



Situation Analysis of Legal and Regulatory Aspects of HIV and AIDS in Seychelles

FINAL REPORT



FOREWORD

Creating enabling environment is a critical element in effective national HIV and AIDS response. The progress that Seychelles has made in improving policy environment indicates the Government's leadership and commitment in the fight against HIV and AIDS ever since the first case of HIV infection was diagnosed in 1987 in Seychelles. In 2012, the Government revised its policy and developed the 2nd National Strategic Plan (NSP) for HIV and STIs for 2012 -2016 to guide the national response. The new policy and NSP highlight the need to further strengthen the legal and policy environment to support effective HIV programming and enhance access to services among people living with HIV and the high risk population groups including young people.

It is a known fact that the HIV epidemiology and social dynamics keep changing. Recent studies carried out in Seychelles indicate that HIV prevalence is mainly concentrated among injecting drug users and men having sex with men. Such findings have profound implications for our response. We now need to reach out to these population groups who traditionally remain stigmatized and hard to reach with facility based health services. The studies also show that while HIV prevalence among the general population is reported as low, the prevalence of risk behaviours still remains high among general population in the country.

In such situations, it is only prudent that we seek to understand not only the immediate causes but also the underlying legal and structural causes of the spread of HIV infections in Seychelles. Situation analysis for legal and regulatory aspects of HIV and AIDS thus was commissioned as an important step to provide information on how Seychelles legal and regulatory framework either support or constrain effective national AIDS response, and what could be done to strengthen legal environment and enhance access to services and support among people living with HIV and key populations. The assessment report has clarified in details important issues and the influence that certain existing laws and regulations exert on national HIV response. It also outlines recommendations based on findings and in broad consensus reached at National AIDS Council meeting in April 2013.

I trust these recommendations will guide our decisions and that they would also be translated into actions required to strengthen our legal framework. This will ensure full enjoyment of human rights, support to and improved access to services among people living with HIV and most at risk populations. The recommendations will also advance Seychelles' commitments to UNGASS 2006 and the 2011 Political Declaration on HIV/AIDS to intensify efforts to eliminate HIV and AIDS.

Finally, the level of progress and commitment already shown are very encouraging. While Government remains committed a collective resolve and actions have to be undertaken by all including the government, the private sector, civil society, development partners, individuals, families and communities to assist the country to respond to this challenge and reach the desired targets of zero HIV infections, zero discrimination, and zero deaths in Seychelles.



Hon. Mitcy LARUE
Minister of Health Seychelles

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Disclaimer

The views expressed in this publication are those of the authors and do not necessarily represent those of Ministry of Health, NAC or UNDP including United Nations agencies involved.

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ABBREVIATIONS

AIDS	Acquired Immune Deficiency Syndrome
AU	African Union
CDCU	Communicable Diseases Control Unit
CECSR	Committee on Economic, Social and Cultural Rights
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DaO	Delivering as One
FGD	Focus Group Discussions
GCHL	Global Commission on HIV and the Law
GOP	Gainful Occupation Permit
HIV	Human Immuno-deficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDUs	Intravenous Drug Users
ILO	International Labour Organisation
IP	Intellectual property
KAP	Knowledge, Attitudes and Practices
KII	Key Informant Interviews
LUNGOS	Liaison Unit of Non Governmental Organization
MDG	Millennium Development Goals
MOH	Ministry of Health
MSM	Men who have sex with men
NAC	National AIDS Council
NCPI	National Commitments and Policies Instrument
NHRC	National Human Rights Commission
NHRDC	National Human Resources Development Council
NSF	National Strategic Framework for HIV & AIDS and STIs 2012-2016
OHCHR	Office of the High Commissioner for Human Rights
PLHIV	People living with HIV
STIs	Sexually Transmitted Infections
SW	Sex Worker
TB	Tuberculosis
TRIPS	WTO Agreement on Trade Related Aspects of Intellectual Property Rights
TWG	Technical Working Group
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	United Nations Joint Programme on HIV/AIDS
UNGASS	United Nations General Assembly Special Session
UNODC	United Nations Office on Drugs and Crime
WHO	World Health Organization
WTO	World Trade Organization

Executive Summary

Stigma, discrimination and a range of human rights abuses faced by people living with HIV or AIDS as well as by key populations at higher risk of HIV infection both in law and in practice worldwide compromise their ability to access health care services, including HIV prevention, treatment and care services and thus negatively impact on national responses to HIV and AIDS. The Seychelles is no exception. A Knowledge, Attitudes and Practices (KAP) study conducted in 2003, amongst the general population aged 15 to 65 years revealed high levels of discrimination against people living with or affected by HIV and AIDS¹ and a recent review of the 2005-2009 National Strategic Plan and (KAP) study conducted in 2013 confirms that stigma and discrimination continue to be issues affecting people living with HIV and creating barriers to their access to HIV treatment, care and support.²

The Constitution of the Seychelles, the supreme law of the land, is built upon human rights principles. It contains a Charter of Fundamental Rights that includes protection of the rights to equality and non-discrimination, the right to gender equality, the right to privacy, the right to dignity, the right to security of the person, the right to information and the right to work, amongst others. The Constitution also guarantees the right to access to health care for all Seychellois under Article 29. In addition, the Seychelles is party to and has ratified various regional and international conventions, declarations, covenants and treaties that safeguard the rights of all people.

All people, including PLHIV and other vulnerable and key populations are accorded human rights and protection from discrimination in the Seychelles. However, HIV and AIDS are not specifically listed as protected grounds for non-discrimination in the Constitution, nor is there specific HIV and AIDS legislation in the Seychelles

Although a comprehensive analysis of the Seychellois legal and regulatory framework for HIV and AIDS has not been conducted, various legal and human rights challenges have previously been identified including:

- The lack of HIV-specific anti-discrimination protection for people living with HIV and key populations at higher risk of HIV exposure in law;
- Discriminatory laws, policies and practices that create barriers to access to HIV testing, prevention, treatment, care and support (including harm reduction measures) for affected populations and that deny people living with HIV access to education, insurance, bank loans and employment in the armed forces; and
- Punitive laws that criminalize populations at higher risk of HIV exposure (such as men who have sex with men (MSM), people who inject drugs and sex workers).³

Reversing HIV trends and patterns to get to zero HIV infections, zero discrimination and zero deaths requires an effective response underpinned by a supportive and protective environment

¹ Republic of Seychelles, Ministry of Health (2003) *National KAP Study*

² Republic of Seychelles, National AIDS Council (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016*

³ Ibid.; see also Aids & Rights Alliance for Southern Africa (2013) *HIV and Human Rights in Southern Africa: Draft Report*

in the country.⁴ The role of a supportive legal and policy environment in improving outcomes of HIV and AIDS interventions has been increasingly documented and recognized to include improving protection of rights, enhancing access to HIV and AIDS services and mitigating the impacts of the epidemic. Thus, as part of the national response to HIV, targeted actions to create an enabling legal and regulatory environment will also contribute to achieving and maintaining Universal Access targets, Millennium Development Goals (MDGs) and MDG *plus* in the case of Seychelles.

