* - Criminalisation of sex work settings impedes access to services, reduces sex workers' negotiation ability & makes introduction of health and safety regulations impossible.

Existing laws impeding risk reduction

Men who have sex with men

- Sec 377, IPC, punishes voluntary 'carnal intercourse' against the order of nature with man, woman or animal. Used by police to harass, extort & blackmail MSM.
- *Impact on HIV interventions* - Providing sexual health & HIV information can be treated as abetment of a crime e.g. - Naz/Bharosa, Lucknow, 2001
- *Impact on Public Health* - Criminalisation of consensual, adult sex between males increases stigma & marginalisation, hampers HIV interventions, exacerbating vulnerability to HIV.

Existing laws impeding risk reduction

Injecting Drug Users

- NDPS Act makes consumption, possession etc. of drugs a punishable offence. Pushes IDUs to the fringes, without access to basic services & rights.
- *Impact on HIV Interventions* - Renders provisions & access of needle exchange, drug use paraphernalia & drug substitution programmes 'illegal'
- *Impact on Public Health*- Absence of HIV related information & services including NEPs has fuelled the epidemic among IDUs in several places

Need for law reform

- There is a need to review criminal laws affecting these populations in the light of the HIV epidemic. Targeted interventions have failed primarily because of dichotomous laws and practices.
- There is a need for laws that empower marginalised communities & facilitate introduction & acceptance of HIV & health programmes.

UNDER THE DRAFT LAW

- Existing laws cannot in any manner, prohibit, impede, restrict or prevent the implementation or use of any strategy for reducing risk of HIV transmission
- The possession of any tool or paraphernalia for reduction of risk of HIV transmission will not amount to a criminal offence or attract civil liability.
- Certain strategies of risk reduction are specifically protected - IEC, safe sex tools, drug substitution programmes etc.

This implies .....

- Police cannot interfere with any risk reduction programme.
- Implementation of risk reduction programmes is not illegal.
- Persons providing/possessing/utilising services of risk reduction programme have immunity from civil/criminal liability.
- Police cannot apprehend/harass persons providing/using risk reduction strategies.

Issues for consideration ...

- Does this go far enough to protect vulnerable groups from harassment & persecution?
- Should certain 'physical spaces' be created/earmarked for carrying out risk reduction programmes?
- Can this provision be used to introduce coercive measures like mandatory testing of vulnerable groups?
- Will risk reduction programmes result in increased stigmatisation and isolation of these groups?

PROHIBTION OF QUACKERY

Draft Legislation on HIV/AIDS
Lawyers Collective HIV/AIDS Unit

PRINCIPLES

- People should have choices/alternatives - but should be REAL CHOICES
- Alternatives should be based on SCIENTIFIC/SOUND DATA
- Harmful effects should be weighed with the beneficial effects of all the alternative treatments.
- Licenses of the persons propagating such drugs should be checked and approved by the Licensing Authority

Who is a Quack?

- "Quack":
  - "pretender of medical skills";
  - "a charlatan";
  - "one who talks pretentiously without sound knowledge of the subject discussed".
  - "an unqualified practitioner of medicine".
- "A person who does not have knowledge of a particular system of medicine but practices in that system is a quack" (SC)

How Quackery Harms?

- Economic harm
- Direct harm
- Indirect harm
- Psychological harm
- Stealing time
- Harm to society

What do quacks do?

They prescribe licensed drugs

They manufacture & sell unlicensed drugs

They claim to have magic remedies, like mantra, kavacha talisman or any other charm of any kind which allegedly possess miraculous powers

What do quacks use to promote themselves?

- Advertisements
- Internet, web pages
- Flyers, leaflets, posters
- Word of mouth
- Media - articles, statements and interviews
- Use mobile vans, or set up a small make-shift place to practice quackery.

The existing Legal System

• Against *Quacks*: prohibiting them from practicing:

1. Indian Medical Council Act.
2. Medical Degrees Act.
3. Indian Medicine Central/State Council Act.
4. Homeopathic Central Council Act.
5. Civil and Criminal remedies

The existing Legal System

• Against *import, manufacture, sale of unlicensed drugs*:

1. Drugs & Cosmetics Act/Rules
   - regulates import/manufacture/distribution/sale.
   - allopathic/ayurvedic/homeopathic/unani/siddha.
   - *specifically prohibits any drug claiming to prevent or cure AIDS.*
   - only RMP to prescribe licensed drugs - under personal supervision of registered pharmacist.
   - DCGI powers to seize drugs and cancel license to manufacture/sell drugs that purport to treat/ cure disease.

The existing Legal System

• Against *advertisements:* that mislead, directly/indirectly, give false impression or makes a false claim

1.Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 -
- specifically prohibits misleading ads relating to drugs and magic remedies.
- Prohibits ads for cure/prevention of "HIV/AIDS"

2. Advertising Standards Council of India (ASCI)
- Binds advertiser/ agency/ media owner.

Lacunae in the Legal System

1. Quacks and quackery not defined.
2. Penalties insufficient
3. No comprehensive law to deal with quacks.
4. No law prohibiting persons from practicing magic remedies.
5. Media not covered. To prevent them from carrying advertisements, articles, etc. claiming false cures and treatment.

10

Quackery under the Draft Law

- What is prohibited?
  - manufacture
  - marketing
  - distribution
  - provision
  - prescription(practice?)
  - sale
  - claim of cure/prevention

11

Quackery under the Draft Law

- Of
  - Substance
  - service or
  - therapy
- for the
  - cure
  - prevention??
  - alleviation
- of medical conditions associated with HIV/AIDS

12

Quackery under the Draft Law

- Unless substance etc. has been
  - tested/approved/authorised by ICMR/DCGI (?) and
  - person is qualified/licensed/registered to manufacture etc.

Issues to consider

- Does this address the gaps in the law?
- How does this impact indigenous systems?
- Impact on general healthcare system
- Penalties?

CONSENT
for
HIV TESTING, TREATMENT & RESEARCH

Draft Legislation on HIV/AIDS
Lawyers Collective HIV/AIDS Unit

CONSENT

- Based on fundamental principles of autonomy & bodily integrity -- *every person has the right to determine what should be done to her/his body*
- Recognised in ***Common Law*** (medical situations), ***Criminal Law*** (injuries to the body), ***Constitution*** (Article 21 -- Right to life & liberty)

CONSENT

- Principle set out in law of contract: *"when two or more persons agree upon the same thing in the same sense"*
  (Section 13, Indian Contract Act)
- Not free when obtained by:
  coercion/ ***Undue Influence***/ fraud/ mistake/ misrepresentation
  (Section 14, Indian Contract Act)

HIV Context

- HIV test/ treatment cannot be treated as any other diagnostic test/ treatment because:
  - HIV is ***not curable***
  - other diagnostic tests do not have ***life-threatening implications***
  - HIV+ status carries ***unprecedented stigma***
  - knowledge of HIV+ status may lead a person to ***untold trauma***
  - ***Toxicity*** of HIV-related treatment

INFORMED CONSENT in HIV Context

- HIV test/ treatment/ research must be ***preceded by informed consent***
- Informed Consent taken after giving ***adequate, accurate information*** *(about the test, treatment and research)* in a language & manner ***understood*** by the person

INFORMED CONSENT in HIV Context

- Informed consent must be ***free*** *(i.e. without undue influence, coercion, fraud, misrepresentation, mistake)*
- ***Specific consent*** required *(consent to another diagnostic test or general check up cannot be taken as implied consent to an HIV+ test)*

PROXY Consent

- Consent from a person's representative in cases of:
- *death*
- ***incapacity*** due to *minority of age or physical/ mental incapacity*
- ***emergency*** where person is *unconscious* or *unable to give consent*

EXCEPTIONS to Consent for HIV testing

- **When ordered by a court** – for *determination of issues*, and – *in the interests of justice*
- **If permitted by a law (?)**
- **For testing blood, organs, semen & other body fluids**
  (in all cases protocols for pre & post-test counselling and confidentiality to be followed)
- **For surveillance** *(anonymous & unlinked)*

CONSENT under the Draft Law

Recognises right to *AUTONOMY* and *BODILY INTEGRITY*:

"Every person has the right to bodily and psychological integrity including the right not to be subject to medical treatment, interventions or research without her/his informed consent"

CONSENT under the Draft Law

- HIV testing can be conducted only:
  - for ***voluntary determination*** of HIV status
  - if ***medically indicated & in the interest*** of the person
- Consent to be
  - in ***writing*** *(with exceptions)*
  - with ***counselling/provision of information***
- ***Proxy*** consent
  - death/incapacity/emergency
  - ***minors*** -- redefining capacity (>12 years)

10

? for testing ? for RX

CONSENT under the Draft Law

Informed consent for:

- ***HIV testing*** - after providing pre- & post-test counselling
- ***HIV treatment*** - after explanation of risks, benefits and alternatives available
- ***HIV research*** - after informing aims, methods, sources of funding, possible conflicts of interest, institutional affiliations of the researcher, potential benefits & risks, possible discomfort & the right to withdraw consent *(ICMR Guidelines - being legislated)*

11

CONSENT under the Draft Law

- ***Exceptions*** to consent when
  - ordered by courts
  - allowed by statute
  - for testing blood, organs, semen etc.
  - for surveillance

12

Issues to consider...

- *For a diagnostic test, should HIV information or HIV counselling be given?*
- *Should mandatory testing be allowed for prophylactic purposes*: MTCT, sexual assault, occupational exposure?
- *Should pre-/post-test counselling be mandatory*, even when the person *voluntarily forgoes* it?
- Do the provisions address *concerns of women* esp. in health care, research settings?
- How can *VCTCs, path labs, blood banks, home test kits* be *regulated?*

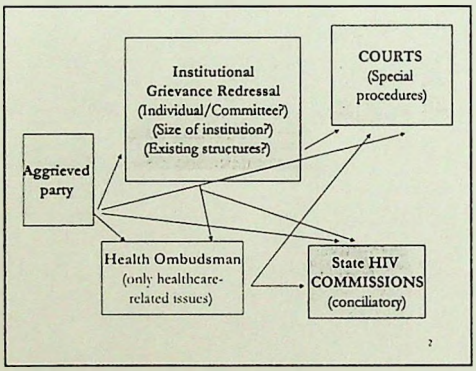
Issues to consider...

- Do the provisions *enable children and young persons* to access HIV counselling and testing services?
- Who should be held *liable for violations?*
- Should *penalties* be imposed?
- How should *consent for HIV/AIDS research* be addressed?
- Should *mandatory testing be allowed under law* (ITPA, JJ Act, Prisons Act, Cr.P.C., vagrancy acts)?

IMPLEMENTATION AND GRIEVANCE REDRESSAL

Draft Legislation on HIV/AIDS

Lawyers Collective HIV/AIDS Unit



Institutional Grievance Redressal

- Appointment of Complaints Officer
  - Permanent
  - Senior Rank
- Applicable to?
  - All healthcare institutions
  - Institution: Venture/organisation carrying on systematic activity with the cooperation of 20/50 persons for satisfaction of human wants

Institutional Grievance Redressal

- Who can make a complaint?
  - Any person whose rights under the HIV/AIDS Act have been violated; or
  - her/his legal heirs/representatives

PROCEDURE FOR GRIEVANCE REDRESSAL

- Complaints Officer to:
  - Deal with complaints on a daily basis
  - Settle complaints in SEVEN DAYS
  - Settle complaints relating to healthcare discrimination, access to health care services or provision of Universal Precautions in ONE DAY

PROCEDURE FOR GRIEVANCE REDRESSAL

- Person who has violated provisions of the HIV/AIDS Act to be counseled immediately.
- If violations persist despite counselling appropriate disciplinary action to be taken
- Complainant to be informed about the action taken

Issues to consider

- Grievance Redressal by individual or committee?
- Separate persons for internal and external complaints?
- Effect of non-compliance: penalties?

Health Ombudsperson

Health Ombudsperson

- Why? For immediate redressal for violations in healthcare sector.
- Who? : In a Union Territory person of or above the rank of the the Joint Director of Health and Family welfare

  In a State District, a person equal or above the rank of the officer responsible for Health in such district

* Respond to complaints from public + private sector
* High ranking - DHO ? conflict of interest
* NOT for institutional level

Health Ombudsperson

- Powers and functions:
  - to inquire and investigate into violations of Act by healthcare institution or provider
  - based on a compliant by
    - protected person
    - person on her/his behalf
    - organisation representing protected persons
  - suo motu (on his own)
  - request by government
  - request by court

10

Health Ombudsperson

- Powers and functions:
  - to pass orders and/or take actions
  - to pass orders for withdrawal/rectification of breach including directing admission, treatment, operations etc.
  - in emergency, orders may be passed without hearing - however, parties to be heard subsequently

not necessarily oral, on affidavit or written. No hearing

11

Health Ombudsperson

- Procedure:
  - settle complaints in 7 days
  - settle complaints relating to healthcare discrimination in 1 day
  - all proceedings to be summary
  - pass orders which are reasoned
  - maintain records
- To report nature and number of complaints to Government

12

don't need evidence
short reasoning for sentences / paras not detailed - There is a chance of abuse
will be monitored by Govt / KSAPS
What shd be the penalty - innovative
Change of attitude & practice is success
not penalising but counselling / discussing
assisted by NGOs

Issues to Consider

- What should the effect of non-compliance of Health Ombudsman order be?
- Complaints: letters? Telephonic? Accessibility issue.

PROCEEDINGS IN COURTS

SPECIAL PROCEDURES

- Suppression of identity
  - substituting the name of the HIV positive party in a court proceeding with a pseudonym
  - trial to be conducted *in camera*
  - restraining any person from publishing any matter relating to the disclosure of identity.
- Expediting hearings
  - any legal proceedings concerning an HIV positive person to be taken up on priority basis

cant be published in newspapers
Bihar High Court order that HIV cases
should be given priority if possible (
Nearly dealt (LC - 25 deaths among
clients from 1998 - 2003, all bef. 19-
30 yrs d/o unavailability of ARVs)
courts don't have modern mang
Techniques.

SPECIAL PROCEDURES

- Court shall fix a timetable for final hearing within 90 days of filing such legal proceedings
- timetable fixed so that trial would be on a day to day basis
- All interlocutory applications to be disposed off in a summary manner

16

Law accepts capitalist approach that any harm/injustice can be compensated for money

used by lawyers to delay cases

SPECIAL PROCEDURES

- Court may pass orders to
  - prevent breaches of the provisions of this Act
  - redress the breaches of the provisions of this Act (affirmative action, damages, withdrawal of breaches, suspend/revoke licence, submit the matter to concerned police station in case of criminal proceedings)

17

SPECIAL PROCEDURES

- In case of discrimination in employment, courts can order
  - reinstatement
  - payment of salary/wages/benefits etc. that may have been lost due to the discrimination
  - order damages

18

SPECIAL PROCEDURES

- Burden of Proof
  - on the Respondent to prove that the discrimination did not take place
  - Respondent must prove that the act was not discriminatory

19

Shifting of burden of proof on accused

SPECIAL PROCEDURES

- Bail Applications

  HIV positive status of a person will be relevant factor considered while granting bail
- Sentencing

  HIV positive status of a person shall be a relevant factor while passing orders relating to fine, suspension or commutation of sentence of a person.

20

? HIV status or health status

Issues to Consider

- Should HIV+ persons get special consideration in criminal matters?

21

* can anonymity of complaint be maintained

* ? any provision for PIL (special jurisdiction of High Court / SC)

* can an NGO/activist file a complaint on behalf of a [illegible] campaigns / aggrievement

- PIL history [illegible] people in [illegible] political [illegible] poor people [illegible]
- [illegible] in [illegible] on PIL. [illegible] decide [illegible] other [illegible]

7

HIV/AIDS COMMISSIONS

Proposal: To make NACO/SACS statutory bodies

NHC and SHC COMPOSITION

- Central Government
- Representatives from State and Union Territory
- PLHAs
- Representatives of protected persons, healthcare providers, NGOs
- HIV/AIDS experts

Appointment and Advice for NHC

- Nomination Committee for appointment
  - Prime Minister/The leader of the Opposition/other parties?
  - NGO representatives/PLHA
- Advisory Committee
  - Prime Minister/The leader of the Opposition/other parties/
  - Minister of Health and Family Welfare
  - NGO representatives
  - Representative of ICMR/healthcare workers
  - Representative of HIV-positive persons/protected persons
  - Human rights activist
  - Epidemiologist.