The Government of the Republic of Seychelles has shown continued commitment to improving the national response to HIV through leadership and through the allocation of resources to support interventions at various levels. There has been considerable progress in the development of HIV programmes, strategies and policies. The recent National Strategic Framework 2012-2016 has furthermore prioritised the needs of key populations at higher risk of HIV exposure,⁵ in response to the limited prioritisation within the previous national plan of the specific needs of affected populations such as young people, MSM, people who inject drugs, sex workers and migrants.⁶ However, there remains a need to strengthen the legal and regulatory environment to enhance support and protection for people living with HIV or AIDS and other vulnerable and key populations to enable effective implementation of and access to services, in keeping with international guidance and national human rights commitments.

As a result, the Government of the Republic of Seychelles, in collaboration with UN agencies under the Delivering as One “DaO” framework, initiated this project as an important step to provide information and evidence that will inform actions to strengthen the legal environment for an effective HIV and AIDS response. This analysis of legal and regulatory aspects in the context of HIV and AIDS seeks to clarify how existing laws, policies and practices and their implementation and enforcement either support or undermine an effective HIV response in the country. This is important to ensure an effective HIV response that protects and promotes the human rights of people living with HIV and of most at risk and vulnerable populations.

The aim of the legal and regulatory analysis is to improve the availability of information and evidence of legal and regulatory aspects in the context of HIV and AIDS, for purposes of making recommendations for creating and strengthening an enabling environment that promotes an effective national AIDS response in accordance with the National Strategic Framework for HIV and AIDS and STIs 2012-2016. The assessment has been conducted by way of a desk review of documentation on selected laws, regulations and policies and a qualitative assessment of the level of knowledge on human rights among key and vulnerable populations; and of the degree of awareness of HIV related laws and human rights among law makers and law enforcers to enable effective implementation of services, access to justice and enforcement of HIV-related laws and rights.

This Legal Environment Assessment identified a number of on-going challenges relating to HIV, law and human rights in the Seychelles. First, there are a number of vulnerable and key

⁴ UNAIDS (2010) *Getting to Zero: 2011-2015 Strategy*

⁵ Republic of Seychelles (2012) *National Strategic Framework 2012-2016 for HIV and AIDS and STIs*

⁶ Republic of Seychelles; National AIDS Council (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016*

populations including women, children, young people, people with disabilities, men who have sex with men, sex workers, people who inject drugs, prisoners and migrant workers, amongst others, who have been shown to be at higher risk of HIV exposure and/or to experience the impact of HIV and AIDS more severely. Second, HIV-related stigma and discrimination was found and was reported to exacerbate the negative impact of HIV. In addition, stigma and discrimination on the basis of sexual orientation or on the basis of being a sex worker or a person who injects drugs was also found and was reported to hinder access by members of these groups to HIV prevention and treatment services. Thirdly, although protective provisions in Seychellois law and policy were identified (such as criminal laws to protect women from sexual violence, children's laws that protect the rights of orphaned children and employment laws that protect all employees from unfair discrimination), many laws pre-date and do not specifically deal with HIV and AIDS or the various inequalities and human rights abuses experienced by people living with HIV and other key populations at higher risk of HIV exposure. In addition, access to justice and law enforcement for human rights violations is limited. Populations are not fully aware of their rights and how to enforce these rights and enforcement mechanisms are not always accessible and well resourced. Fourthly, there were a number of punitive or coercive provisions in law, many of which pre-date AIDS but which are now recognized as creating barriers to the response to HIV and AIDS. For instance, laws that criminalize sex between men and criminalize aspects of sex work as well as laws that prohibit possession of drug injecting paraphernalia block access to services for key populations. Lastly, the assessment team noted that there are several laws hamper the effective implementation of sectoral policies, including the national HIV and AIDS policy as well as the National Strategic Framework 2012-2016 for HIV and AIDS and STIs, which progressively promote a human rights based response to HIV and AIDS and provide for access by all, including MSM, sex workers and people who inject drugs, to quality accessible, acceptable and affordable HIV prevention and treatment services. In addition, it was noted that the Seychelles is currently drafting new patent legislation. In order not to compromise affordable access to quality treatment, care should be exercised to ensure that the new patent law makes use of the flexibilities within international trade agreements (the TRIPS Agreement) in the Seychelles to promote access to treatment.

Based on assessment of the legal and regulatory framework in the Seychelles in accordance with its own Constitution and regional and international human rights commitments made by the Seychelles, public health and human rights evidence found in a review of relevant literature, the views of key informants and focus group discussions with selected populations, the assessment calls for the enactment of the following protections in law for HIV⁷:

1. The law must protect and promote human rights in the context of HIV and AIDS and prohibit all forms of discrimination on the basis of actual or perceived HIV status. Protection from HIV-related discrimination should be included within any proposed HIV law; alternatively consideration should be given to the enactment of general anti-discrimination legislation which includes HIV as a prohibited ground of discrimination. Existing human rights and constitutional guarantees should be enforced.

⁷ See Part V for detailed recommendations

2. Those provisions of immigration legislation and regulations that exclude migrant workers from employment or foreigners from residing in the Seychelles solely on the basis of their HIV status should be repealed and regulatory reform implemented to ensure that migrant workers and foreigners can access the same quality of HIV prevention, treatment and care services and commodities that are available to citizens. All HIV testing and STI screening for migrant workers and foreigners must be confidential, voluntary and with informed consent. Employers of migrant workers and foreigners should be required to assume responsibility for all health care costs of the employee. In addition legislation should be enacted to give legal effect to the provisions of the policy on HIV and AIDS in the workplaces, including on the prohibition of HIV-related discrimination in the workplace.
3. There must be specific protection in law for the health rights of all people in the context of HIV and AIDS, including:
 - the right to HIV testing with voluntary and informed consent and pre- and post-test counseling;
 - prohibition on HIV testing without consent;
 - the right to medical confidentiality and a prohibition on disclosure of a person's confidential HIV status, with the exception of disclosure by a qualified health professional to an identified 3rd party at risk in certain circumstances and following step-by-step procedures;
 - alignment of the age of consent to sexual and reproductive health services to that of consent to sexual intercourse;
 - the right to access appropriate prevention, treatment, care and support services, including psycho-social support, for all people without discrimination, including populations at higher risk of HIV exposure;
 - definition of and provision for specific protection and the tailoring of accessible prevention and treatment services for vulnerable populations and key populations at higher risk of HIV exposure and in particular those commonly identified by the Legal Environment Assessment such as women, children, people with disabilities, migrants, travelers, prisoners, people who inject drugs, sex workers, men who have sex with men and the homeless;
 - provision to give effect to the commitment to providing harm reduction programmes for people who use drugs, including the repeal of laws that restrict the availability of preventive measures such as clean needles and syringes; and
 - protection for the rights of research participants in all health research, including protection for the specific vulnerabilities of participants in HIV research.
4. The Patents Act 1901 should be amended in order to comply with the TRIPS Agreement and include specific directives on utilising TRIPS flexibilities in relation to public health for increased access to good quality and affordable generic medicines.
5. Criminal laws relating to violence, including sexual violence, as well as policies to manage those who have been sexually violated, should be strengthened. Crimes relating to rape and non-consensual sex should be strengthened to be gender-neutral and to apply to all domestic partnerships.

6. Provisions in the Penal Code 1955 criminalising consensual sex between adult men must be reviewed with a view to repeal.
7. Consideration should be given to reviewing the provisions in the Penal Code 1955 acting to prohibit aspects of consensual sex work with a view to repeal; and to using the 'public nuisance' laws to punish, penalise or harass sex workers as harm reduction measures.
8. Consideration should be given to amending the Misuse of Drugs Act to make provision for needle exchange and substitution therapy programmes as well as for the referral of drug offenders to effective rehabilitation programmes in place of imprisonment. Consideration should also be given to reviewing the provisions of the Misuse of Drugs Act 1995 criminalising possession of drugs for own use with a view to repeal as a harm reduction measure.
9. Attention should be given to ensuring that all prisoners are afforded access to acceptable, affordable and accessible quality HIV voluntary testing and counseling and prevention, treatment and care services. In addition attention should be given to improving nutrition and addressing overcrowding in prisons.
10. HIV-specific laws that criminalize HIV transmission and exposure should not be enacted. Where individuals maliciously and intentionally transmit or expose others with the express purpose of causing harm, existing laws against assault, homicide and causing bodily harm, or allowing intervention where a person is spreading communicable diseases-suffice to prosecute people in those exceptional cases. Guidelines should be developed to support law enforcement agents and the judiciary to ensure that criminal sanctions are applied reasonably, where elements of foreseeability, intent, causality and consent are clearly and legally established and where considerations and circumstances that mitigate against criminal prosecutions (such as the age, gender or disability) or aggravation of sentence are considered.
11. In the event of sexual violence such as rape, sexual assault or defilement that results in the transmission of HIV or creates a significant risk of HIV transmission, the HIV-positive status of the offender may be considered an aggravating factor in sentencing if the person knew he or she was HIV-positive at the time of committing the offence. Provision in law for compulsory HIV testing of an accused or an offender should not be considered to constitute evidence of knowledge of HIV status.
12. Law, including occupational safety and health law, and policy must include provision for the management of HIV within *all* working environments, including for members of the police and armed forces and workers in the tourism industry, to ensure:
 - Equality and non-discrimination on the basis of HIV and AIDS
 - Voluntary and confidential HIV testing and counselling
 - A prohibition on pre-recruitment HIV testing in all working environments
 - Procedures to ensure safety within the working environment
 - Access to post-exposure prophylaxis and compensation for occupational infection.

13. Various measures should be taken to strengthen access to justice and law enforcement, including the strengthening of stigma and discrimination campaigns; law and human rights information on existing and new laws, education and training for all, including key populations and key service providers such as health workers; strengthening legal support services and mechanisms for enforcing HIV-related human rights complaints and redress mechanisms and sensitising law-makers, judicial officers and law enforcers on HIV, law and human rights.

PART I INTRODUCTION

A. Introduction and Background

The HIV epidemic remains one of the major public health and development challenges in Seychelles. By the end of 2011, it was estimated that around 300 people were living with HIV or AIDS in the Seychelles. The country has a concentrated HIV epidemic with high levels of HIV amongst certain key populations at higher risk of HIV exposure including youth aged between 15 and 24 years, people who inject drugs, men who have sex with men (MSM) and sex workers. Sex between men is believed to account for around 15 to 25% of HIV transmissions and, while data on HIV incidence and prevalence amongst MSM is limited, there is a recent recognition of MSM as a key population with growing HIV incidence. Injecting drug use is recognized as a matter of increasing concern, with more recent information available on HIV amongst people who use drugs. The HIV prevalence among people who inject drugs and MSM is estimated to be about 5.8% and 13.2% respectively and about 53.5% of people who inject drugs were found to be infected with Hepatitis C in a study conducted in Mahe, Praslin and La Digue Islands. While sex work is suspected to have increased significantly over the recent years, no systematic study has been conducted to estimate HIV prevalence among this population group.⁸

A Knowledge, Attitudes and Practices (KAP) study conducted in 2003 amongst the general population aged 15 to 65 years revealed high levels of discrimination against people living with or affected by HIV and AIDS⁹ and a recent review of the 2005-2009 National Strategic Plan and KAP study conducted in 2013 and confirms that stigma and discrimination continue to be issues affecting people living with HIV and creating barriers to their access to HIV treatment, care and support.¹⁰ Although a comprehensive analysis of the Seychellois legal and regulatory framework for HIV and AIDS has not been conducted, various legal and human rights challenges have previously been identified, including:

- The lack of HIV-specific anti-discrimination protection for people living with HIV and key populations at higher risk of HIV exposure in law
- Discriminatory laws, policies and practices that create barriers to access to HIV testing, prevention, treatment, care and support (including harm reduction measures) for affected populations and that deny people living with HIV access to education, insurance, bank loans and employment in the armed forces
- Punitive laws that criminalize populations at higher risk of HIV exposure (such as MSM, people who inject drugs and sex workers).¹¹

⁸ Government of Seychelles (2012) *Global AIDS Response Country Progress Report* Available at [http://www.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2012countries/ce_SC_Narrative_Report\[1\].pdf](http://www.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2012countries/ce_SC_Narrative_Report[1].pdf) [Accessed 25th September 2012]; see also country situation analysis Available at http://www.unaids.org/ctrysa/AFRSYC_en.pdf [Accessed 25th September 2012]; see also Ministry of Health: Epidemiology Department (2011) *Respondent Driven Sampling Study*

⁹ Republic of Seychelles, Ministry of Health (2003) *National KAP Study*

¹⁰ Republic of Seychelles; National AIDS Council (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016*

¹¹ *Ibid.*; see also AIDS & Rights Alliance for Southern Africa (2013) *HIV and Human Rights in Southern Africa: Draft Report*

Reversing HIV trends and patterns to get to zero HIV infections, zero discrimination and zero deaths requires an effective response underpinned by a supportive and protective environment in the country.¹² The role of a supportive legal and policy environment in improving outcomes of HIV and AIDS interventions has been increasingly documented and recognized to include improving protection of rights, enhancing access to HIV and AIDS services and mitigating the impacts of the epidemic. Thus, as part of the national response to HIV, targeted actions to create an enabling legal and regulatory environment will also contribute to achieving and maintaining Universal Access targets, Millennium Development Goals (MDGs) and MDG *plus* in the case of Seychelles.