Election com + NHRC are independent in functioning d/o power given to them; appointed by highest bodies / high ranking com; which ensures independence

Social accountability.
quality of care – equal
Who is accountable?
Judgement – many sources

- work on citizens,
- work of commission vs Dept: autonomy from Govt, Transparency mechanism, small effective body

Primary functions of NHC/SHC

- Prevent and control the spread of HIV;
- Promote and protect the rights of protected persons;
- Provide care, support and treatment to those infected and affected by HIV/AIDS;
- Reduce the vulnerability of individuals and communities to HIV/AIDS;
- Promote awareness, information and education about HIV/AIDS; and
- Alleviate the socio-economic and human impact of HIV/AIDS;

25

NHC Functions

- National HIV/AIDS Policy - review every 3 yrs after widespread consultation;
- SHCs: supervise functioning, provide assistance/guidance, co-ordinate activities, resolve disputes, lay down/modify, in consultation with them standards for HIV tests, blood safety, medication, etc., budgetary allocations, monitor use of funding
- Guidelines for registration & support of NGOs by State/Union Territory Commissions - to be open to public scrutiny - evaluation of NGOs (?)

26

SHC Functions

- Translate disseminate National HIV/AIDS Policy and NHC Guidelines
- Report to NHC - co-ordinate with other SHCs.
- Conciliation and settlement after inquiry or report to Government
- Establish HIV/AIDS helplines in each district;
- Counselling: VCTC, Registration of Counsellors, etc.

27

unwritten hierarchy between NACO + SACS will be formalised

\+ Role and HIV/AIDS plan from 1st April. lacked adequate / consult / planning supervision

\+ Translation of Bill / Act in local languages

Common Functions

- HIV related Programmes [care, prevention, support]
- Training
- Capabilities of Government, municipal corporations, panchayat institutions and leading NGOs
- Guidelines for avoidance of acts in violation of Act;
- Advise & report to Government
- Review laws and policies
- review factors that inhibit rights of protected persons
- Strengthen healthcare system
- Particular focus on women - review of laws, committee/forum to examine impact of HIV/AIDS epidemic on women

Common Functions

- List of care & support centres, doctors providing care & treatment for HIV/AIDS, helplines, testing facilities, legal assistance;
- Research in relation to HIV/AIDS;
- Surveillance activities?
- Collect information on HIV/AIDS, human rights etc ;
- Promote, understanding, acceptance and public discussion of rights of protected persons and of the provisions of this Act;
- Formulation of five year action plan for each commission – open to public scrutiny

Legal aid Act – not working because of lack of funds

Evidence based policy/dayo

Courts arbitrariness

Duty on Commissions to Consult

- Commissions to consult governmental and non-governmental organisations.
- Call upon public health, human rights, law, HIV etc. to assist in inquiries.
- Community consultation in all phases of HIV/AIDS policy design, programme implementation
- Establish formal and regular mechanisms to facilitate ongoing dialogue with community representatives
- Support greater involvement of persons living with HIV/AIDS - GIPA

GIPA principles - greater involvement of People & AIDS/HIV

Issues to Consider

- What should their composition be – NGO, civil society, PLHA representation? Who should appoint them?
- What functions – programmes, IEC, conciliation – consultation with NGOs/civil society?
- Should the SHCs have the power to conciliate?
- How to ensure financial commitment from the government?
- How can accountability and transparency be ensured?

- FOGSI & Godrej - lack of facilities in private practice clinics
  ∴ refer all HIV +ve to govt. clinics
- Commissions ~~de~~ no adjudicatory powers ? conciliatory powers
  ↓
  review monitoring / implementation
- National Infertility Act - not yet in force
  depends on State Right to Infertility Act
  uses ~~that~~ SAGe / commercial does not come under purview of Act
- NHRC - power to receive complaints + adjudicate & give a report / recommendation
  - can be a petitioner
  - can do suo motu
  - can make enquiries
  - can ask for reports + ask for depositions
  ↳ Also in women Commission
  - can decide policy

  BUT can't implement do not function as courts.
- GOI only will $ funds, rest from WB.
- ARTs
  - Prescription - audit
    - regulation
    - licensing
- Who is culpable for harmful public health practices?

PROHIBITION OF UNFAIR DISCRIMINATION

Draft Legislation on HIV/AIDS
Lawyers Collective HIV/AIDS Unit

DISCRIMINATION

DOCTRINE OF CLASSSIFICATION

- CLASSIFICATION TO BE ON OBJECTIVE BASIS
- OBJECTIVE BASIS MUST HAVE A RELATIONSHIP TO THE OBJECT
- ACT OF DISCRIMINATION SHOULD NOT BE ARBITRARY ~ but based on rational criteria.

Doctrine of arbitrariness - criteria has no rel. to what is rqd

DISCRIMINATION

- Concept of discrimination is in Articles 14, 15 and 16 of the Constitution.

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

- These form part of the Fundamental Rights Chapter (Part III) of the Constitution.
- Fundamental rights are available only against the State (Article 12)

? privatisation
pub. sector doing pvt. practice

DISCRIMINATION

- Article 15 = prohibits discrimination discrimination on the grounds of religion, caste, creed, sex, colour,etc)
- Article 16 = prohibits discrimination on the grounds of religion, caste, creed, sex, colour,etc) in employment
- Articles 15 and 16 available only to citizens

apart any body controlled admin or otherwise by State

NEED FOR ANTI DISCRIMINATION LAW ON HIV

- Under the Constitution, State refers to government, municipal bodies, state controlled bodies & corporations & bodies created by statute
- Under the Constitution, there is no remedy for discrimination by private individuals/bodies
- Private individuals/bodies can only be prevented from discriminating by specific anti-discrimination legislation

Law already in USA/UK/Can etc by special statutes qua private sector.

WHAT IS DISCRIMINATION?

- DEFINITION?
- any act or omission including a policy, law, rule, practice, condition or situation
- which directly or indirectly
- imposes burdens, obligations or disadvantages on, or withholds benefits, opportunities or advantages, from,
- any person based on one or more HIV related grounds

WHAT IS DISCRIMINATION?

- WHAT ARE HIV RELATED GOUNDS?
- HIV status, actual or perceived; or
- actual or perceived association with an HIV positive person; or
- actual or perceived risk of exposure to HIV infection; or
- any other ground where discrimination related to HIV/AIDS – (1) causes or perpetuates systemic disadvantage, (2) undermines human dignity or (3) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner

} — from South African law

Discrimn

WHAT DOES THE LAW DO?

PROHIBITS ONLY UNFAIR DISCRIMINATION } – only this is actionable in court

- IT IS NOT UNFAIR IF IT IS BASED ON RATIONAL OBJECTIVELY DETERMINABLE CRITERIA,
- HAS A LEGITMATE PURPOSE, OR IS
- INTRINSIC TO THE ACTIVITY CONCERNED

Discrimn that is actionable in Court

(Sometimes positive discrimn has a legitimate purpose)

eg a HIV + surgeon may legitimately be shifted in his job.

WHO DOES THE LAW APPLY TO?

- STATE
- 'ANY PERSON'
- PUBLIC AND PRIVATE SECTORS

Does it apply to domestic sphere – at home

WHAT SITUATIONS DOES THE LAW COVER?

- INCLUSIVE
- EXCLUSIVE
- THIS LAW IS INCLUSIVE

EMPLOYMENT DISCRIMINATION

- DENIAL
- UNFAIR TREATMENT → eg given ep charging high loan rates for ex. 30% helps but becomes cumbersome
  otherwise / A judgemental use interpretation

EMPLOYMENT DISCRIMINATION

- TERMINATION in case of
  - SIGNIFICANT RISK
  - MEDICAL UNFITNESS
  - REASONABLE ACCOMODATION
  - UNDUE HARDSHIP
  - No other ground for discrimination in employment

EMPLOYMENT DISCRIMINATION

UNFAIR TREATMENT:

- DENIED TERMS/CONDITIONS/BENEFITS/PRIVILEGES THAT OTHER (EMPLOYEES) PERSONS IN SAME POSITION ENJOY
- DENIED PROVIDENT FUND/GRATUITY/HEALTH INSURANCE,
- NON RENEWAL OF EMPLOYMENT CONTRACT,
- PRESSURED IN ANY WAY TO LEAVE EMPLOYMENT,
- FORCED RESIGNATION/VRS,
- ASKED NOT TO REPORT FOR DUTY,
- DENIED PROMOTIONS,
- SUSPENDED FROM WORK/DISCIPLINARY ACTION INITIATED
- NON-CONDUCIVE ATMOSPHERE FOR WORK,
- PREJUDICIAL COMMENTS AND BEHAVIOUR,
- PUBLIC IDENTIFIED AS HIV+ OR RELATED/ASSOCIATED WITH HIV
- MANDATORILY ISOLATED OR SEGREGATED

HEALTHCARE DISCRIMINATION

- SITUATIONS
- WHAT IS?
- DENIAL/UNFAIR TREATMENT
- MEDICAL TREATMENT IS DENIED FOR THE FOLLOWING REASONS:FEAR OF OCCUPATIONAL EXPOSURE/LACK OF RESOURCES TO PROVIDE ADEQUATE TREATMENT AND PROTECT ONESELF.
- LAW PROVIDES FOR RIGHT TO SAFE WORKING ENVIRONMENT

What about when denial of access to healthcare is widespread & systemic?

HEALTHCARE DISCRIMINATION

UNFAIR TREATMENT:

- UNTIMELY OR ARBITRARY DISCHARGE
- CHARGING HIGHER RATES
- [IMPOSING CONDITIONS IN THE FORM OF RESEARCH]
- PUBLIC IDENTIFICATION
- PRESSURE TO LEAVE THE HEALTHCARE INSTITUTION
- UNDIGNIFIED TREATMENT OF A CORPSE
- REFUSAL TO TREAT
- INAPPROPRIATE TREATMENT
- PHYSICAL ISOLATION IN WARDS
- EARLY DISCHARGE
- DELAYS IN TREATMENT
- CONDITIONAL TREATMENT
- PREJUDICIAL COMMENTS & BEHAVIOUR

OTHER SITUATIONS

- EDUCATION
- RESIDENCE
- TRAVEL
- ACCESS TO SERVICES
- ACCESS TO INSTITUTIONS
- INSURANCE

Shd examples be given to all - it would become too long (45 pg to be 1/4 to 30 pp)

PROHIBITION OF HATE PROPAGANDA

- Cannot PUBLISH, ADVOCATE, COMMUNICATE etc. MATERIAL on HIV related grounds, that is:
  - hurtful
  - harmful/ incites harm
  - promotes hatred/ exposes to hatred; or
  - shows an intention to unfairly discriminate
- against any PERSON OR GROUP

Comments prejudicial to a person/ group of persons

Already in IPC - in penal statute a complaint has to be made

- IT IS IMPORTANT TO UNDERSTAND THAT DISCRIMINATION IS SPECIFICALLY LINKED TO THE HIV CONTEXT
- THESE ARE ONLY SOME OF THE SITUATIONS OF DISCRIMINATION A PROTECTED PERSON IS LIKELY TO FACE AND ANY OTHER ACT OR OMISSION THAT DISCRIMINATES IS ALSO PROHIBITED.

REGIONAL CONSULTATION ON DRAFT LAW, BANGALORE 13.03.04

Hep B

For policies > 5 lakhs, HIV test done.

Media; public figures (personalities); public servants; health edu; bg of professionals

Research guidelines; law making bodies

- feedback

Inheritance & in family set

custody of children.

Minority institutions (Art 29/30)

Discrim in promotions offices in 6 states

Preemployment medical test.

ISSUES FOR CONSIDERATION

- DOES THIS COVER ALL SITUATIONS?
  - WOMEN
  - CHILDREN
  - HOME
  - PARTIES
  - NGOs
  - INSURANCE
- SHOULD THE PROHIBITION ON HEALTHCARE DISCRIMINATION EXTEND BEYOND THE HIV CONTEXT?
- DOES THIS PROPERLY ADDRESS DISCRIMINATION IN THE PRIVATE SECTOR?

19

In health sector - do not restrict to HIV.
- has been raised by others

- To charge [illegible]
- gen health
- pub/private sector
- quality of care.

? Health certificates - stating HIV/AIDS] How does LC look at this
does it discriminate
say the OI/AIDS not certificate

Fitness certificate - does not incl HIV testing
- it is not reqd.

Kar Administrative Tribunal - a constable was reqd to undergo a test

WHO wants to abandon pretest counselling - opposed by LC.

Insurance cos want to know causing death ... Insurance Act for photocopy of papers etc (disclosure)

They have a right to ask under common law

Statute overrides common law

You can give immediate cause.

Insurance Policy law - can be amended. - we cannot do anything or

* HIV for visa purposes for other countries - ? a prejudiced opinion
* S.C. said sex work was inherently immoral - ? a
a case referred to in Surat sex workers case
* Medical insurance for HIV [illegible]
* ~~No need~~ HIV a disability in USA - ? go by antidiscrimination law as in other countries

Law cannot address stigma in society - but discriminatory acts by law

* Evidence based policy - assumptions
* 150 mill $ GFATM - for 33 mill
* Singapore Bill for supporting aged parents - Indian section 125
* Sentinel surveillance can lead to discrim. it is not anonymous
then vulnerability.

CONSULTATION ON THE DRAFT LEGISLATION ON HIV/AIDS
EVALUATION FORM
13th & 14th March, 2004

Hotel Bangalore International, Bangalore

Please rate the following on a scale of 1 – 5 with 5 being the highest score, and 1 the lowest.

1. PROGRAMME EVALUATION — AVERAGE RATINGS

a. Was the agenda complete and satisfactory? ___

b. Were the sessions useful? ___

d. Was there adequate time for discussion? ___

e. Were the discussions effective? ___

f. Was it a fruitful exercise to have a consultation to discuss the draft legislation on HIV/AIDS? ___

g. Any other suggestions or comments about the consultation?

2. WORKSHOP ADMINISTRATION

a. Hotel arrangements ___

b. Food arrangements ___

c. Helpfulness of HIV/AIDS Unit staff ___

Group-3

Agenda

Regional Consultation on Draft Legislation on HIV/AIDS

Hotel Bangalore International, Bangalore
13-14 March 2004

Day 1

8.30 am onwards	Registration
9.30 – 10.00 am	Inaugural Remarks *Vandana Gurnani, IAS, Project Director, KSAPS*
	Welcome and Background (Process & rights-based approach) *Anand Grover, Project Director, Lawyers Collective HIV/AIDS Unit*
	Introduction of participants
10.00 – 10.15 am	*Open House*
10.15 – 11.00 am	DISCRIMINATION
11.00 – 11.30 am	*Open House*
11.30 – 11.45 am	Tea
11.45 – 1.15 pm	Group Discussions on DISCRIMINATION
1.15 – 2.00 pm	LUNCH
2.00 – 2.30 pm	CONSENT
2.30 – 2.45 pm	*Open House*
2.45 – 3.45 pm	Group Discussions on CONSENT
3.45 – 4.00 pm	TEA
4.00 – 4.30 pm	DISCLOSURE OF INFORMATION
4.30 – 4.45 pm	*Open House*
4.45 – 5.45 pm	Group Discussions on DISCLOSURE OF INFORMATION
5.45 – 6.00 pm	*Feedback & Wrap up*

Day 2

10.00 – 10.45 am	IMPLEMENTATION, GRIEVANCE REDRESSAL & REMEDIES
10.45 – 11.00 am	*Open House*
11.00 – 11.15 am	TEA
11.15 – 12.30 pm	Group Discussions on IMPLEMENTATION, GRIEVANCE REDRESSAL & REMEDIES
12.30 – 1.15 am	ACCESS TO TREATMENT & PROHIBITION OF QUACKERY
1.15 – 1.45 pm	*Open House*
1.45 – 2.45 pm	LUNCH
2.45 – 3.15 pm	RISK REDUCTION AND SPECIAL PROVISIONS
3.15 – 4.00 pm	*Open House*
4.00 – 4.15 pm	TEA
4.15 – 4.30 pm	INFORMATION, EDUCATION & COMMUNICATION
4.30 – 5.15 pm	*Open House*
5.15 – 5.30 pm	*Feedback & Wrap up*

Dr. Mahesh Bidri – KSAPS

LAWYERS COLLECTIVE HIV/AIDS UNIT

The Lawyers Collective has, with the support of the European Commission, instituted an HIV/AIDS Unit to provide legal aid and allied services for people affected by HIV/AIDS. The Unit also has an extensive advocacy and research & policy initiative. It conducts workshops on legal and ethical issues relating to HIV/AIDS for people living with HIV/AIDS, the legal community, policy planners (legislators, administrators, government officials), the judiciary, trade unions, employers, activists and organizations working on HIV/AIDS-related issues and the general public with special emphasis on marginalised groups. Its legal aid and advocacy initiatives are complemented by its research work that aims to influence policy and law reform.