The Government of the Republic of Seychelles has shown continued commitment to improving the national response to HIV through leadership and through the allocation of resources to support interventions at various levels. There has been considerable progress in the development of HIV programmes, strategies and policies. The recent National Strategic Framework 2012-2016 has furthermore prioritised the needs of key populations at higher risk of HIV exposure,¹³ in response to the limited prioritisation within the previous national plan of the specific needs of affected populations such as young people, MSM, people who inject drugs, sex workers and migrants.¹⁴ However, there remains a need to strengthen the legal and regulatory environment to enhance support and protection for people living with HIV or AIDS and other vulnerable and key populations to enable effective implementation of and access to services, in keeping with international guidance and national human rights commitments.

As mentioned above, the Seychelles has not, to date, undertaken a systematic analysis of the extent to which existing laws, policies and practices either support or constrain the national response to HIV and AIDS. As a result, the Government of the Republic of Seychelles, in collaboration with UN agencies under the Delivering as One “DaO” framework, initiated this project as an important step to provide information and evidence that will inform actions to strengthen the legal environment for an effective HIV and AIDS response. This analysis of legal and regulatory aspects in the context of HIV and AIDS seeks to clarify how existing laws, policies and practices and their implementation and enforcement either support or undermine an effective HIV response in the country. This is important to ensure an effective HIV response that protects and promotes the human rights of people living with HIV and of most at risk and vulnerable populations.

The purpose of this project is to provide an assessment and analysis of the legal and regulatory aspects in the context of HIV and AIDS in Seychelles. The assessment has been conducted by way of a desk review of documentation on selected laws, regulations and policies and a qualitative assessment of the level of knowledge on human rights among key and vulnerable populations; and of the degree of awareness of HIV related laws and human rights among law makers and law enforcers to enable effective implementation of services, access to justice and enforcement of HIV-related laws and rights. This report sets out the findings of the assessment

¹² UNAIDS (2010) *Getting to Zero: 2011-2015 Strategy*

¹³ Republic of Seychelles (2012) *National Strategic Framework 2012-2016 for HIV and AIDS and STIs*

¹⁴ Republic of Seychelles; National AIDS Council (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016*

and analysis and provides sound recommendations on actions required to create and strengthen the HIV-related legal and regulatory environment.

B. Aims and Objectives

Aim

The aim of the situation analysis is to improve the availability of information and evidence of legal and regulatory aspects in the context of HIV and AIDS, for purposes of making recommendations for creating and strengthening an enabling environment that promotes an effective national AIDS response in accordance with the National Strategic Framework for HIV and AIDS and STIs 2012-2016 in Seychelles.

Specific objectives

The Situational Analysis aims to:

- Systematically analyse an agreed list of prioritized, relevant laws, regulations as well as policies and practices, where relevant, to determine how they undermine or support an enabling environment and national AIDS response,
- Analyse the extent to which affected populations know and are able to access their rights and service providers, lawmakers and law enforcers are sensitized to HIV-related law and human rights issues to enable effective implementation of services, access to justice and enforcement of HIV-related laws and rights; and
- Provide detailed and appropriate recommendations of selected laws and regulations considered necessary to be reformed, enacted or better enforced as well as appropriate measures to strengthen access to justice and improve law enforcement, to create an enabling framework for HIV and AIDS.

Key Deliverables

The key deliverables under the project were as follows:

- Detailed work plans for the major project activities including a desk review, key informant interviews (KIIs), focus group discussions (FGDs) and public consultations
- A preliminary analytical report on the desk review of the available documentation on selected laws, regulations and policies, detailing key HIV, law and human rights issues and the impact of the legal framework on the national HIV response in Seychelles
- A preliminary analytical report on the findings of key informant interviews and focus group discussions, including the nature and extent of stigma and discrimination against affected populations, the extent to which affected populations know their rights and the extent to which service providers, lawmakers and law enforcers are sensitized to HIV-related law and human rights issues to enable effective implementation of services, access to justice and enforcement of HIV-related laws and rights
- A comprehensive final draft report providing a synthesis of findings from the desk review, focus group discussions, and key informant interviews with overall recommendations on actions required to address the identified legal and regulatory issues, to enable effective implementation of services, access to justice and enforcement of HIV-related laws and rights.

C. Implementation Modalities

Technical Approach

The Situational Analysis has been guided by a human-rights based approach to health, HIV and AIDS¹⁵ using national, regional and international human rights commitments made by the Seychelles as the starting point for framing the enquiry, designing the tools for analysis, analyzing the findings and developing the recommendations. In the context of HIV, this approach aims to promote the right to health and other related rights. It examines the legal, social, economic and/or cultural contexts which underlie the HIV epidemic in Seychelles, with the broader aim of recognising and responding to the underlying inequalities, prejudices and power relationships that impact upon HIV transmission and access to HIV-related health care services in the country.

The main principles of the rights-based approaches that are proposed as guiding principles for the Situational Analysis are the principles of equality and non-discrimination; participation and inclusion of rights-holders; capacity building of duty-bearers and accountability. The Situational Analysis recognises the inter-relationship between all human rights, including health rights and equality rights, and seeks to balance public health and human rights goals in developing the rights of all people.

Research Methodology

The Situational Analysis has been carried out using the various methodologies set out below:

Desk Review

The Situational Analysis includes a desk review of all relevant documentation relating to HIV, law and human rights issues at national level, as well as regional and international levels in order to determine the scope and content of laws, regulations and policies as well as issues around how laws are implemented and enforced. Documents reviewed include:

- International and regional human rights commitments as well as regional and international health and HIV-specific commitments and guidance documents;
- Laws, regulations and policies as well as selected policies, plans and guidelines, where relevant;
- Case law; and
- Annual reports, research reports and other documents of civil society organisations working with health, HIV, people living with HIV and key populations; reports of government ministries, statutory bodies (such as the Human Rights Commission and/or Ombudsman), regional and international organisations and academic publications.

The desk review aims to determine the nature, extent, efficacy and impact of the legal and regulatory framework (include laws, regulations and policies as well as access to justice and law enforcement issues) for protecting rights and promoting universal access to HIV prevention, treatment, care and support in the Seychelles. It furthermore makes recommendations for law review and reform as well as efforts to strengthen access to justice and law enforcement.

¹⁵World Health Organisation (2009) *A Human Rights Based Approach to Health: Policy Brief*

The desk review includes an initial focus on the key issues identified in the preparatory phase of the project. It furthermore identifies additional key HIV, law and human rights issues of concern within the Seychelles for further exploration during key informant interviews and focus group discussions.

See Annexure 1 for a list of documents reviewed

Key Informant Interviews

The key informant interviews provided qualitative information on the views of decision-makers on key HIV, law and human rights issues within Seychelles; the impact of the legal and regulatory framework upon the response to HIV and AIDS as well as recommendations for strengthening the legal and regulatory framework to protect rights and promote access to services in the context of HIV and AIDS.

Key informants were selected from across a range of sectors, including from government, civil society, the private sector and other partner institutions. They include relevant government officials from key government institutions and ministries such as the National AIDS Council, Ministry of Health and Social Services, the Office of the Attorney-General, Labour and Human Resource Development, Education and Internal Affairs amongst others. They also include members of the National Assembly, legal experts including the judiciary, members of the Police, the Human Rights Commission/Ombudsman. Key informants also include representatives of Civil Society Organisations working with and for people living with HIV and other affected populations, faith based organisations as well as development partners working on health, HIV and related issues.

See Annexure 2 for a list of key informants interviewed.

Focus Group Discussions

Focus Group Discussions (FGDs) were used to obtain qualitative data from selected populations on their experiences of stigma, discrimination and human rights violations in the context of HIV and AIDS, how laws, policies and practices impact upon rights and the ability to access services in the context of HIV and whether affected populations are able to access justice and enforce rights.

Focus group discussions included populations vulnerable to and at higher risk of HIV exposure such as persons living with HIV or AIDS, people who use drugs, prisoners, young people, and immigrant workers. They also included key service providers, such as health care providers at various levels and educators. The views and experiences of rights holders are critical to inform specific areas of laws that will need to be addressed.

See Annexure 3 for a list of FGDs conducted

Data Management

The national consultant transcribed interviews from all KIIs and FGDs conducted; these notes were used for analyses.

Consultative Workshops, Validation and Dissemination of Study Findings

The Situational Analysis process included two public consultative workshops involving all relevant stakeholders to obtain feedback and build consensus on the findings and

recommendations during the course of the project. The preliminary findings of the desk review were presented to a national consultative workshop on 21st February 2013. Additionally, the findings and recommendations of the final draft report were shared with a wide range of involved and affected stakeholders at a national stakeholders meeting in Victoria on 22nd March 2013 for feedback and validation. Feedback from this process has been incorporated into the final recommendations of this report.

Oversight by Technical Working Group

The Situational Analysis was overseen by a Technical Working Group (TWG) made up of key stakeholders from a range of disciplines and sectors, including key government ministries, Civil Society organisations working on HIV and human rights issues and/or representing affected populations, international organisations and UN agencies. The TWG met regularly and worked closely with the consultants to guide the Situational Analysis. This included providing assistance with the development of the report as well as the questionnaire for the FDGs, the planning and implementation of activities; regularly reviewing the process, findings and recommendations throughout the various stages of the project and ensuring that the views of decision-makers and key affected populations were reflected in the analysis process.

See Annexure 4 for a list of members of the TWG and Coordination team

The Situational Analysis Report

This Situational Analysis report reflects the outcome of the process, combining the findings of the desk review, the perspectives of key informants and populations participating within focus group discussions as well as the comments and feedback provided by key stakeholders throughout the process.

It consists of this and four other parts in total. Part II of the Analysis report sets out the international, regional and national human rights framework to which Seychelles has committed itself and which frames the investigation of HIV-related rights. Part III further details both the specific international and national perspective of the legal and policy issues relating to Equality and Anti-Discrimination; Health; Criminal Law and Law Enforcement; Employment; Education and Information; and Social Welfare. This part of the report analyses the current situation and makes recommendations on how to address the gaps identified so as to be in line with international requirements vis a vis HIV and the law. Part IV details the current mechanisms in place relating to access to justice and law enforcement in Seychelles, whilst providing an insight on actual access to justice by key populations and vulnerable groups and also makes recommendations on how to strengthen the system. Part V of the report consolidates the recommendations made in the two preceding parts of the document.

The following limitations to the Situational Analysis should be noted.

- Limited availability of existing research on the nature and extent of HIV-related stigma and discrimination against key populations at higher risk of HIV exposure
- Limited 'visibility' of people living with HIV and key populations at higher risk of HIV exposure
- Fears of confidentiality breaches and of HIV-related stigma and discrimination amongst affected populations
- Time and resource constraints

For this reason, the Situational Analysis was able to conduct a limited number of focus group discussions with affected populations. The analysis does not purport to provide definitive evidence of stigmatising and discriminatory practices but rather seeks to give voice to some of the experiences related by affected populations, for purposes of law and policy review. The invaluable perspectives provided by informants and focus groups are gratefully acknowledged.

PART II. INTERNATIONAL / REGIONAL / NATIONAL HUMAN RIGHTS FRAMEWORK

In this section we examine the international, regional and national human rights framework which should oversee and govern the national response to HIV and AIDS. The Analysis considers:

- How international and regional human rights instruments apply to the regulation of law and human rights in the Seychelles;
- Key international and regional human rights instruments and an overview of the important human rights norms and standards within those frameworks that support effective national responses to HIV; and
- A further examination of selected human rights principles set out in international, regional and national law (the Seychellois Constitution) and a discussion of their application to HIV and AIDS

It is this understanding of each right, how it is interpreted to apply in the context of HIV and AIDS and what is or is not considered to be reasonable limitation of the right in particular circumstances, which guides the analysis of HIV law in Seychelles.

A. The International Perspective

International and regional human rights law provides an overarching framework for an analysis of HIV, law and human rights issues in Seychelles. International and regional human rights law is set out in the various charters, treaties and conventions signed and ratified by member states. Once a state has signed and ratified a treaty or convention, it agrees to be legally bound by that convention and to ensure that the principles and provisions of that instrument are met and implemented at a national level. It is required to report periodically to the relevant treaty monitoring body on its compliance with the provisions of each treaty.