The Unit believes that the protection of human rights is central to an effective response in controlling the spread of HIV/AIDS.

The main objective of the Unit is to protect and promote the fundamental rights of people affected by HIV/AIDS, which may have been denied in areas such as:

- Healthcare
- Employment
- Housing
- Terminal dues such as gratuity, pension
- Rights to informed consent, privacy and confidentiality
- Marital rights relating to maintenance, custody etc.
- Education
- Information and other services
- Insurance

The Unit also initiates public interest litigation on the following:

- Public Health issues like access to treatment
- HIV/AIDS education and awareness issues
- Gender issues ~ issues relating to women
- Safe blood supply
- Access to and quality of healthcare services
- Decriminalization of homosexuality
- Protection of sex workers
- Quacks

People affected by the HIV/AIDS seeking legal aid, advice and support including organizations, individuals, members of the legal community, NGOs in need of informational support and other services related to their work with HIV/ AIDS are encouraged to contact us at:

Lawyers Collective HIV/AIDS Unit (PMU)
7/10 Botawalla Building, 2nd Floor
Horniman Circle, Fort
Mumbai – 400 023
India

Tel: 91-22-2267 6213/9 Fax: 91-22-2270 2563
email: aidslaw@vsnl.com
website: www.lawyerscollective.org

Lawyers Collective HIV/AIDS Unit (PO)
63/2 Masjid Road, 1st Floor
Jangpura
New Delhi - 110 014
India

Tel: 91-11-2432 1101/2, 2431 6925
Tel/fax: 91-11-2432 1101
email: aidslaw1@ndb.vsnl.net.in

Anand Grover
Project Director

Vivek Divan
Project Coordinator

Lawyers Collective HIV / AIDS Unit
Supported by the European Commission

POSITIVE DIALOGUE

NEWSLETTER # 16

MARCH 2003

"[M]edical treatment for many conditions costs more than most people can afford ... when dealing with chronic illnesses like AIDS ... larger aggregations of resources are required, and insurance companies constitute one of the primary means of creating such aggregated funds."

Mark Scherzer, 'Private Insurance'
from AIDS Law Today edited by Scott Burris et al

SOCIAL SECURITY AND HIV/AIDS

Social security is an instrument that enables society to protect individuals against distress in situations of ill health, infirmity, old age and death. Over the past two decades developing countries, which already fare poorly on health and development fronts, have been experiencing much of the burden imposed by the HIV/AIDS epidemic. Repeated illnesses, costs of treatment and medical care, loss of wages and livelihoods pushes people living with HIV/AIDS (PWA), caregivers and survivors into poverty and deprivation. In this context, social security measures can go a long way in reducing HIV/AIDS related morbidity and mortality and easing the encumbrance on affected individuals and households. This edition of Positive Dialogue profiles some of the social security measures in India and examines their provisions in the context of HIV/AIDS.

The Employees State Insurance Scheme - an overview

The Employee State Insurance Scheme (ESIS) is an important social security measure for workers in India. The scheme was introduced under the Employees' State Insurance Act, 1948 (ESI Act) with the aim of providing benefits to employees and their families in the eventuality of sickness, injury and maternity. Towards this objective, the scheme provides a range of medical services and cash benefits to employees and dependants' insured under the scheme when they are ill or incapacitated and unable to work. In the context of HIV/AIDS, the scheme assumes immense significance not only because it is one of the few insurance mechanisms that provide comprehensive treatment for HIV/AIDS including anti-retroviral medication (ARVs) but also because it offers much-needed protection from destitution to HIV-positive employees and their families.

Nature of the scheme

The ESIS is a contributory scheme based on the principle of pooling risks and resources on a tripartite basis in order to offer security to workers. The scheme operates with economic contributions from employees, employers and the government with the employees' share being 1.75 % of the wages, the employers contributing 4.75 % of the entire wage bill and the government bearing 1/8 share of expenditure on health services with a maximum of Rs.600 per person per year. The onus of collecting both the employer and employee's contribution is on the former. These are paid into the ESI Fund, which is administered by the ESI Corporation and are expended for provision of medical services to insured persons and their families and payment of cash benefits to insured persons.

Applicability of the ESI Act

The ESI Act applies to all factories that are engaged in manufacturing and employ more than 10 persons (with the aid of power) or 20 persons (without the aid of power). The scope of the scheme has been expanding over the years and establishments such as shops, hotels, restaurants, cinemas, transport undertakings have also been covered. The scheme covers employees earning less than Rs.6500/month. Further, employees earning an average daily wage of less than Rs.40 are exempted from making a contribution but are entitled to all benefits under the scheme. By the end of 2002, it was estimated that the ESIS provided insurance coverage to over 8.6 million persons besides providing medical and cash benefits to over 33.4 million individuals (including family members of insured workers). Yet, a critique of the scheme has been that in a population of 1 billion Indians, the ESIS has not reached out to the optimum extent.

For delivery of health care services, the ESIS has a widespread network of medical facilities including dispensaries, panel clinics, diagnostic centres and hospitals. The ESI Corporation has tie-ups with public and private healthcare institutions for providing specialised care and treatment that are not available within the ESIS.

Nature of services and benefits available

The ESIS encompasses a range of medical services, cash benefits and other relief.

- *Medical benefits* include all aspects of prevention, treatment and care - diagnostic services, inpatient, outpatient and domiciliary care and free supply of drugs and dressings. These services can be availed by insured persons and dependants, which may include spouse, children below the age of 18 years and parents.
- *Sickness benefits* include the provision of cash to insured

persons in the event of sickness resulting in absence from work and possible loss of earnings. The cash is payable upon production of medical records certified by an authorised physician at a standard rate which is not less than 50 percent of the wages. The maximum duration till which sickness benefits can be availed is 91 days.

- *Extended sickness benefits* are payable in cash at an amount equal to 70% of daily wages to persons inflicted with any of the 34 infections listed in the schedule to the Act after they have exhausted sickness benefits. This list includes Tuberculosis and AIDS. The maximum period for which benefits can be availed is upto 2 years.
- Other benefits include *maternity benefits, enhanced sickness benefits, disablement benefits* (for persons who suffer from occupational diseases), *dependant's benefits* and *funeral benefits.*

Provisions of the ESIS applicable in the context of HIV/AIDS

Overall, the ESIS provides various measures for relief and security to workers, many of whom are in the lower economic strata. Lack of access to resources and services compounds vulnerability of poor working classes particularly in situations of ill health and infirmity resulting in loss of livelihood. In the context of HIV/AIDS, the burden on affected workers and their families increases due to lack of access to timely and adequate treatment. Further, frequent spells of sickness due to HIV/AIDS-related medical conditions, especially in the absence of ARVs for PWA and the subsequent debilitation of bread earners leave families affected by HIV/AIDS in the clutches of debt and on the brink of destitution.

In this regard, coverage of HIV-positive workers and their families under the ESIS helps alleviate some of the hardships imposed by the epidemic and enables affected individuals and families to cope with the same. Some of the provisions under the scheme that afford protection, security and support to insured workers include:

Provision of treatment including ARVs

Workers' insured under the ESIS are entitled to medical services and treatment for all conditions including HIV/AIDS. In the context of HIV/AIDS, the scheme not only provides treatment for opportunistic infections and other HIV-related illnesses but also provides ARVs to insured persons if these are prescribed by the treating physician. Under the Act, the ESI Corporation is obligated to provide treatment to all insured workers' and their dependants and cannot refuse treatment including supply of medicines for any medical condition even if the drugs are prohibitively expensive. According to information available from the ESI Corporation, by the end of 2002, a total of 65 persons across the country were being provided with ARVs under the scheme.

Another related practice in the context of treatment is that in case a person insured under the scheme gets excluded from its coverage for any reason, the treatment regimen of the person provided under the scheme continues as long as the sickness/condition persists. Application of this principle in the context of a PWA receiving ARVs under the scheme implies that s/he will continue to get the medicines even if s/he gets excluded from coverage under the scheme, since once initiated, ARV therapy must continue for life. It should be noted that the ESI Corporation is reconsidering this position in the context of chronic conditions like HIV/AIDS although as of today, a PWA, if initiated on ARV will continue to be given the same even if s/he is excluded from the scheme's coverage.

As regards availability of equipment for monitoring ARV therapy such as CD4 tests, viral load etc., medical amenities available with ESI hospitals are not state of the art though, according to ESI officials, the Corporation is in the process of upgrading services. Further, administrators maintain that non-availability of equipment for monitoring treatment is not a hindering factor for providing ARVs and that the ESI Corporation has arrangements with other institutions where such facilities are available.

Theoretically, therefore, the ESIS upholds the fundamental right to health of all persons including PWA, by providing treatment and medication. This is in sharp contrast to the National AIDS Prevention and Control Policy (NAPCP), which justifies not providing life-prolonging treatment to PWA on grounds of "their prohibitive costs on account of indefinite period of treatment and other supportive investigations required for monitoring the progress of the disease".

Availability of cash benefits for PWA

Under the scheme, persons incapacitated by medical conditions are entitled to receive cash benefits so that they are not rendered destitute. This is a very significant provision for PWA, since it provides economic security to them and their families in the eventuality of HIV-related illnesses. Further, the extended sickness benefits available under the scheme specifically apply to PWA who are entitled to receive cash benefits for a period of 2 years of continuous sickness, thereby protecting households from indigence when the earning member is afflicted with AIDS.

Non discrimination in employment

To a limited extent, the ESI Act also safeguards the right to employment of employees debilitated by sickness, injury or disability. Section 73 provides that an employer cannot dismiss, discharge, reduce or punish an employee who is receiving sickness benefits or is under medical treatment or is absent from work as a result of a sickness. Although this does not go far enough to protect the right of PWA to work, it does provide some statutory protection to insured PWA from discriminatory practices including termination and diminution in wages during the period of ill-health.

Protection of confidentiality of medical history including HIV status

The ESI scheme has procedural safeguards for protecting confidentiality of an employee's medical condition while claiming benefits. As a practice, ESI records do not divulge the employee's medical condition on the document, which is to be shared with the employer. The medical certificate merely states "unable to work on medical grounds" along with a period for which sick leave is required. This institutional practice of protecting confidentiality of patients' health status from the employer has immense importance in the HIV/AIDS scenario, where PWA commonly experience stigmatisation and discrimination at the work place because of disclosure of HIV status to the employer and fellow workers. It further enables PWA to claim entitlements without fear of disclosure.

Lessons to be learnt from the ESIS

The NAPCP notes that "the large network of ESI hospitals and dispensaries under the scheme should be effectively used for

spreading the message of prevention of the disease and providing services to HIV/AIDS infected workers and families". While the Government of India has hailed ESIS as one of the most comprehensive social security instruments for workers, sadly, the provisions of the scheme which afford treatment, security and support to individuals and households affected by HIV/AIDS have not been embraced in the national response to the epidemic. The contributory insurance model that has been utilised by the ESIS to provide expensive medication including ARVs to PWA, apart from other measures for monetary support, has neither been examined nor explored in the national HIV/AIDS programme.

Notwithstanding gaps in service delivery, the ESI model of sharing burden to provide benefits to insured persons deserves closer examination while evolving responses to mitigate the impact of HIV/AIDS on individuals, families and communities. This contributory model goes a long way in enabling PWA to realise their rights including the right to access treatment, employment, social security and insurance services. In this context, the scheme offers valuable lessons to government agencies, employers' bodies, insurance providers and AIDS service organisations, for whom, unaffordability and financial non-viability have, until now, posed a major challenge in responding to the overall needs of PWA.

The Central Government Health Scheme (CGHS)

Government jobs in India are much sought after for the security that they offer by way of employment and other benefits attached to the job. These benefits sometimes include health services. One such scheme implemented by the central government for its employees is the Central Government Health Scheme (CGHS). All central government employees, presently serving and pensioners, can enrol for the scheme by contributing a minimum amount between Rs.5 to Rs.150 per month to become a cardholder, which entitles them to health services under the scheme. This scheme also covers families (beneficiaries) of central government employees, presently serving or retired. The government estimates (2000 figures) that the scheme covers 9,62,824 cardholders and 41,42,491 beneficiaries. Under CGHS, the government has set up a network of 241 dispensaries in major cities and townships in India where central government offices are located. Dr. Hazarika, Additional Director, CGHS informed Positive Dialogue that a cardholder or a beneficiary under the scheme can avail of free medicines, outpatient care from the dispensary in his/her area and hospitalisation from a CGHS-recognised hospital.

Treatment for HIV/AIDS

In the context of HIV/AIDS, Dr. Nongpiur, Director, CGHS (India), confirmed that ARVs and medicines for opportunistic infections (OIs) were available under the scheme. Dr. Hazarika recognised that one of the most important issues for PWA is access to medicines, both ARVs and drugs for the treatment of OIs. In this context, he explained that CGHS had no ceiling on cost incurred for medicines provided to the employee or his/her family through the scheme.

Dr. SR Koranne, Medical Officer-in-charge, CGHS Dispensary, Jungpura, New Delhi elaborated that if the dispensary was not equipped to treat the patient, s/he is referred to a government hospital. All drugs prescribed by the hospital are then provided to the patient by the dispensary. If the required drugs are not available with the dispensary, they are procured through a chemist authorised by the government and provided to the patient.

Despite providing a variety of medical benefits described above, the WHO (WHO/SEARO, Regional Health Forum: Volume 4, Number 1&2, 2000) has indicated that the quality and delivery of services under the CGHS is poor. Besides improvement in the quality of services, adherence to legal/ethical standards i.e. ensuring confidentiality and an enabling non-discriminatory environment are essential for encouraging PWA to access health services under the scheme. In India, such schemes under which a wide network of health infrastructure has already been set up, provide an opportunity for disseminating essential sexual health information, promoting voluntary testing and providing appropriate care and support to PWA.

DRAFT LEGISLATION on HIV/AIDS

Lawyers' Collective HIV/AIDS Unit has been requested by Kapil Sibal, Member of Parliament and the National AIDS Control Organisation (NACO) to prepare a draft legislation on HIV/AIDS for presentation to Parliament. This initiative has received the commitment of resources from the Indian government. We are very excited about this opportunity but also feel a great sense of responsibility toward civil society in ensuring that its concerns are reflected in the law.

As we commenced on this task we felt the need to begin by undertaking a comprehensive examination of legal developments around HIV/AIDS in other countries in order to contextualise the Indian experience within the global picture of the pandemic and borrow from other legislative experiences to create the basis for a draft legislation for India. This work has led us to preparing *Background Papers* on the legal, ethical and human rights issues that HIV/AIDS has raised over the course of the epidemic. At present we continue to work on these papers. The next phase of the process is *drafting the legislation*, which will be based on human rights models present worldwide with particular emphasis on common law regimes that are similar to India. Protecting and promoting the rights of PWA, as well as those affected by the epidemic and those most vulnerable to it, is central to creating an environment whereby stigma, violence and inequity is reduced, if not eradicated. It has been observed and established that the creation of a non-discriminatory environment based on principles of human rights is the best public health strategy in controlling the spread of HIV/AIDS. Thus, the goal for the process we are undertaking is to create a comprehensive law which protects the rights of PWA as well as has the scope to provide anti-discrimination protections for other marginalised groups.

We recognise that any legislative measure that attempts to address the prevention of HIV infection and mitigation of the impact of the epidemic must be informed by the experiences of people living with and working in the field of HIV/AIDS. With this in mind, the Unit proposes to conduct a *Nationwide Consultation* on the draft legislation on HIV/AIDS by involving and learning from representatives of the various sectors that are impacted by the epidemic. The consultation process, which

is scheduled to take place between from May/June 2003, is envisaged to entail three different processes in order to be able to exchange views with the widest spectrum of individuals and institutions as feasible. These are:

- 2 National Consultations: Focusing on PWA and on representatives from vulnerable communities (MSM, Sex Workers, IDU etc.)
- 6 Regional Consultations: Focusing on individuals, institutions and other stakeholders in HIV/AIDS-related issues (NGOs working on HIV/AIDS and/or related issues such as women's issues, healthcare institutions/workers, trade unions, management, educational institutions etc.)
- 'Call-for-comments' Consultations: These will be done through our website (www.lawyerscollective.org), by email and by posting the Background Papers with the Draft Legislation to individuals and institutions who would like to express their views but may not be able to attend the meetings.

After the consultations we will integrate the feedback into the draft legislation and annex the report of the entire consultation to the draft itself. We feel that one of the most critical aspects of successful rights-based HIV/AIDS legislation is the involvement of an informed civil society committed to broad-based community mobilising on these issues. To this end, we hope that you and all your colleagues will participate actively in this process to ensure the creation of a law that meets the needs of the people it affects most. We will be sending periodic updates on the consultation and other processes as the logistics are finalised. Please feel free to pass this information on to individuals or organisations that may be interested in this process and would like to contribute in some form.

Contributions: Tripti Tondon, Leena Menghaney and Vivek Divan

Monthly Drop-in meeting

Lawyers Collective HIV/AIDS Unit holds monthly drop in meetings on the first Thursday of each month. The meetings start at 4.30 pm at the Delhi Office and at 5.00 pm at the Mumbai Office. The objective of the meeting is to share experiences, information and discuss issues of concern. We invite your active participation in these meetings.

Lawyers Collective HIV/AIDS Unit provides legal aid and allied services for people affected by HIV/AIDS. The main objective of the Unit is to protect and promote the fundamental rights of persons living with HIV/AIDS, who have been denied their rights in areas such as:

- Health care
- Employment
- Terminal dues like gratuity, pension
- Marital rights relating to maintenance, custody etc
- Housing

The Unit is involved in initiating public interest litigation on issues like the right to marry, confidentiality, access to health care, safe blood supply, quacks, etc. Lawyers Collective HIV/AIDS Unit also conducts workshops on legal and ethical issues relating to HIV/AIDS for people living with HIV/AIDS, lawyers, judges, health care providers, NGOs etc.

Please send your comments and queries to the addresses given below. Those affected by HIV/AIDS seeking legal aid, advice and support are welcome to contact us at:

Lawyers Collective HIV/AIDS Unit

Programme Management Unit

7/10, BOTAWALLA BUILDING, 2ND FLOOR
HORNIMAN CIRLCE, FORT, MUMBAI - 400 023

TEL : 022 267 6213/9
FAX : 022 270 2563
E-MAIL : aidslaw@vsnl.com
Website : www.lawyerscollective.org

New Delhi Project Office

63/2 MASJID ROAD, 1st FLOOR, JANGPURA
NEW DELHI – 110014

TEL/FAX: 011 432 1101/02 or 011 4316925
E-MAIL : aidslaw1@ndb.vsnl.net.in
Hours : Monday – Friday : 10:00 a.m. – 7:00 p.m.
Saturday : 10:00 a.m. – 4:00 p.m.

Subscribe to :

LAWYERS COLLECTIVE

JALARAM JYOT BUILDING, 4TH FLOOR, 63, JANMABHOOMI MARG, FORT, MUMBAI 400 001

A Monthly Legal Magazine, uses law as an instrument of social change

BOOK POST

If undelivered please return to :
Lawyers Collective HIV/AIDS Unit 7/10, BOTAWALLA BUILDING, 2ND FLOOR HORNIMAN CIRCLE, FORT, MUMBAI - 400 023.

Lawyers Collective HIV / AIDS Unit

POSITIVE DIALOGUE

NEWSLETTER # 15

DECEMBER 2002

"Rather than requiring that people seeking marriage licenses be tested for HIV, states should focus on education, e.g., providing marriage applicants with AIDS education materials. Education should emphasise the importance of prevention and voluntary testing."

From 'Mandatory Pre-marital HIV Testing: A Record of Failure'
An American Civil Liberties Union Report, March 1998

MANDATORY PRE-MARITAL TESTING

TThe National AIDS Prevention & Control Policy of the Indian Government clearly mandates voluntary testing as the appropriate public health strategy in dealing with HIV/AIDS and the Union Health Minister has been quoted recently reaffirming this stand. On the other hand there have been opposing views expressed at the governmental level in other parts of the country particularly favouring mandatory pre-marital testing for HIV. These have been voiced recently in the Goa legislature and by the Andhra Pradesh legislature and reported in the press. Lawyers Collective HIV/AIDS Unit believes that such a proposal will have a deleterious impact on India's efforts to contain HIV/AIDS and that such a strategy is based neither on sound public health nor human rights visions. In light of this, the Unit wrote to the executive and legislative representatives in Goa and the Chief Minister of Andhra Pradesh explaining its reasons for opposing such a proposal and requested a rethink on this issue. Reproduced in this edition of Positive Dialogue is Lawyers Collective HIV/AIDS Unit's letter to the Chief Minister of Andhra Pradesh that awaits a response:

D[redacted]: September 18, 2002

The Hon'ble The Chief Minister,
Shri Chandrababu Naidu,
Andhra Pradesh

Dear Sir,

This is with reference to make HIV testing compulsory for couples before marriage, as was reported in Aaj Tak on September 18, 2002.

1. We appreciate that a policy to mandatorily test couples before marriage could be motivated out of the concern to protect the prospective spouses of persons living with HIV from acquiring the disease, thereby, as a public health initiative trying to reduce and prevent the spread of the disease. However, we would like to bring to your notice a few issues and concerns for individuals and the public that arise in mandatorily screening couples before marriage for HIV which would be counterproductive at an individual level as well as a public health level.

2. Testing persons for HIV mandatorily in the pre-marital situation does not fulfil the objectives sought to be achieved at an individual level. Also at a public health level, mandatory testing for HIV has negative public health consequences. This is mainly because of the following reasons:-

(a) The most common way of testing for HIV is through an antibody test. However, the peculiarity of an HIV antibody test is the "window period". The "window period" is one in which even though a person is infected with HIV, s/he would be tested negative as her/his antibodies are not developed. Therefore, even though a person is infected with HIV, s/he will test HIV negative. Therefore, a single antibody test for HIV does not serve the purpose of preventing the prospective spouse from getting infected. Therefore, mandatory testing would not result in achieving the objective sought to be achieved.

(b) It may also be noted that there is also a high rate of false positive results in the country and persons may not actually be infected. Thus, in view of the stigma surrounding HIV, a person who is actually not HIV positive could be marred for life on account of a false positive result and may not be able to marry at all. This would have a traumatic effect on her/ his life and on her/ his family.

(c) Mandatory testing for HIV prior to marriage would only give the state a false sense of security and a false belief that the infection is being effectively prevented from spreading.

(d) A pre-marital HIV mandatory test does not prevent persons from getting infected after marriage, and thereby putting the spouse at the risk of getting infected.

(e) A pre-marital HIV test would not really prevent the spread of infection to the unmarried sexual partners or the needle-sharing partners of the person affected by HIV.

(f) For reasons stated above, mandatory testing for HIV before marriage does not really serve the purpose of preventing the spread of the disease, as such a policy does not consider sexual relations prior to marriage and extra marital relations.

3. This apart, a pre-marital mandatory HIV testing policy would tend to have negative public health consequences, in the following manner:-

(a) Mandatory testing would only drive the disease underground. Not many persons are aware of HIV, the nature of the disease, the testing methods, the methods of transmission of HIV, etc. Due to the ignorance, there is fear even to get an HIV test done. There is a lot of stigma attached to the disease, which ostracises persons living with HIV from their community and prevents them from getting any support. Mandatory testing would only dissuade people from getting their tests done. This is against the National AIDS Control Organisation (NACO) policy on testing, which encourages voluntary testing after pre-test counselling. Mandatory testing would actually only drive the disease underground and would be very costly for the state in the long run.

(b) Further, this would only have the consequence of people going outside the State to marry, where such tests are not required.

(c) Pre-marital mandatory testing for HIV would be a myopic policy, as it does not take into consideration infection after marriage, infection to sexual partners and needle sharing partners. Therefore, from a public health perspective it does not really prevent the spread of the disease.

(d) Mandatory testing often ignores issues of consent and confidentiality of a person's HIV status. This again would have a negative public health impact as people would lose their faith in the health system of the state.

(e) Mandatory testing could also open a racket of issuance of false certificates prior to marriage, thereby having a negative impact on the entire public health system.

(f) Mandatory pre-marital testing for HIV could prove to be a very costly public health strategy for the state, as repeated tests require to be undertaken for confirming the positive status of a person. This could drain out the funds substantially.

(g) In most personal laws marriages are not required to be registered. Thus, for example, a Hindu marriage can be solemnised only by performing ceremonies. No registration is required. Therefore, a policy for mandatory testing would be impossible to implement.

4. Successful public health strategies are those that have optimally utilised the scarce resources, both infrastructural and financial resources, in empowering and encouraging women to prevent themselves from getting infected. It is not our intention to suggest that a woman (or any prospective spouse) does not have the right to ask for an HIV test. The question is that should it be done by making it mandatory or by empowering women so that they can themselves decide.

(a) Women are vulnerable to HIV infection within and outside the marital setting. It is easy to pronounce a policy of pre-marital testing for the ostensible reason that it will prevent women from getting infected. Pre-marital testing is an easy way out. However, such a policy will only give a false sense of security. It will not empower women to negotiate sexual relations, which is what is really required i.e. the empowerment of women to prevent infection. But mandatory pre-marital testing does not really prevent women from getting infected, it does not give information to women about HIV, about safe sexual practices, it does not empower them, it does not emancipate women. A policy that would actually empower women so as to prevent themselves from getting infected is difficult to implement and sustain.

(b) The policy required today is to impart information, educate people and to counsel women about HIV, at the adolescent stage, thereby helping them to prevent themselves from getting the infection. This is the real challenge. It is difficult but possible. A determined legislative action can really emancipate women, thereby helping them to prevent themselves from getting the infection.

(c) Therefore, if the same funds are allocated in spreading information about prevention, safe sex, and emancipating women, educating women and the girl child, and in removing the ignorance and bias attached to HIV, it would in the long run prove to be a more cost-effective public health strategy. It would then encourage people to voluntarily test themselves prior to marriage and help people from protecting themselves from getting infected. This could prove to be an effective policy in reducing and preventing the spread of the infection in the long run.

5. The American Civil Liberties Union Report of March 1998 reported that mandatory pre-marital HIV testing was a record of failure. It stated that more than 30 states in the USA considered pre-marital HIV testing. However, all the states except for Illinois and Louisiana rejected the idea. Illinois and Louisiana enacted and enforced mandatory pre-marital testing, but subsequently repealed them. In Utah too, a state in the United States of America, there was a legislation making a marriage to an HIV positive person void. However, the legislation in Utah was reversed as it was against public policy and they amended the same making such marriages valid. Please find enclosed the relevant documents for your kind perusal.

6. Thailand has been able to control the spread of HIV infection through intensive dissemination of information, education and communication. Condom usage was encouraged in all awareness campaigns, thereby increasing the rate of condom usage and drastically bringing down the rates of HIV and STD infections.

7. We therefore request you not to pass any legislation to make pre-marital HIV testing mandatory which could have a negative impact on public health and on the individual, but to re-think of the strategies that would empower women so that they can effectively prevent the spread of HIV infection in the population.

Thanking you,

Yours truly,

Anand Grover
Project Director

cc: Andhra Pradesh State AIDS Control Society

Enclosed:

1. A letter written by UNAIDS, by Susan Timberlake, Human Rights Adviser, Policy, Strategy and Research, to Ms. Marina Mahathir, Malaysia.
2. Mandatory Pre-Marital HIV Testing - An American Civil Liberties Union Report, March 1998.
3. Utah Code.

Supreme Court of India restores HIV+ person's Right to Marry

On 10 December 2002 the Supreme Court of India passed an order in a case related to the issue of an HIV+ person's right to marry. This case was filed by Lawyers Collective HIV/AIDS Unit on behalf of its client Mr. X, seeking clarifications and challenging the judgment of the Supreme Court in the case of Mr. X v Hospital Z in 1998 wherein the court had suspended the right of PWA to marry, although this was never an issue before it.

In this order the Supreme Court held that all observations relating to marriage in Mr. X v Hospital Z in 1998 were not warranted as they were not issues before the Court. The Supreme Court did, however, state that it's pronouncements regarding the role of hospitals to make disclosure of HIV+ status in Mr. X's judgment remain as they were made regarding an issue before it in the case (Mr. X's case concerned the issue of breach of confidentiality of the petitioner's HIV+ status by a hospital blood bank to the petitioner's relatives). In effect, therefore, the Supreme Court's judgment in Mr. X v Hospital Z to the extent that it suspends the right of PWA to marry is no longer good law. The right of an HIV + person to marry is restored. However, this does not take away from the duty of those who know their HIV+ status to obtain informed consent from their prospective spouse prior to marriage.

We are happy to convey this positive order of the Supreme Court and extremely pleased that the rights-based approach to HIV/AIDS has received further support and PWA rights have been strengthened. This is the only effective way in dealing with HIV/AIDS - taking away rights only strengthens stigma and fear, protecting and providing them strengthens understanding and empowerment.

Violence against sex workers continues

[redacted]er the incident in Nippani, Karnataka earlier this year (reported in Positive Dialogue #13), where sex workers belonging to Veshya AIDS Mukabla Parishad (VAMP) were harassed and abused by police while carrying out HIV/AIDS prevention work, yet another horrific incident of violence against women in sex work has come to light. This time the targets were sex workers from the Durbar Mahila Samanvay Committee (DMSC), the largest organisation of sex workers in the region with over 60,000 members.

In August 2002, Rekha, a sex worker, was severely beaten up by local hoodlums in the Tollygunj red light area in Kolkata for having a public altercation with her husband. When Swapna, the President of DMSC protested and lodged a complaint with the police, the same gang publicly attacked her for "daring to involve outsiders in an internal matter". Policemen on duty were silent spectators to the incident and refused to file a FIR.

[redacted]DMSC organised a rally of more than 3000 sex workers from all over the state to protest against the violence and inaction of the police. They also registered complaints with State agencies, including the Government of West Bengal, the State Human Rights Commission and the State Women's Commission. Since then two of the three assailants have been arrested while one is still absconding. The local goons persist in threatening Swapna, who has been rendered shelterless, and other members of DMSC. Following threats and coercion, the STD clinic run by DMSC has been shut down and has ceased to function. Needless to say, the HIV/AIDS prevention intervention programme has been adversely affected.

This is not just a stray incident of violence against individual sex workers but a deliberate attempt to undermine the collective leadership of sex workers represented by DMSC. The organisation's role in implementing effective HIV/AIDS interventions in Sonagachi, Kolkata have been acknowledged at national and international levels. The self-regulation mechanisms introduced by DMSC to address exploitation including entry of children and other unwilling persons within the sex industry have been an unparalleled initiative. Above all, DMSC's untiring efforts in organising sex workers for their rights and building a movement against exploitation has continued to enthuse and inspire human rights activists, organisations working on HIV/AIDS and other marginalised communities all over the world.

The incident once again points to the failure of state agencies, particularly the police, in safeguarding fundamental rights of women in sex work including the right to life and protection of law. Besides disrupting health and HIV/AIDS interventions such incidents result in destabilising movements for human rights by marginalised and minority communities. The time is overdue for the state to take responsibility in protecting the lives of women in sex work and ensuring that their disempowerment and abuse ceases.