‘Signature’ of a treaty is an act by which a state provides a preliminary endorsement of an agreement. Signing does not create a binding legal obligation but does demonstrate the state’s intent to examine the agreement and consider ratifying it. Whilst signing does not commit a state to ratification, it does oblige the state to refrain from acts that would defeat or undermine the treaty’s objective and purpose. ‘Ratification’ is an act by which a state signifies an agreement to be legally bound by the terms of a particular treaty. To ratify a treaty, the state first signs it and then fulfils its own national legislative requirements. Even where states have not signed or ratified conventions or treaties, these can still be binding if their principles form part of what is known as customary international law.¹⁶

Although Seychelles has signed and ratified a number of such instruments, in dualist countries such as the Seychelles, these instruments require to be domesticated within national laws in order to apply. The process of domestication of international treaties is governed by Article

¹⁶ Malawi (2012) *Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi* ; See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S.331, entered into force on Jan 27, 1980, article 18(1) Available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

64(4) of the Constitution of Seychelles which states that “A treaty, agreement or convention in respect of international relations which is to be or is executed by or under the authority of the President shall not bind the Republic unless it is ratified by –

- (a) An act or
- (b) A resolution passed by the votes of the majority of the members of the national assembly”.

However, even in dualist countries, international and regional law can still impose obligations on countries that have ratified particular treaties. The African Commission on Human and Peoples’ Rights (African Commission), which is responsible for monitoring compliance with regional human rights treaties, has noted that “international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties.”¹⁷

In some countries such as the Seychelles, domestic constitutional provisions explicitly command courts to look at international, regional and comparative law in reaching their decisions. Article 48 of the Seychellois Constitution provides that the Seychellois Charter of Fundamental Human Rights and Freedoms (Chapter 3) shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of –

- a) the international instruments containing these obligations;
- b) the reports and expression of views of bodies administering or enforcing these instruments;
- c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms;
- d) the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.

In the case of *Christopher Gill v Registrar of Political Parties*,¹⁸ the Supreme Court of Seychelles (with Justice D. Karunakaran presiding) delivered an important judgment. It upheld the decision of the Registrar of Political Parties rejecting the registration of a group of people as a political party on the grounds that the party’s objectives were not lawful and contrary to the Constitution in that they aimed to propagate racial discrimination.

In upholding the Registrar’s decision, the court referred to the legal and constitutional provisions of Seychelles under Article 48 of the Constitution, which requires the Seychelles courts to take judicial notice of international instruments and decisions of international or regional bodies on human rights, and to interpret the fundamental rights within Chapter II of the Constitution in consonance with those human rights instruments and decisions. In particular, the court referred to the Universal Declaration of Human Rights (UDHR) and the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD), to which Seychelles acceded on

¹⁷ Malawi (2012) *Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi*

¹⁸ Supreme Court Civil No: 1 of 2011 30th March 2011 Digest 16/17

The constitutional obligation for courts to take judicial notice of international and regional human rights obligations, including findings by international bodies on such rights, as well as foreign law, is significant for our understanding of HIV-related rights and obligations. It suggests that Seychelles should be guided by the interpretation of human rights obligations in the context of HIV and AIDS by international and regional bodies as well as by foreign courts. In this Situational Analysis, we draw on international and regional guidance on HIV, law and human rights, including the UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights*, as well as the findings of international and regional bodies and foreign courts on HIV and human rights matters. .

B. Human rights standards and the nature of State obligations

The Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in June 1993, affirmed that all human rights are universal, indivisible, interdependent and interrelated. States have the duty, regardless of their political, economic and cultural systems, to promote and protect universal human rights standards and fundamental freedoms. A human rights approach to HIV is, therefore, based on these State obligations with regard to human rights protection and hence promoting the health and dignity of its citizens.¹⁹

The Global Commission on HIV and the Law (GCHL) has found that there are instances where legal and justice systems have played constructive roles in responding to HIV, by respecting, protecting and fulfilling human rights. Compelling evidence shows that it is the way to reduce vulnerability to and mitigate the impact of HIV. Good laws can widen access to prevention and health care services, improve the quality of treatment, and enhance social support for the infected and affected and thereby protecting their human rights. Examples include instances where police cooperate with community workers, condom use can increase and violence and HIV infection can decrease amongst sex workers; harm reduction programmes can contribute to a significant drop in HIV infection rates for people who use drugs. Effective legal aid can make justice and equality a reality for people living with HIV and thus create better health outcomes. Court actions and legislative initiatives can help introduce gender-sensitive sexual assault law and recognize the sexual autonomy of young people.²⁰

Seychelles has either signed or ratified the following human rights treaties, all of which include important rights in the context of HIV and AIDS:

- International Covenant on Civil and Political Rights (ICCPR),
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The Convention on the Rights of the Child (CRC)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Optional Protocol of CEDAW, as well as General

¹⁹ Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (2006 Consolidated Version) *International Guidelines on HIV/AIDS and Human Rights*

²⁰ Global Commission on HIV and the Law (2012) *Risks, Rights & Health*

Recommendations No. 19

- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
- African Charter on Human and Peoples' Rights and the African Women's Protocol
- African Charter on the Rights and Welfare of the Child

In addition, Seychelles has endorsed and supported a United Nations Joint Statement ending acts of violence and related human rights violations based on sexual orientation and gender identity.²¹ During the Universal Periodic Reporting by Seychelles, it was recommended²² that Seychelles adopts the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. This has not yet been done.

Finally, there are also several international and regional declarations, commitments and guidelines which deal specifically with HIV, human rights and gender equality. While not strictly legally binding, they are generally reflections of the application and interpretation of accepted international and regional human rights principles to the HIV epidemic. In this respect, they are important guidance for Seychelles in its interpretation of its own human rights standards in the context of HIV and AIDS. In addition, many international and regional strategies and plans include guidance on law and policy responses to HIV and AIDS. As such, they provide important and persuasive guidance for national response to HIV and AIDS.

HIV and AIDS related commitments

- 2001 UNGASS *Declaration of Commitment on HIV/AIDS*
- 2006 UNGASS *Political Declaration on HIV/AIDS - Universal Access*
- 2011 UNGASS *Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS*
- 2000 UN Millennium Development Goals
- 2001 Abuja *Declaration on Universal Access: HIV/AIDS/TB/Malaria/STIs*
- 2003 Maseru Declaration
- 2006 Brazzaville *Commitment on Scaling Up Towards Universal Access to HIV and AIDS Prevention, Treatment, Care and Supporting Africa in 2010*
- 2011 Windhoek *Declaration Women, Girls, Gender Equality and HIV: Progress towards Universal Access*
- 2012 African Union *Roadmap on Shared Responsibility and Global Solidarity for AIDS, TB and Malaria Response in Africa*

The key human rights principles which are essential to effective State responses to HIV, found in existing international instruments, are detailed below. Their specific application to the HIV response is further explored in Part C.

²¹ Available at <http://www.ishr.ch/council/376-council/1033-ground-breaking-statement-on-sexual-orientation-and-gender-identity-by-record-number-of-85-states>

²² By Canada

Human rights principles relevant to HIV/AIDS

The right to non-discrimination, equal protection and equality before the law; The right to life; The right to the highest attainable standard of physical and mental health; The right to liberty and security of person; The right to freedom of movement; The right to seek and enjoy asylum; The right to privacy; The right to freedom of opinion and expression and the right to freely receive and impart information; The right to freedom of association; The right to work; The right to marry and to found a family; The right to equal access to education; The right to an adequate standard of living; The right to social security, assistance and welfare; The right to share in scientific advancement and its benefits; The right to participate in public and cultural life; The right to be free from torture and cruel, inhuman or degrading treatment or punishment.

Particular attention should be paid to the human rights of children and women and those of other marginalized, vulnerable populations and key populations at higher risk of HIV exposure.²³

Key populations are defined by the country context and generally include MSM, transgender people, sex workers, people who use drugs, prisoners and migrant workers populations. They are often marginalized by society and by law and face unacceptable levels of stigma and discrimination, which hampers their ability to access HIV prevention, treatment and care services, placing them at higher risk of HIV infection.²⁴

HIV prevalence amongst key populations tends, as a result, to be higher in communities where legislation does not ensure the protection of their human rights and where national health responses fail to ensure their right to health. High levels of prejudice and moral loading have also been shown to create barriers against accessing prevention, treatment, and other health care services.²⁵ Respondent-Driven Sampling Surveys conducted in Seychelles in 2011 in two key population samples, people who inject drugs and MSM, show a recorded prevalence of HIV of at least 5 times and 14 times respectively higher than that found in the general population (under 1%).²⁶

Limitation of Rights

Despite the importance attached to human rights, there are situations where it is considered legitimate to restrict rights to achieve a broader public good. As described in the International Covenant on Civil and Political Rights, the public good can take precedence to "secure due recognition and respect for the rights and freedoms of others; meet the just requirements of

²³ UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights*

²⁴ UNAIDS (2010) *Getting to Zero: 2011-2015 Strategy*

²⁵ UNAIDS *Key Population Policy Brief "A Gap Analysis and Recommendations for Key Populations and HIV in South Africa"*

²⁶ Republic of Seychelles (2012) *Global AIDS Response Country Report*

morality, public order, and the general welfare; and in times of emergency, when there are threats to the vital interests of the nation."²⁷

Public health is one such recognized public good. Traditional public health measures have generally focused on curbing the spread of disease by imposing restrictions on the rights of those already infected or considered most vulnerable to becoming infected. Coercion, compulsion, and restriction have historically been significant components of public health measures.

Although the restrictions on rights that have occurred in the context of public health have generally had as their first concern protection of the public's health, the measures taken have often been excessive. Interference with freedom of movement when instituting quarantine or isolation for a serious communicable disease--for example, Ebola fever, syphilis, typhoid, or untreated tuberculosis--is an example of a restriction on rights that may in some circumstances be necessary for the public good and therefore, could be considered legitimate under international human rights law. However, arbitrary measures taken by public health authorities that fail to consider other valid alternatives may be abusive of both human rights principles and public health "best practice." There are countless examples from around the world of this sort of abuse in the context of HIV and AIDS.²⁸

Certain rights are absolute, which means that restrictions may never be placed on them, even if justified as necessary for the public good. These include rights such as the right to be free from torture, slavery, or servitude; the right to a fair trial; and the right to freedom of thought. Interference with most rights can be legitimately justified as necessary under narrowly defined circumstances. Limitations on rights, however, are considered a serious issue under international human rights law, regardless of the apparent importance of the public good involved. When a government limits the exercise or enjoyment of a right, this action must be taken only as a last resort and will only be considered legitimate if the following criteria are met:

- 1) The restriction is provided for and carried out in accordance with the law.
- 2) The restriction is in the interest of a legitimate objective of general interest.
- 3) The restriction is strictly necessary in a democratic society to achieve the objective.
- 4) There are no less intrusive and restrictive means available to reach the same goal.
- 5) The restriction is not imposed arbitrarily, i.e., in an unreasonable or otherwise discriminatory manner.^{29,30}

In line with the provisions of the Syracuse Principles, Article 47 of the Constitution of Seychelles provides that where a right or freedom contained in the Charter of Human Rights and Freedoms is subject to any limitation, restriction or qualification, that limitation, restriction or qualification

²⁷ Human Rights and HIV/AIDS, S Gruskin, D Tarantola <http://hivinsite.ucsf.edu/InSite?page=kb-08-01-07#S3X> accessed on 19 March 2013

²⁷ United Nations Economic and Social Council (ECOSOC) (1985); The Syracuse Principles on the limitations and derogation provisions in the international covenant on civil and political rights. UN Doc. E/CN.4/1985/4, Annex

²⁸ Ibid.

²⁹ Human Rights and HIV/AIDS, S Gruskin, D Tarantola Available at <http://hivinsite.ucsf.edu/InSite?page=kb-08-01-07#S3X> accessed on 19 March 2013

³⁰ United Nations Economic and Social Council 1985; The Syracuse Principles on the limitations and derogation provisions in the International Covenant on Civil and Political Rights. UN Doc. E/CN.4/1985/4, Annex.

shall have no wider effect than is strictly necessary in the circumstances and shall not be applied for any purpose other than that for which it has been prescribed.

The HIV epidemic has also demonstrated that public health and human rights approaches may, and should be complementary and mutually supportive.

The failure to protect the rights of people living with HIV and other vulnerable populations and key populations at higher risk of HIV exposure and the use of coercive or punitive responses may often serve to increase the spread and exacerbate the impact of HIV and AIDS.³¹³²

“Public health interests do not conflict with human rights. On the contrary, it has been recognized that when human rights are protected, fewer people become infected and those living with HIV and their families can better cope with HIV and AIDS”³³

C. The application of specific human rights in the context of the HIV and AIDS

The Constitution of the Republic of Seychelles 1993

In its Preamble the Constitution recognises the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation for freedom, justice, welfare, fraternity, peace and unity. It further reaffirms that these rights include the rights of the individual to life, liberty and the pursuit of happiness free from all types of discrimination; by declaring to uphold the rule of law based on the recognition of the fundamental human rights and freedoms enshrined in the Constitution and on respect for the equality and dignity of human beings. The Constitution is the supreme law of Seychelles and any other law found to be inconsistent with it is, to the extent of the inconsistency, is considered to be void.³⁴

The Seychellois Charter of Fundamental Rights is found in Chapter 3 of the Constitution. These are listed below.