Treatment Access - positive developments

Thailand, October 1, 2002 - People living with HIV/AIDS in Thailand won a precedent-setting court case in Thailand's Central Intellectual Property and International Trade Court (CIPITC) against the pharmaceutical company, Bristol - Myers Squibb (BMS). The court ruled that the pharmaceutical company had illegally amended its application three years after its original submission, in order to claim a wider monopoly on ddI (an NRTI a critical first regimen AIDS drug) than the patent description justified and has ordered BMS to revert to its original claim. BMS in its original patent application filed in July 1992, asked that its patent be extended to cover only a "range of 5 mg to 100 mg per unit of use." In 1997, BMS amended its patent and omitted the dosage restriction.

The decision rejected BMS' exclusive right to market ddI in Thailand and paved the way for its generic production (patented ddI tablets cost twice as much as generic ones). The drug company can now exclusively produce ddI only in doses from 5 milligrams to 100 milligrams, while other drug companies can produce the drug in larger doses.

There are over one million people living with HIV/AIDS in Thailand. Only a few thousand have access to treatment. The Thailand Network of People Living with HIV/AIDS (TNP+) and other treatment access groups have campaigned for expanded and improved access to treatment. In 1998, treatment activists demanded that the Thai government exercise its rights to use

a compulsory license to produce generic ddI tablets in order to address its AIDS treatment crisis. The government refused, citing fear of trade sanctions. Instead the Thai Government Pharmaceutical Organisation (GPO) produced ddI in powder form which causes increased side affects in comparison to tablets and was also not easy to administer.

In May 2000, the plaintiffs, two persons living with HIV/AIDS and the AIDS Access Foundation initiated legal action on behalf of all people living with HIV/AIDS in Thailand, against BMS and the Thai Department of Intellectual Property (DIP).

Some significant points from the judgement include:
a) For the first time the Doha Declaration on Patents and Public Health was cited by a court to ensure access to treatment. The court stated that the Doha Declaration insisted that TRIPS be interpreted and implemented so as to protect the country's public health, especially the promotion and support of access to medicine for all people.
b) People living with HIV/AIDS and an NGO working on AIDS, and not commercial enterprises contested a patent in court on the grounds that health interests supersede patent protection.

In October 2002, Thai activists also decided to challenge BMS' Thai patent (number 7600) that it applied for and received in 1998 for a formulation of ddI despite the fact that it does not involve any significant inventive step or novelty, a necessary criteria for granting a patent. Activists point out that the patent is invalid, as BMS had simply combined the drug with a buffer, an antacid that helps ddI to be better absorbed from the stomach, (a common practice among pharmacists) and that this is not an inventive step. As a result, BMS managed to maintain its monopoly on this important AIDS drug.

Contributions: Veena Johari, Tripti Tandon, Leena Menghaney

Monthly Drop-in meeting

Lawyers Collective HIV/AIDS Unit holds monthly drop in meetings on the first Thursday of each month. The meetings start at 4.30 pm at the Delhi Office and at 5.00 pm at the Mumbai Office. The objective of the meeting is to share experiences, information and discuss issues of concern. We invite your active participation in these meetings.

Lawyers Collective HIV/AIDS Unit provides legal aid and allied services for people affected by HIV/AIDS. The main objective of the Unit is to protect and promote the fundamental rights of persons living with HIV/AIDS, who have been denied their rights in areas such as:

- Health care
- Employment
- Terminal dues like gratuity, pension
- Marital rights relating to maintenance, custody etc
- Housing

The Unit is involved in initiating public interest litigation on issues like the right to marry, confidentiality, access to health care, safe blood supply, quacks, etc. Lawyers Collective HIV/AIDS Unit also conducts workshops on legal and ethical issues relating to HIV/AIDS for people living with HIV/AIDS, lawyers, judges, health care providers, NGOs etc.

Please send your comments and queries to the addresses given below. Those affected by HIV/AIDS seeking legal aid, advice and support are welcome to contact us at:

Lawyers Collective HIV/AIDS Unit
Programme Management Unit
7/10, BOTAWALLA BUILDING, 2ND FLOOR
HORNIMAN CIRLCE, FORT, MUMBAI - 400 023

TEL : 022 267 6213/9
FAX : 022 270 2563
E-MAIL : aidslaw@vsnl.com
Website : www.lawyerscollective.org

New Delhi Project Office
63/2 MASJID ROAD, 1st FLOOR, JANGPURA
NEW DELHI – 110014
TEL/FAX: 011 432 1101/02 or 011 4316925
E-MAIL : aidslaw1@ndb.vsnl.net.in
Hours : Monday – Friday : 10:00 a.m. – 7:00 p.m.
Saturday : 10:00 a.m. – 4:00 p.m.

Subscribe to :

LAWYERS COLLECTIVE

JALARAM JYOT BUILDING, 4TH FLOOR, 63, JANMABHOOMI MARG, FORT, MUMBAI 400 001

A Monthly Legal Magazine, uses law as an instrument of social change

BOOK POST

If undelivered please return to :
Lawyers Collective HIV/AIDS Unit 7/10, BOTAWALLA BUILDING, 2ND FLOOR HORNIMAN CIRCLE, FORT, MUMBAI - 400 023.

Are You Affected by

HIV/AIDS ?

Know Your rights

Employment

- Can I be denied employment or be removed from my job if I am HIV+?

No. If you are fit to perform your job functions, otherwise qualified and do not pose a substantial risk to your fellow workers, a government/public sector employer cannot deny you employment because you are HIV+.

This has been held by the Bombay High Court in *MX v ZY* and arises from your fundamental rights to work, to be treated equally and to earn a livelihood under the Indian Constitution.

Similarly, you cannot be removed from your job by any employer because you are HIV+, provided you are fit to continue to perform your job functions and do not pose a substantial risk to your colleagues.

- What are the remedies available to me if I am removed from my job due to my HIV+ status?

You cannot be removed from your job merely due to your HIV+ status. However, if you are, you have different remedies under the law depending on certain variables. Your remedies could include approaching the Labour or Industrial Court for reinstatement and back wages or approaching a civil court for damages or the High Court, if you are in the government/public sector, for setting aside the termination as violative of your fundamental and/or statutory rights.

- If, due to my medical condition, I am not fit to perform my current job, can I be transferred to a different department within the same organization?

If your medical condition does not permit you to perform your job functions, you may be offered an alternate job. But this arrangement should not pose any undue financial or administrative burden on the employer.

- Can an employer make me undergo a compulsory HIV test as part of a medical examination at the time of recruitment or during the course of my employment?

No. The purpose of a medical examination is to decide whether a person is fit enough to do a particular job during employment. A medical examination tests a person's functional abilities by examining aspects of her/his health that are relevant to the job s/he performs e.g. tests for the heart, eyesight, breathing etc. An HIV test does not indicate the capacity of the individual to perform her/his job functions.

Government testing policy states that a compulsory HIV test should not be imposed as a pre-condition of employment or for providing health care facilities during employment or as an assessment of fitness to work.

An HIV test can be a voluntary part of a medical examination and should only take place with the specific informed consent of the employee.

However, the above may not apply to a private employer.

- Do I need to inform my HIV+ status to my employer?

No. You are not obliged to inform your employer about your HIV+ status unless required by a statutory law because your status is not relevant for the determination of your fitness or capacity to perform your job functions.

- Can a doctor inform my employer of my HIV status?

The doctor has an obligation to maintain the confidentiality of his/her patient's medical status. However, the doctor may disclose the status if the employee agrees, either expressly or impliedly, to waive his/her right to confidentiality.

- If I am a spouse of an HIV+ person who has passed away, do I have a right to employment in his/her place?

If your spouse was working in the government/public sector and the employer has a scheme for compassionate employment, you as the dependant family member can apply for a job on compassionate grounds provided you are fit to perform the functions and qualified to work in accordance with the scheme.

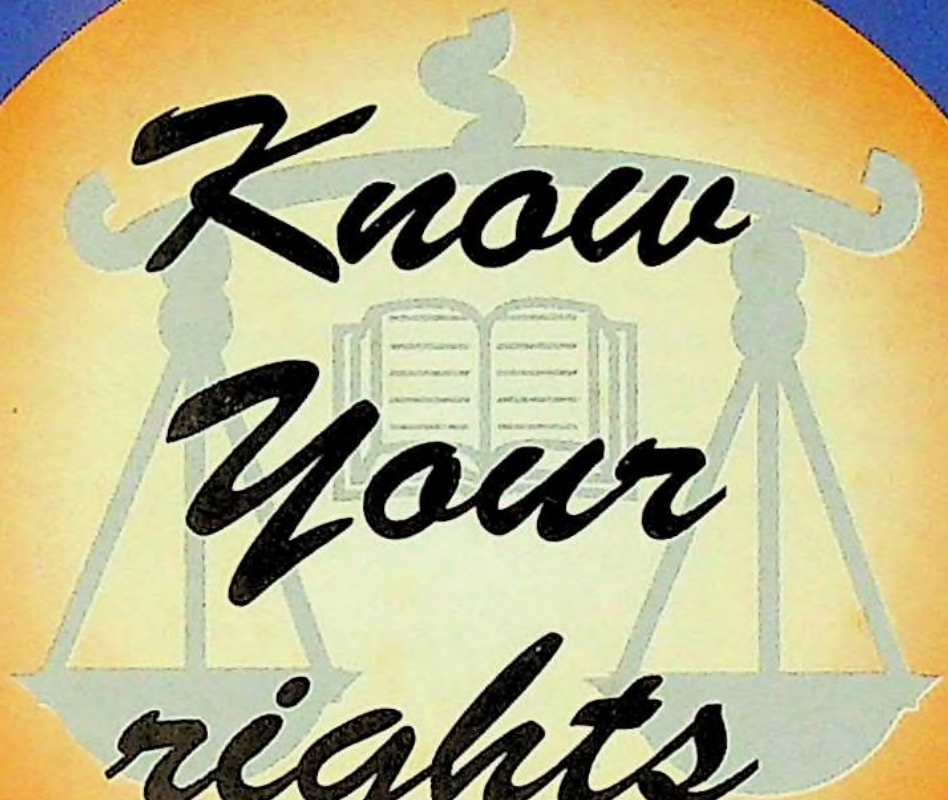
- Am I entitled to benefits even if I am HIV+?

All employees, irrespective of their status, are entitled to terminal benefits. You are entitled to all employment benefits such as pensions, provident funds and housing as well as those relating to spouse, children and/or dependants. However only insured employees i.e. those covered under the Employees State Insurance Act or other insurance schemes, are entitled to medical benefits.

Lawyers Collective HIV/AIDS Unit provides free legal and advice to people affected by HIV/AIDS. Contact us at:
email: aidslaw@vsnl.com

63/2 Masjid Road, Jangpura, New Delhi 110014. Tel/Fax: 011-24321101/2 email: aidslaw1@del2.vsnl.net.in

Are You Affected by HIV/AIDS?



Know Your rights

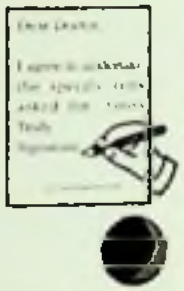
Your Basic Rights

In India, all people are entitled to basic or fundamental rights in the eyes of the law. It does not matter what the religion, race, sex, or place of birth of that person is. Neither do these rights change just because an individual is affected by HIV. It's important to be aware of your basic fundamental rights and to remember that you can do something if they are infringed. Here's a brief idea of three of the most important rights in the HIV scenario.

Right to Informed Consent

Consent is basically agreeing to something. In legal terms, consent is two people agreeing on the **same thing** in the same sense.

- Consent, can be '**express**', which is verbal or written, or '**implied**' through conduct or action, like a nod of the head.
- Consent may be **general**, when it is taken for a lot of things or **specific**, when it is taken for a specific purpose.



- **Consent has to be free. It is not free** when it is obtained by coercion, mistake, misrepresentation, fraud or undue influence.
- Consent also needs to be **informed**. This is particularly important in a doctor-patient relationship. The doctor knows more and is trusted by the patient. Before any medical procedure, a doctor is supposed to inform the patient of the risks involved and the alternatives available so the person can make an informed decision to undertake the procedure or not.
- The implications of HIV are very different from most

other illnesses. That's why testing for HIV requires **specific** and **informed** consent from the person being tested. Consent to another diagnostic test cannot be taken as implied consent for an HIV test. If informed consent is not taken, your rights may have been violated and you can seek a remedy in court.

Remember to always ask your doctor what tests and medicines you are being asked to take and why. It will help you understand your health problems better. Most doctors will take the time to help you out. After all, that's what they are there for!

Right to Confidentiality

Confidentiality may simply be described as keeping specific information to yourself, just like a secret.

- Confidentiality arises when in a confidential relationship based on trust, information having the quality of confidentiality is imparted from one person to the other. In such a relationship if confidential information is imparted, then it must be kept confidential.
- When you tell someone in whom you place trust something in confidence and s/he tells another person about it, that amounts to breach of confidentiality.
- A doctor's primary duty is towards the patient and to maintain the confidentiality of information imparted by the patient. If your confidentiality is either likely to or has been breached you have the right to go to court and sue for damages.
- People living with HIV/AIDS (PWAs) are often afraid to go to court to vindicate their rights for fear of their HIV status becoming public knowledge. However, they can use the tool of '**Suppression of Identity**' whereby a person can litigate under a pseudonym (not your real name). This beneficent strategy ensures that PWAs can seek justice without fear of social ostracism or discrimination.

Right Against Discrimination

The right to equal treatment is a fundamental right. However it is available only against state-controlled entities, not against private parties. The law provides that a person may not be discriminated against on any grounds of sex, religion, caste, creed, descent or place of birth etc. either socially or professionally by a government-run or controlled institution.

The right to public health is also a fundamental right, something which the state is supposed to provide to all persons. HIV positive persons seeking medical treatment or admission to a hospital cannot be rejected. If they are denied treatment, they have a remedy in law.

Similarly, a person with HIV may not be discriminated against due to his positive status in an employment scenario. A person can be terminated from employment on the grounds of continued ill-health. For someone who is HIV-positive but otherwise fit to continue the job without posing a substantial risk to others cannot be terminated from employment. Termination in such a situation would give that person an opportunity to seek legal redress.

So whether it's something as simple as using a public well or something more serious like denial of housing, remember you have the right to be treated equally. And you have the support of the legal system to ensure it.

Lawyers Collective HIV/AIDS Unit provides free legal aid and advice to people affected by HIV/AIDS. For more information, contact:

e-mail: aidslaw@vsnl.com

63/2 Masjid Road, Jangpura, New Delhi - 110 014.
Tel/Fax : 011 2432 1101/2

D15-2T

Lawyers Collective HIV / AIDS Unit

Adv/Letter/128/p/05

25 July 2005

Dear Colleagues,

Enclosed is the Lawyers Collective HIV/AIDS Unit Comment on the proposed HIV/AIDS Bill. We have submitted this note to the Law Minister of Karnataka today. Please do not hesitate to call us if you want clarifications on any aspects of the Karnataka proposed bill.

Warm regards,

Priti Radhakrishnan
Senior Project Officer
Lawyers Collective HIV/AIDS Unit - Bangalore

Encl:(1) Lawyers Collective HIV/AIDS Unit Comment on the proposed HIV/AIDS Bill
(2) Letter to the Chief Minister of Karnataka.

422
27/7/05

File - CHC Lib - H.U/AIDS file
3/8/05

SJC 5/8/05

HRH - pl. inform Premadas/SJC/NST abt. This paper - for reference & lib.

PMU : 7/10, Bolawalla Building, 2nd Floor, Horniman Circle, Mumbai 400 023. INDIA Tel.: 91-22-2267 6213, 2267 6219 Fax : 91-22-2270 2563
email : aidslaw@vsnl.com / aidslaw@lawyerscollective.org

P.O. : First Floor, No. 4A, M.A.H. Road, Off Park Road, Tasker Town, Shivajinagar, Bangalore 560 051. INDIA Tel.: 91-80-5123 9130/1 Fax : 91-80-5123 9289
email : aidslaw2@lawyerscollective.org

P.O. : 1st Floor, 63/2 Masjid Road, Jangpura, New Delhi 110 014. INDIA Tel : 91-11 2432 1101 / 2432 1102, 2432 2237 Fax : 91-11-2432 2236
email : aidslaw1@ndb.vsnl.net.in / aidslaw1@lawyerscollective.org

Regd. Office : 4th Floor Jalaram Jyot, 63 Janmabhoomi Marg, Fort, Mumbai 400 001. INDIA Tel : 91-22-2283 0957, 2285 2543 Fax : 91-22-2282 3570
www.lawyerscollective.org

A Comment on the Proposed Karnataka HIV/AIDS Bill

Lawyers Collective HIV/AIDS Unit

The *Human Immuno Deficiency Virus Affected And Acquired Immuno Deficiency Syndrome Persons (Protection of Rights And Prevention Of Infection) Bill, 2005* is the initiative by the Karnataka state government. The Karnataka state government has recognized the needs of Persons Living With HIV/AIDS and is making a commendable attempt in trying to legislate to protect rights and prevent the spread of HIV/AIDS.

It should be noted that if the State Assembly passes this bill in its present form, it may result in harmful consequences. This bill, though a praiseworthy attempt, is ridden with ambiguities. There is also an absence of key provisions that are essential to a comprehensive statutory response to HIV/AIDS.

In this document, we set out in **Part I** a **"Broad Analysis"**, offering overarching comments with respect to areas of concern in the legislation. In **Part II,** we undertake a **"Specific Analysis"**, offering comments on selected chapters/provisions.

PART I: BROAD ANALYSIS:

Pending Bill in the Centre: There is a national HIV/AIDS legislation on the anvil that is expected to be tabled with the Parliament this year. This national legislation contains a comprehensive set of provisions of law. In the eventuality of such a bill becoming a statute or an enactment, in case of repugnancy the Central Legislation will prevail over the state statute or legislation as provided under the Constitution. *It is advisable that the state government consults the central government before proceeding forward with this piece of legislation.*

Overlapping sections: There are sections in this bill which overlap with provisions in existing legislations. In cases where provisions of this bill conflict with any provision in central legislations, the central legislations will prevail over the state legislation. For the bill to override the already existing provisions, there should exist a non-obstante clause, which is absent in the present bill. (e.g. "Notwithstanding anything contained in any law for the time being in force"....).

Inconsistency in the Statement of Objects and Reasons: The objects and reasons of any bill form the core statement of the topic that is being legislated, as the purpose and the rationale behind the bill is explained. There should exist no contradictions in the body of the bill when it is read with the statement of objects and reasons. In the present bill contradictions do exist. The substantive clauses have not covered all the areas articulated in the statement of objects and reasons, such as information and education to heighten awareness.

Ambiguities and absences in the definitions: The definitions are not precise and are incomplete. Definitions form the crux of any legislation: in the event of the Hon'ble Courts interpreting the meaning of a term, the judicial determination will depend heavily on the definitions. In case the definitions are ambiguous, the Hon'ble Courts will depend on other statutes; this may be inappropriate for an HIV/AIDS response as each statute is legislated for a different purpose and will ascribe meanings to words that may not conform to the HIV/AIDS context.

Furthermore, in the proposed bill, there is an absence of critical terms such as "person", "consent", "confidentiality", "discrimination", etc.

Absence of special provisions protecting rights of women and children: The disease burden of HIV/AIDS in India falls disproportionately on women and children. In this bill, specific sections do not exist to address this reality. (e.g. matrimonial rights, domestic violence, custody, sexual assault, breach of confidentiality, the concept of discrimination within family and children, age of consent, or the issue of informed consent).

Key issues are absent: The bill fails to adequately address concepts such as discrimination, confidentiality and consent, which form the core areas requiring

legislation for HIV/AIDS. Furthermore, the bill does not address many other areas, which are central to an HIV/AIDS legislation, such as risk reduction for vulnerable communities, Information/Education/Communication (IEC), implementation mechanisms, a safe working environment, and access to antiretroviral and related treatment to prolong healthy lives of HIV-positive persons.

Lack of evidentiary or scientific basis. Any statutory response to HIV/AIDS should base itself on strategies that have worked in India and abroad. In this respect, there is a crucial lacuna in the bill, as it is based on hypothetical assumptions and not on evidence and science.

Uncertainty in the bill's legislative scope/reach: The legislative scope of the bill is unclear: will it be applicable to the private sector, public sector or both? In some of the provisions, the bill suggests that the private sector would fall within the parameters of the bill, and in some other provisions it suggests that it would not.

Additionally, the sections cover only the rights of Persons Living With HIV/AIDS, but do not set out rights for persons who are affected by HIV/AIDS [e.g. orphans, family members, etc] or those perceived to be HIV- positive [e.g. those perceived to be "at-risk"].

Confusion on the identity of the State Authority: The bill provides for a Board or an Authority that is to be formed, but it remains unclear if the bill is replacing the present Karnataka State Aids Prevention Society ("KSAPS"), or if the bill envisages the creation of a new body. If the structure is the same as KSAPS and is merely statutorising the body, it is dramatically decreasing the functions of the body. This will have a severe impact on health outcomes as programmes focused on targeted interventions, IEC, blood, and others will cease to exist. Moreover, there will have to be a structure to take over the present KSAPS, which is quite a cumbersome structure in any bill: indeed, in the national legislation, the structure takes 20 pages. On the other hand, if the bill is creating a new body, it is unclear why it would do so and it is duplicating work.

In either case, the bill implies a change in the structure and functioning of the present KSAPS. This will change only in Karnataka as no other state has a bill with similar provisions to date. Furthermore, in case the Board under the bill does become a statutory body, it will have different powers and responsibilities and may not be able to work under the National AIDS Control Organisation. This may have negative consequences for HIV/AIDS programming and health outcomes in Karnataka: a national, coordinated response is integral to tackling the spread of the epidemic.

Lack of provision on expedited procedures for relief: The bill does not create any provision to expedite the procedures to obtain judicial reliefs. In our experience litigating on behalf of HIV-positive persons in Karnataka, justice may be delayed for years. A provision that mandates faster procedures is essential.

Dearth of adequate remedies: The bill does not provide for remedies in a systematic or definite manner. The remedies provided in the bill are inadequate and insufficient.

Incorrect usage of terms: The provision uses the word "rehabilitation" in the context of HIV-positive persons. This raises a concern as to how HIV/AIDS is viewed in our society: Persons Living With HIV/AIDS do not require "rehabilitation". Rather, some may require life-saving treatment, and perhaps the word "treatment" is more appropriate here rather than "rehabilitation".

Certain sections contain the term "HIV/AIDS patient", which we believe to be paternalistic and inaccurate. As HIV is a condition/infection, a person can be HIV positive and stay asymptomatic for years. They may not be patients at all, but healthy individuals capable of leading productive lives for many years.

Arbitrary powers given to the officials: The "good faith" clause provides immunity to the board members without making them responsible for any acts which they may have done that violated rights. Due to the fact that a comprehensive set of rights is not set out, if an official acts to prevent HIV/AIDS in a manner that violates rights, but does so in good faith, the victim may not have legal recourse. To illustrate, if there is no right provided against discrimination or isolation, and if HIV-positive persons are isolated in good faith to prevent the spread of the infection, they would not be able to redress the wrong. This clause gives sweeping powers for the directors and other board members and places too high a burden on the Person Living with HIV/AIDS.

Problematic Nature of Board/Authority: The proposed structure raises several concerns pertaining to the composition of the Board and appointing of the members. The Board lacks representation of Persons Living with HIV/AIDS. The proposed bill does not indicate how the Board members and other officials will be sensitised to issues of HIV/AIDS, or mention the duration of tenure for ex-officio members. There is a lack of recognition of vulnerable populations in the programme as they are among those affected, and their rights need to be protected in order for prevention of the infection to be possible.

PART II SPECIFIC ANALYSIS

Chapter II: Rights Of the HIV/AIDS Infected

Every person and citizen is entitled to some fundamental rights that are provided in the Indian Constitution. One of the greatest lessons that the HIV pandemic has taught public health experts is that the spread of the HIV infection can be prevented, from HIV-positive persons to others, if the rights of people infected or affected with HIV/AIDS are protected. By creating an enabling environment, Persons Living With HIV/AIDS will access health services, allowing interventions to prevent the epidemic from spreading.

This lesson has been shown in our country in Sonagachi, Kolkata. Using the rights-based approach for sex workers, condom usage was scaled-up from 2.7% in 1992 to 90.5% in 1998. As a result, the number of persons testing VDRL dropped in the same period from 25.4% to 11.5%. In the same period the number of new persons testing for HIV from 442 to 506 and the number of persons who tested HIV negative rose from 0.15-2.11% CI to 3.54-7.52% CI. Thus when people know that they are entitled to certain rights which protect their status, they will be encouraged to exercise such rights, e.g. get themselves tested, disclose their HIV status voluntarily and engage in safer behaviour. This lesson has to be incorporated in any law on HIV that is enacted.

In the context of the present bill, it is an important step that the Karnataka government seeks to vest rights in Persons Living With HIV/AIDS. It is important to note, however, that the bill also takes away rights of confidentiality, informed consent and freedom to procreate. Such provisions will only discourage people from accessing health services and preventing the spread of transmission. Therefore, it is the paramount duty of the state government to legislate a bill keeping the rights-based approach in mind.

Furthermore, the bill reemphasizes the following existing rights under the Indian Constitution:

Provisions in Karnataka Proposed Bill	Provisions in Constitution of India
Section 3(a)(b)	Article-15 (2)(a)(b)
Section-3(c)	Article-19(1)(g)
Section-4	Article-14 and Article-16
Section-6 and Section-7	Article 21

The bill is therefore duplicating existing constitutional rights and is not expanding the area of its applicability. The rights guaranteed under the Indian Constitution are applicable only to the public sector, and are enforceable only against such authorities that are public sector enterprises or are working under them. The bill does not explicitly set out whether these existing rights are applicable to the private sector or private individuals.

3. Rights against enforcement of social disabilities: *No person shall on the ground of HIV/AIDS infection enforce against any person any disability with regard to:*

a. *access to any shop, public restaurant, hotel or place of public entertainment; or*

b. *the use of any utensils, and other articles kept in any public restaurant, hotel, or public place for the use of the general public.*

c. *the practice of any profession or the carrying on of any occupation, trade or business.*

d. *the use of or access to any river, stream, spring well, tank cistern water tap or other watering space, or any bathing ghat, burial, or cremation ground, any sanitary convenience, or any other place of public resort which other members of the public have a right to use or have access to; or*

e. *the use of or access to any public conveyance.*

Comment: Section 3 seeks to remove any kind of discrimination against HIV-positive persons. However, it uses the phrase "social disability", which is not an accurate term to use, unless it is defined. Since there is no definition for "disability" in Chapter I, it will be difficult to enforce the rights provided in this section.

This section reemphasizes the right already guaranteed under the Indian Constitution but it is not clear whether such right is vested in a person and can be enforced against a private person or private body, as the reading of the section implies that only public places are covered.

4. Right to equality in matters relating to employment: *No person shall be subjected to a discriminatory treatment on the ground that he is HIV-positive, nor shall he/she be removed from service.*

Comment: The subheading refers to equality, whereas the substantive section is about non-discrimination. There is a significant legal distinction between the two which is not addressed.

The section provides for the right against discrimination in the context of employment. However discrimination is not defined. This is a serious flaw in the bill. Also, there is a wealth of judgments on this point, which need to be incorporated.

The section provides that any person because of his HIV status should not be removed from service and should not be subjected to discriminatory treatment. In order that an HIV positive person should be able to exercise rights guaranteed under this section, specific acts must be included, e.g. demotion, ill treatment, non-payment of bonus separation, unnecessary transfers, etc. This should be done within the definition of discrimination.

***5. Right against pre-employment HIV test**: All pre-employment HIV tests are banned. No employer shall prescribe a pre-employment HIV test.*

Comment: This section is in accord with the National Testing Policy. The overall coverage of the section would include the private sector. There is no basis for testing for HIV in the pre-employment setting.

***6. Right to treatment:** Every HIV/AIDS patient shall have a right to medical treatment in all the Government Hospital/Primary Health Centres*

Comment: This section provides for all HIV-positive people to be treated in all government hospitals and primary health centres. Other institutions run by the government are absent, e.g. community health centres, government specialty hospitals, etc. Therefore, the section limits the availability of medical treatment. Moreover, treatment is not defined. The aspect of finance is not looked at, as unless the central government agrees to this provision it will not be realised, since all HIV work is funded by the central government.

***8. Right to marry:** Every HIV/AIDS patient shall have a right to marry a person who has freely and voluntarily consented to that marriage being conscious of the fact that the person is HIV positive. However, this right shall be subject to the provisions of Chapter-IV.*

Comment: The section is a step in the right direction in that it actualises the right of HIV-positive persons to marry. However, it requires any HIV-positive person who seeks to get married to disclose his/her status to the prospective spouse and only if the prospective spouse accepts such a condition, can the marriage take place. The problem is that this right is subject to the rights in Chapter IV. Read together with that, the section implies disclosure of one's status but does not provide any safeguards for the same, such as maintaining confidentiality to make sure that the other person does not disclose one's status to the world without his consent. The section also does not envisage a situation where an HIV-positive person might not know his HIV status.

In a country like India where marriages are usually arranged, this is not a feasible provision to implement, especially for women. This is particularly so in Karnataka where 46% of marriages are child marriages. Women, who usually do not have a choice to choose their life partner, may not be in a position to ask for an HIV test from their prospective spouses. Therefore, unless other provisions are put in place to empower women and girl children, this section may be used against women by stigmatising and blaming them.

***9. Punishment for violation of rights:** Any person violating the above rights shall be punished with an imprisonment for a term which may extend to one year and also with a fine of up to twenty five thousand rupees.*

Comment: This section is a penalty clause for violation of the rights provided for under Chapter-II. The Section does not expressly mention what rights are referred to. Assuming all the rights in this chapter are covered, it is not clear which court will try the offence and whether it is cognisable and/or bailable or not.

***10. Right to information**: Every Medical practitioner who knows that he has HIV/AIDS infection shall before performing any en vivo medical procedure on a person shall inform him of the said infection.*

Comment: This is a specific section applicable only to medical practitioners. It is now universally accepted that an ordinary doctor performing day to day to medical procedures does not pose a significant risk to the patient. Even in the realm of surgeries, only major invasive surgeries are considered to pose a significant risk. The risk reduces further with the use of universal precautions. In any event, it is the duty of the employer to ensure that the surgeon is free from HIV. This would require reporting the HIV status to the employer, not to every patient.

Chapter-III: Prohibition of Certain Acts

This chapter prohibits acts that hinder the rights of HIV positive and negative persons. The sections in this chapter are not in a purposeful sequence or grouping.

11. Intentional Transmission of HIV:
(a) No person who knows or in all reasonable probability would have known that he has HIV infection shall intentionally or knowingly engage in any practice or behaviour or do or abstain from doing any act, which places or has a tendency to place any other person at risk to HIV infection.

Comment: Section 11(a) includes provisions that are similar to those already existing in the Indian Penal Code, sections 269 and 270. Section 269 and 270 make acts that may transmit disease dangerous to life punishable. These provisions, which cover HIV transmission, are sufficient in scope. *Therefore, a new criminal provision is not necessary.*

The primary reason for rejecting such a provision is on grounds of public health; enacting such a provision:

- Serves as a disincentive to testing because of the criminal liability and because safeguards for confidentiality will not exist;
- Obstructs access to counselling and related services;
- Enhances HIV/AIDS related stigma, discrimination and isolation;
- Spreads incorrect information about HIV/AIDS;
- Punishes persons who, given the lack of education and counselling that exists in society today, know their HIV status but are not aware of its implications, e.g. transmission.

Such consequences will serve to drive HIV-positive persons underground, and away from crucial health information and services, which will inevitably promote the spread of the epidemic. Furthermore, HIV specific criminal legislation contradicts the more effective message that it is the behaviour of each individual, whether infected or not, which determines the course of the epidemic and whether individuals contract HIV.

In other parts of the world, similar attempts to introduce HIV-specific criminal laws were rejected. In South Africa, such a provision was considered largely because women and girls were being infected. The South African Law Commission rejected the provisions in part because (1) a change in the law would be based on "urban legends" and not scientific/empirical evidence that HIV-positive persons were wilfully/negligently placing people at risk, (2) problems would ensue e.g. burden of proof and constitutional issues, (3) limited prosecutions under existing provisions indicate that few will utilize an HIV-specific statutory offence. Similarly, Canada, the United States and Namibia abandoned similar statutory provisions.

(b) Whoever contravenes sub section (a) shall, regardless of whether such practice or behaviour or act has actually transmitted the infection to such other person or not, shall be punished with imprisonment for a term of not less than five years and which may extend to ten years and with fine, which shall not be less than two lakh rupees and which may extend to twenty five lakh rupees.

Comment: This section punishes a person regardless of whether the infection was actually transmitted or not. Indian Penal Code section 269 and 270 provides punishment for similar acts. There is no need to have a special section for HIV as Penal Code sections 269/270 deal with the situation adequately. It is important to note that such a huge fine will only work against the poor, particularly against the sex workers.

(c) Any court sentencing a person to fine under sub section (b) may award such fine or any part thereof as compensation to the person placed at risk of HIV infection.
(d) The compensation awarded under sub section (c) shall be in addition to and not in derogation of any compensation to which such person is entitled, if any, under any other law for the time being in force.

Comment: This section provides for compensation to the victim, and the accused is required to pay a fine in addition to the imprisonment. The victim is further entitled to claim damages under any other statute, which simply means that the accused will have to not only pay compensation under this bill, but also damages.

12. Prohibition of misleading advertisements: *All misleading advertisements about cure to HIV/AIDS in print, electronic and other media are prohibited. All persons responsible for issuing and publishing such advertisements shall be punished with an imprisonment for a term which may extend to one year and with a fine which may extend to tweniy five thousand rupees.*

Comment: This section punishes any person providing misleading information about a cure for HIV/AIDS. The term "misleading" itself is a subjective term. As one person might find an advertisement misleading and another might not, "misleading" therefore needs to be defined clearly. The bill replicates an existing provision under the Drugs and Cosmetics Act. The difference is that the section under this bill provides a penalty for violation of this provision. It is not clear whether the offence is cognisable and bailable and which court will entertain the case. This provision will not work if there is no authority to take proactive action against persons who issue the advertisements. Moreover, it is not only advertisements which need to be tackled. There are many who claim, through word of mouth and/or practice, that there is a cure for HIV/AIDS.

13. Prohibition of mass tubectomy, etc.: *Mass tubectomy, circumcision, and any other such mass camps without involving qualified medical practitioners shall be prohibited. Any person organising such camps in contravention of this provision shall be punished with an imprisonment which may extend to six months and with a fine which may extend to ten thousand rupees*

Comment: This section prohibits mass tubectomy and circumcision where qualified medical practitioners are not present. By implication, this provision allows for situations wherein qualified medical practitioners are present. There is no rationale for this section, as no data supports the contention that these camps promote the spread of the infection.

14. Prohibition of disclosure of HIV test results: *Subject to the provisions of this Act, the fact that a person has tested positive to HIV test shall remain confidential.*

Comment: This section prohibits disclosure of one's HIV status without providing any exceptions and situations. There is no indication as to when disclosure is permissible, e.g. cases of sexual assault, cases where there is an identifiable partner who is at significant risk, by an order of the court, etc.

Chapter –IV: Regulation of Matrimonial Relations and Procreation

The title of Chapter IV reflects an intent to permit the state to interfere with the individual's private rights, e.g. the right to know one's HIV status, the right to privacy and the right to procreate. On the other hand, the State does have the authority to legislate on the lives of individuals, provided such authority is not violating basic fundamental rights. In this chapter, fundamental rights are violated.

This chapter also impedes effective HIV strategies by using marriage as the normative construct, thereby excluding other relationships. Given that HIV infection is spreading in Karnataka through sexual and needle-sharing relationships outside of marital relationships, this chapter does not reflect the realities existing in the State.

This chapter is also flawed as implementation of the provisions appears impossible.

15. Pre Marital HIV Test: If one of the contracting parties to the marriage insists on the test to check the HIV status of the other person, the other person shall undergo such test to the satisfaction of the person concerned.

Comment: This provision does not create an enforceable right beyond what ordinary persons are free to do in the absence of a statute: request an HIV test from a prospective spouse before marriage.

If the intent of the provision is to give prospective spouses the right to know their partner's HIV status before marriage, it may not achieve its objective. At the time of the test, there is a possibility that a person may test negative, even if they are infected with HIV. This time period is known as the "window period". The common way in which the test for HIV is conducted is an antibody test. Even if the person is infected with HIV, the antibody test result will still show a negative result if the antibodies are not developed. Hence, a single antibody test for HIV does not serve the purpose of identifying people with the virus, and preventing he /she from getting infected.

If the intent of the provision is to protect women who are likely to be infected by their husbands, the question is raised: will the prospective spouse ask the question if there is a law? Will the law really empower women? This is doubtful given the cultural traditions that exist in India where the girl child is not empowered. The real challenge is to empower the girl child and educate her about sex. This will empower women not only before marriage but also during marriage, which will help her in case her husband contracts the infection after marriage which is very often the case. Absent such empowerment, the law can only be a paper tiger.

This provision also has a number of weaknesses: it will encourage unscrupulous doctors to give false negative certificates, there will be deleterious consequences for persons who obtain "false positive" results (which is very high in India), and it does not prevent the spread of the infection to sexual partners outside of marriage or needle-sharing partners.

Even if this provision becomes law, it does not address the crucial issue of what will happen to the persons if they are found HIV-positive. Once the community knows a person's HIV status, the stigma and discrimination the person will face are not addressed and adequate safeguards are not provided. Safeguards to protect confidentiality must be included.

The provision also raises two other concerns: (1) the phrase "to the satisfaction of the person concerned" is not set out clearly, and does not explain what would meet the standard of satisfaction, which is a subjective criteria; (2) the phrase "contracting parties" raises an issue as to whether Hindu couples would fall within the provision, as the Hindu Marriage Act does not recognise marriage as a contract.

Lastly, it is important to note that this provision is alarmingly close to a provision mandating pre-marital HIV testing. Pre-marital mandatory testing has been considered

In case this section is implemented, people may not want to get themselves tested as test results may be disclosed to their spouses and sexual partners. Out of fear that individuals will be known as HIV-positive, they may stop accessing medical services. In turn, they will not get essential information about safe sexual and needle-sharing practices, and the disease may spread further. By protecting the rights of one person we can protect the rights of the whole society.

17. If the husband is HIV positive and wife is HIV negative, they shall not procreate children through wedlock.

Comment: This section may violate Article 21 of the Indian Constitution, which sets out a right to privacy. The right of procreation has been read into this right. This provision allows the state to intervene in the choice of two individuals without offering a rationale for the same. Courts have found that HIV-positive people may get married. If there is consent between two persons, the State cannot intervene. Similarly, it may be argued that the State may not intervene in a decision to procreate arrived at between two consenting adults. It may also be argued that a woman has the right to procreate and have complete autonomy over her own body, among other rights.

The section is probably based on a misconception that married couples only engage in sex for procreation. This is obviously not true as people engage in sex for pleasure. Furthermore, it should be noted that implementation of this section will be nearly impossible.

Lastly, the intent behind the section is unclear. No explanation has been offered as to why HIV-positive husbands and HIV-negative wives may not procreate through wedlock, whereas HIV-negative husbands and HIV-positive wives may procreate through wedlock. In this respect the section would be unconstitutional and is liable to be struck down.

18. All pregnant women shall be tested for HIV during the 3rd month, 6th month and before delivery. Those found positive shall be compulsorily counselled and treated to prevent transmission of HIV infection to the child.

Comment: This provision adopts mandatory testing as a public health strategy. The provision dispenses with the need for pre-test counselling and written, informed consent, both of which are acknowledged by leading public health authorities as essential for prevention of HIV transmission. It has not been proven that mandatory HIV testing of pregnant women is the most effective approach for reducing prenatal transmission. Leading public health authorities recommend voluntary counseling and testing as the optimal strategy for prevention of HIV transmission.

The data in India and Karnataka, demonstrating that mandatory testing is unnecessary, is ignored in this provision. India has rightly followed the protocol of voluntary counseling and testing in the antenatal clinic setting. There exists criticism that it is not "really" a voluntary counseling and testing situation, as the counseling is lacking. However, even if there is only information given to the mother about the benefits of testing, then the results

are evident: at the national level, of the women who were counseled in the ANC setting or given basic information, 97% opted for testing. Thus, there is no need to make testing or treatment mandatory.

The consequences of mandatory testing are well-documented; persons often avoid accessing medical services and information, fueling the spread of the epidemic. These consequences are equally applicable in the context of pregnant women. This provision presumably restricts the woman's rights in the best interest of the unborn child, seeking to prevent children from being born HIV-positive. Experiences in Karnataka indicate that when women are offered HIV information in a pre-natal setting, by and large they seek testing and treatment to prevent transmission to their unborn child. Experiences also demonstrate that pregnant women who are HIV-positive often shun medical help because they fear they might be stigmatized or discriminated against. By offering these women crucial health information and a choice to get tested, the chances may be increased that women will obtain counselling, testing and treatment.

Mandatory testing in any situation creates fear and fuels stigma and discrimination against people infected or affected by HIV/AIDS. Women already suffer from discrimination as a result of social, political, cultural and legal factors in our society. Subjecting pregnant women to compulsory HIV testing not only violates women's rights but also places them at heightened risk for being blamed for infecting the spouse, domestic violence, being thrown out of their homes, losing custody of the children, etc. This is particularly true under a provision such as Section 18, which does not provide for confidentiality, and when read with Section 16, mandates disclosure to the spouse or sexual partners.

Furthermore, it may be argued that mandatory HIV testing and treatment violates rights to bodily integrity and privacy.

Factually a large number of pregnant woman do not access health services until the last day of pregnancy. Therefore the access of public health services for women has to improve tremendously. This requires empowering the girl child so that when she is pregnant she knows she has to access health services for a safe delivery.

It should also be noted that implementation of this provision will require a tremendous investment of financial and human resources. Most importantly, no provision has been made for the continued treatment of the woman after transmission to the child has been prevented.

Furthermore, the treatment referred to in the provision, to prevent transmission to the child, is problematic under the current scenario in India. Emerging problems include drug resistance, unavailability of alternatives, and contraindicated medications (for opportunistic infections) being offered in the absence of alternatives.

Adv/Letter/121/p/05

12 June 2005

Hon'ble Chief Minister
Shri Dharam Singh
Room 323, Vidhana Soudha
Bangalore-560001
Karnataka

Dear Sir,

This is in respect to the proposed bill to protect the rights and prevent the infection of persons with HIV/AIDS, currently being considered by the Karnataka State government.

We appreciate the efforts of the concerned persons to enact a statute that will attempt to protect the rights of persons living with HIV/AIDS and prevent the spread of the infection. The protection of rights has been recognised by various countries including India as the optimal strategy for preventing the spread of the infection. Such a public health strategy is referred to as the "AIDS Paradox": by protecting the rights of those infected or at-risk, these persons will not be fearful to access life-saving health information and services, including prevention information. Thus, by protecting the rights of individuals, transmission of the infection is prevented and the community as a whole is protected. It is a praiseworthy step that Karnataka is contemplating a law on HIV/AIDS that recognises public health strategies based on such realities.

However, we would like to bring to your attention a few key concerns regarding the proposed bill:

1. Foremost among these is the fact that the Central government, through the Advisory Working Group ("AWG"), commissioned the drafting of a **national legislation on HIV/AIDS**. The legislation is being presented this week to Dr. Anbumani Ramadoss, the Health Minister, Ministry of Health, Government of India, and is to be tabled in Parliament this year. We would like to bring to your attention that in the event that there are provisions that are absent or contradictory in the state law, the national law would, under the Constitution, ***override the state law*** in the same field.

2. Recognising the pressing need for an HIV/AIDS law in Karnataka, and further taking into consideration the unique cultural, economic, social, and other factors

PMU : 7/10, Botawalla Building, 2nd Floor, Horniman Circle, Mumbai 400 023, INDIA. Tel : 91-22-2267 6213, 2267 6219 Fax : 91-22-2270 2563
email : aidslaw@vsnl.com / aidslaw@lawyerscollective.org

P.O. : First Floor, No. 4A, M A H. Road, Off Park Road, Tasker Town, Shivajinagar, Bangalore 560 051. INDIA Tel : 91-80-5123 9130/1 Fax : 91-80-5123 9289
email : aidslaw2@lawyerscollective.org

P.O. : 1st Floor, 63/2 Masjid Road, Jangpura, New Delhi 110 014. INDIA Tel : 91-11 2432 1101 / 2432 1102, 2432 2237 Fax : 91-11-2432 2236
email : aidslaw1@ndb.vsnl.net.in / aidslaw1@lawyerscollective.org

Regd. Office : 4th Floor, Jalaram Jyot, 63 Janmabhoomi Marg, Fort, Mumbai 400 001. INDIA Tel : 91-22-2283 0957, 2285 2543 Fax : 91-22-2282 3570
www.lawyerscollective.org

present in Karnataka, we acknowledge that Karnataka may require a contextually appropriate legal response. However, it is imperative to emphasise the following point: the nature of the epidemic in India is cross-border and not state-specific. Karnataka, with its central location and high rates of **inter and intra state mobility**, demands a legislative response that necessarily takes these realities into account. An isolated state response that is not coordinated with other states, particularly those bordering it, will be ineffective. Therefore, we believe that only a national response is appropriate for the needs of Karnataka, and any state response must be fashioned in the context of the national response.

3. Furthermore, we are deeply concerned that the Karnataka proposed bill, unlike the national draft law, was not created in a ***consultative*** and participatory manner, obtaining inputs from those infected, affected and working for HIV/AIDS. We believe that a democratic, participatory process, ensuring that people's voices are heard, is integral not only to drafting any HIV/AIDS law but also to ensure its successful implementation.

   We sincerely believe that in order to create an appropriate legal response that best fits the Indian legal and social context vis-a-vis HIV/AIDS, extensive research must be undertaken of global approaches attempted and lessons learned, rigorous scrutiny must be performed of these laws and policies and programmes, and a detailed examination must occur of the application to the Indian legal and social context. For the national draft law, research was first undertaken of laws in other parts of the world that culminated in a background book, "***Legislating an Epidemic: HIV/AIDS in India***". We enclose a copy of the book herewith for your examination.

   This was followed by extensive consultations around the country. Consultations were held with various stakeholders, including: Persons Living With HIV/AIDS, marginalized populations (e.g. sex workers, men who have sex with men, injecting drug users), health care workers, employers/employees, NGOs working with HIV/AIDS, women and children. Each consultation lasted two full days, and was conducted with thorough involvement from various State AIDS Control Societies ("SACS"). This process enabled an understanding of realities occurring at the local level, incorporating a broad cross-section of perspectives and experiences into the draft law.

   What emerged from these consultations was a reaffirmation of our belief that understanding the experiences and needs of affected persons necessarily entails taking cognizance of unique regional differences and perspectives, such as HIV prevalence rates, and social, economic, political, infrastructural, educational and cultural factors. A regional consultation was held in *Bangalore*, Karnataka, in March 2004, with stakeholders from across Karnataka providing critical inputs.

   Above all, it was realized that the law on HIV should be evidence and rights-based and not premised on hypothetical notions of what "should be". The national

law does not base itself on any ideological precepts. It strongly bases itself on evidence of successful strategies in India and around the world. It is also rooted on protection and promotion of the rights of those infected and affected. The understanding of the HIV paradox is crucial to understanding the battle against HIV.

We continue to believe that any statutory approach to the HIV/AIDS epidemic must be informed by these realities, and believe that the national law will therefore most effectively protect persons and communities significantly affected.

4. The national legislation covers a vast array of topics and is ***holistic*** and ***comprehensive***. The proposed Karnataka bill is neither. There are crucial features which are absent or not dealt with adequately in the proposed Karnataka bill that any HIV/AIDS law should provide for, viz. consent, confidentiality and rights against discrimination, special understanding of vulnerable communities and provisions on risk reduction, Information/Education/Communication ("IEC"), implementation mechanisms, a safe working environment, access to anti-retroviral and related treatment to prolong healthy lives of HIV-positive persons, special promotions of rights of women and children.

Given the devastatingly high number of people living with HIV/AIDS who are desperately requiring treatment in Karnataka, it is a glaring gap that there is no sufficient provision for access to medicines and treatment, an essential component of a comprehensive response to the epidemic.

5. We would like to highlight a few of the most troubling sections of the bill, that compromise the rights of women, and of persons living with HIV/AIDS, and which we do not believe will prevent the spread of HIV/AIDS in Karnataka:

- A mention of pre-marital HIV tests that does not provide for enforceable rights, and borders on the dangerous mandate of pre-marital mandatory testing;
- A provision on a mandatory duty to disclose that violates the right to confidentiality and does not provide essential safeguards for Persons Living With HIV/AIDS;
- A provision that proscribes procreation between consenting adults, violating fundamental rights;
- A provision requiring the mandatory testing, counselling and treatment of pregnant women, violating fundamental rights and placing the women of Karnataka at heightened risk of negative health effects, domestic violence, and other deleterious consequences.

These provisions are liable to be challenged and held unconstitutional by courts of law, on account of the violation of fundamental rights. In fact, data from around the country maintained by NACO and SACS demonstrates that of the pregnant women who are reportedly counselled, 97% undergo testing voluntarily.

Therefore, there is no need to test any women mandatorily. This indicates that the law is not based on ground realities or on any evidence, but is premised on hypothetical assumptions that are disastrous in the long run.

6. We would like to note that any statute seeking to prevent the HIV/AIDS infection, and protect rights, must be thoughtfully and precisely drafted. Unfortunately in the proposed bill, terms are not well-defined, sections exist that overlap with existing law, there is no clarity as to which sections are applicable to the public or private sector, proscriptions are recited without judicial avenues named, and remedies or penalties are not clearly set out, to name a few of the problems. Furthermore, the functions of the state board and officials are not explained in relation to the existing national and state bodies and programmes that already exist. Such ambiguity will only result, we believe, in justice denied to those who desperately need it and alienate Persons Living With HIV/AIDS from the rest of society.

We have attached an **in-depth legal analysis** of the proposed bill that highlights its poor draftmanship, which we believe will impede its effective implementation and could potentially worsen the current situation.

7. In conclusion, we request you not to pass this proposed legislation that could have a negative impact on public health and on individuals. We request you to re-examine the law and strategies that can be employed that will empower the citizens of Karnataka, particularly persons living with HIV/AIDS, so that they in turn will effectively prevent the spread of the HIV infection in Karnataka. We respectfully request you to adopt/wait for the national comprehensive HIV/AIDS legislation to be enacted, which we believe is the optimal legal and public health response for Karnataka.

Thank you,

for Anand Grover
Project Director
Lawyers Collective HIV/AIDS Unit – Bangalore

Cc: Dr. Anbumani Ramadoss, Hon'ble Health Minister, Ministry of Health
Dr. Quraishi, Director General, National AIDS Control Organisation
Mr. Patil, Hon'ble Law Minister, Karnataka
Mrs. Mukthamba, Project Director, Karnataka State AIDS Prevention Society

Enclosed:

1. A comment on the proposed Karnataka bill by the Lawyers Collective HIV/AIDS Unit
2. "Legislating an Epidemic: HIV/AIDS in India", a publication of the Lawyers Collective HIV/AIDS Unit

HIV IN THE BLOOD

EDUCATIONAL POSTER

This poster is an educational tool designed to help the overall understanding of how HIV works in the blood.

•

Place it on your wall or door for easy access.

•

For additional free copies, order them online at www.NUMEDX.com

NUMEDX.com

A HEALTHCARE COMMUNICATIONS COMPANY

HIV, HEPATITIS AND HERPES. TEST AND TREAT.

NUMEDX.com Outreach

HIV IN THE BLOOD

When a person contracts HIV there are a series of events that occur in the blood that damages your immune system and your body's ability to fight off infections. HIV enters and destroys infection fighting T-cells which can lead to life-threatening infections. There are medications that work in helping prevent this from happening. There are four classes of anti-HIV medications that work in different ways. Three classes of drugs work inside the cell. The newest class of drug – fusion inhibitors – works outside the T-cell. The goal of therapy is to decrease the amount of virus and increase your T-cells by using a combination of medications.

HEALTHY T-CELL

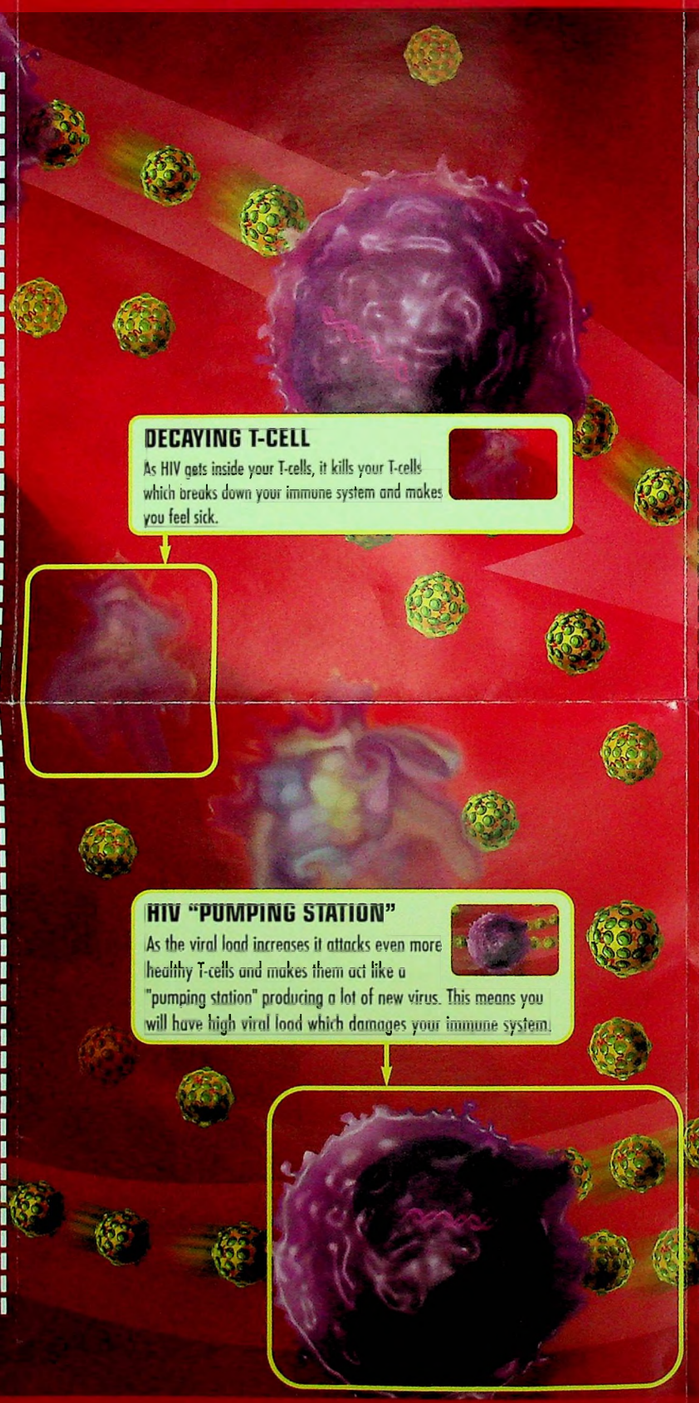
T-cells (or CD4 cells) are part of your body's immune system that helps fight off infections. T-cells act as your immune systems "quaterback" by organizing your body's infection fighting team. If too many T-cells are destroyed then your body's ability to fight off infections is limited.

HIV AND VIRAL LOAD

HIV is a virus that "hijacks" your T-cells. HIV destroys the T-cells and makes more copies of itself by utilizing the cells own internal "machinery" to invade other healthy T-cells. Viral load is the measurement of how much HIV is in your blood. The higher the viral load the more HIV there is to destroy T-cells.

THE INVASION OF HIV

As your viral load increases and gets inside your T-cells, HIV makes more copies of itself and makes you sick .

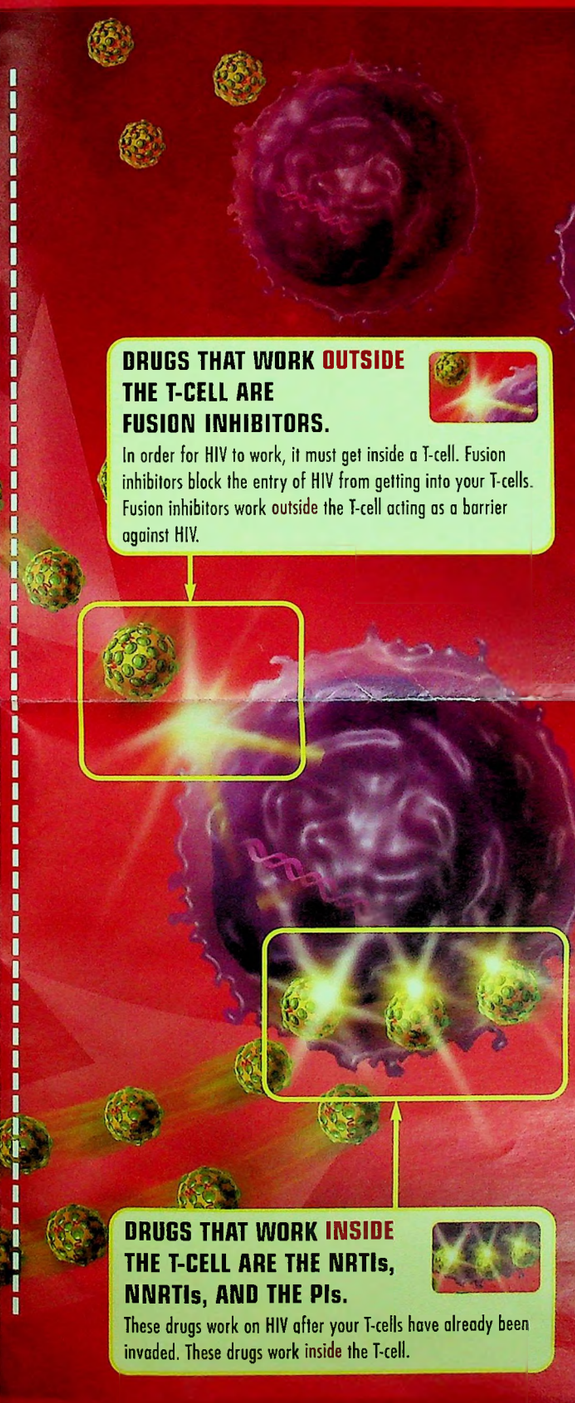


DECAYING T-CELL

As HIV gets inside your T-cells, it kills your T-cells which breaks down your immune system and makes you feel sick.

HIV "PUMPING STATION"

As the viral load increases it attacks even more healthy T-cells and makes them act like a "pumping station" producing a lot of new virus. This means you will have high viral load which damages your immune system.

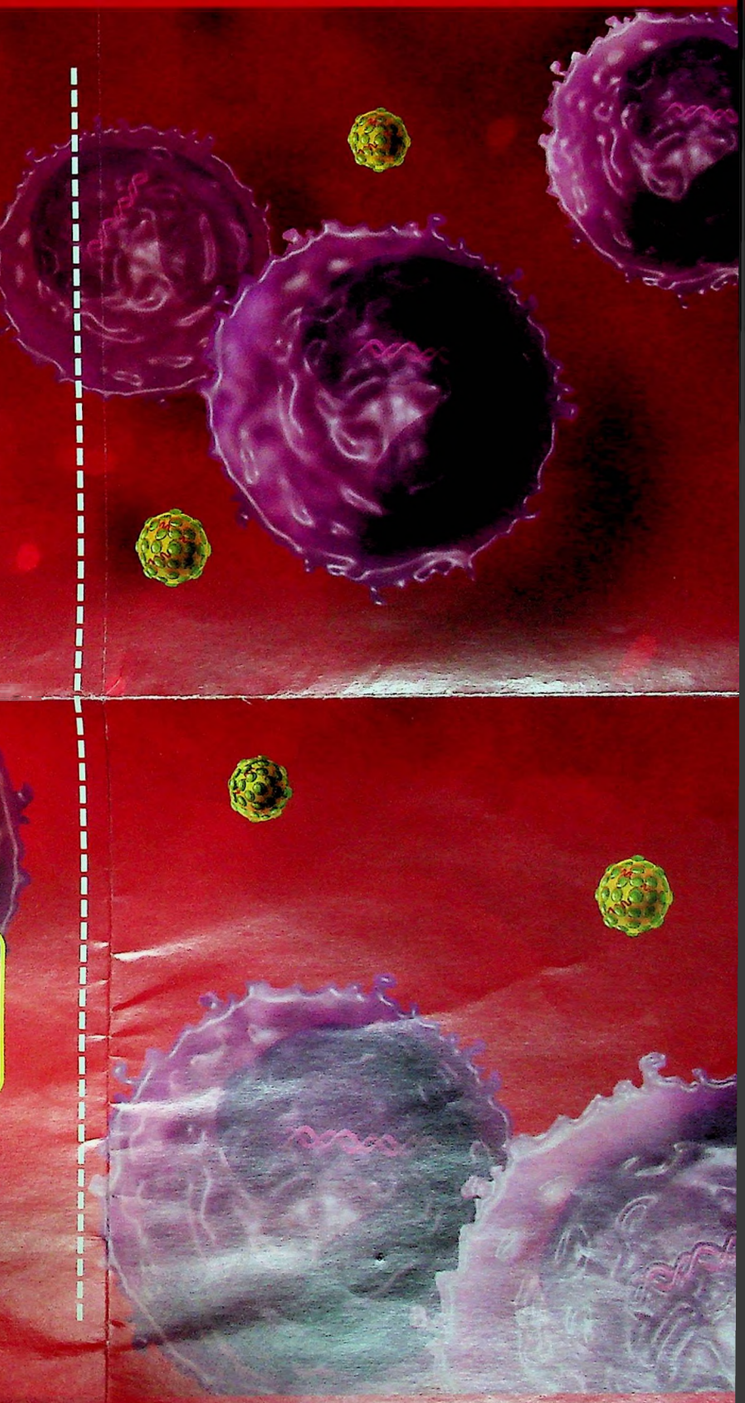


DRUGS THAT WORK OUTSIDE THE T-CELL ARE FUSION INHIBITORS.

In order for HIV to work, it must get inside a T-cell. Fusion inhibitors block the entry of HIV from getting into your T-cells. Fusion inhibitors work outside the T-cell acting as a barrier against HIV.

DRUGS THAT WORK INSIDE THE T-CELL ARE THE NRTIs, NNRTIs, AND THE PIs.

These drugs work on HIV after your T-cells have already been invaded. These drugs work inside the T-cell.



1 **SUMMARY:** HIV invades and kills your healthy T-cells. Once HIV is inside your T-cells it makes more copies of itself. Your immune system then breaks down and you feel sick.

2 **SUMMARY:** After HIV is inside your T-cells, it then aggressively moves on to other healthy T-cells, destroying them as well. This will continue until HIV is stopped.

3 **SUMMARY:** HIV drugs either work outside or inside your T-cells. Only fusion inhibitors work outside your T-cell and block HIV from getting inside. The NRTIs, NNRTIs, and PIs work inside your T-cells. The goal is to lower HIV in your blood to undetectable levels and increase your number of T-cells.

4 **FINAL SUMMARY: STOPPING THE INVASION OF HIV**
A successful plan of attack on HIV is to have less virus (HIV) and more healthy T-cells. Your goal should be to bring your virus (HIV) down to undetectable levels. Having less virus in your blood will strengthen your immune system, and will make you feel better.