Seychellois Charter of Fundamental Human Rights and Freedoms

Article 15: Right to life

Article 16: Right to dignity

Article 17: Freedom from slavery and forced or compulsory labour

Article 18: Right to liberty

Article 19: Right to a fair and public hearing

Article 20: Right to privacy

Article 21: Freedom of conscience

³¹ Human Rights and HIV/AIDS, S Gruskin, D Tarantola <http://hivinsite.ucsf.edu/InSite?page=kb-08-01-07#S3X> accessed on 19 March 2013

³² United Nations Economic and Social Council (ECOSOC) (1985); The Siracusa Principles on the limitations and derogation provisions in the international covenant on civil and political rights. UN Doc. E/CN.4/1985/4, Annex

³³ UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights*.

³⁴ Art 5 Constitution of the Republic of Seychelles

Article 22: Freedom of expression
Article 23: Right of assembly and association
Article 24: Right to participate in government
Article 25: Freedom of movement
Article 26: Right to property
Article 27: Right to equal protection of the law
Article 28: Right of access to information
Article 29: Right to health care
Article 30: Rights of working mothers
Article 31: Rights of minors
Article 32: Protection of families
Article 33: Right to education
Article 34: Right to shelter
Article 35: Right to work
Article 36: Rights of the aged and the disabled
Article 37: Right to social security
Article 38: Right to safe environment
Article 39: Right to cultural life and values
Constitution of the Republic of Seychelles (1993)

The Republic of Seychelles *National Policy for the Prevention and Control of HIV & AIDS and other STIs* ('National HIV Policy') recognises that the human rights of the individual are the foundations of all actions in the national response to HIV and AIDS³⁵.

Excerpts of National HIV Policy

61. It is hereby established that the rights of individuals as set out in the ICCPR, the ICESCR, the Seychellois Charter of Fundamental Rights and Freedoms, as well as other laws in support of the aforementioned instruments shall be respected. Violations shall be condemned, investigated and remedies sought as soon as possible. All services provided by state and non-state actors who choose to work in this field shall hold the human rights of their beneficiaries to the highest standards possible and consider these to be primordial and overriding all other considerations.

62. Seropositive persons shall have access to all types of health interventions (surgical, obstetric, gynecological or any other forms of health care) and social services (housing, education, employment and social security, bank loans, life and endowment insurance policies) as required. Freedom of movement shall not be restricted in any form.

63. Human rights include gender equity. Thus, all persons, boys and men, girls and women, shall be provided with the utmost level of care and support available, without any form of discrimination. Special focus will also be placed on ensuring that all seropositive persons' sexual and reproductive health rights shall be upheld.

³⁵ Paragraphs 60, 61 and 62

In 1998, the Office of the High Commissioner for Human Rights (OHCHR) and UNAIDS published the *International Guidelines on HIV/AIDS and Human Rights* as a tool for States in designing, coordinating and implementing effective national HIV policies and strategies. The Guidelines were drafted by experts at an international consultation in 1996 and provide the framework for a rights-based response to the HIV epidemic. The drafters of the Guidelines considered key human rights protected by international instruments, their interpretation by international bodies and institutions and their application to HIV, including considerations of where limitations of rights may or may not be reasonable and justifiable. As a result, the *Guidelines* provide an important guideline for all nations, outlining how human rights standards apply in the context of HIV and translating them into practical measures that should be undertaken at the national level, based on three broad approaches:

- improvement of government capacity for multi-sectoral coordination and accountability;
- reform of laws and legal support services, with a focus on anti-discrimination, protection of public health, and improvement of the status of women, children and marginalized groups; and
- support and increased private sector and community participation to respond ethically and effectively to HIV and AIDS.

OHCHR encourages governments, national human rights institutions, non-governmental organizations and people living with HIV and AIDS to use the *Guidelines* for training, policy formulation, advocacy, and the development of legislation on HIV-related human rights.

In light of developments in addressing the epidemic, a Third International Consultation in 2002 revised Guideline 6 on access to prevention, treatment, care and support.

In this report, the *International Guidelines* serve to set the scene for the application of the various rights in the context of HIV and AIDS and to guide recommendations on what steps Seychelles needs to undertake to ensure that these rights are being fulfilled. Their recommendations regarding justifiable and unjustifiable limitations of rights in the context of HIV and AIDS are an important guide to the application of human rights standards in the Seychellois context.³⁶ In addition, the recent Global Commission on HIV and the Law (GCHL) (2012) *Risks, Rights & Health* report provides additional evidence of the harmful effects of punitive, coercive and discriminatory laws, policies and practices and recommendations for rights-based responses to promote universal access to HIV prevention, treatment, care and support.

i) Right to Equality and Non-Discrimination

International human rights law³⁷ guarantees the right to equal protection before the law and freedom from discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Although HIV and AIDS is not specifically mentioned as a ground for non-discrimination, the Committee on Economic, Social and Cultural Rights (CESCR) has specifically stated that the list of prohibited grounds of discrimination is not exhaustive. The CESCR urges states to “ensure that a person’s actual or perceived health status is not a barrier to realizing the rights under the

³⁶ <http://www.ohchr.org/EN/Issues/HIV/Pages/InternationalGuidelines.aspx>

³⁷ Articles 2 and 7 of the UDHR, Article 2 of the ICCPR, Article 2(2) of the ICESCR and Articles 2 and 3

Covenant”.³⁸ The Commission on Human Rights has confirmed that “other status” in non-discrimination provisions is to be interpreted to include health status, including HIV/AIDS.³⁹ This means that States may not discriminate against people living with HIV or members of groups perceived to be at risk of infection on the basis of their actual or presumed HIV status.

The right to equality and non-discrimination in the context of HIV and AIDS has furthermore been interpreted as imposing an obligation on states to review and, if necessary, repeal or amend their laws, policies and practices to proscribe differential treatment which is based on arbitrary HIV-related criteria.⁴⁰

In the Seychelles, the Constitution of the Republic of Seychelles also guarantees the right to equal protection of the law of all its citizens and to freedom from discrimination. Article 27(1) states that “Every person has a right to equal protection of the law including the enjoyment of rights set out in this Charter without discrimination on any ground except as in necessary in a democratic state.”⁴¹

The general non-discrimination provision of the Seychellois Constitution does not list the prohibited grounds of non-discrimination, as is done by the Covenant.⁴² The wording of the Seychellois Art 27 does not specifically refer to categories of people, such people living with HIV, but to persons in general.⁴³ However, it does provide protection from discrimination on “any ground” which may be argued to cover grounds such as “health status” or “HIV status”.

Other courts in the Southern African Development Community have found HIV status to be a protected ground of non-discrimination in broad, constitutional anti-discrimination provisions. For example in the South African case of *Hoffman v South African Airways*⁴⁴ the court found that, even though HIV status was not specifically mentioned as a ground for non-discrimination in the constitution’s equality clause, the refusal by an airline company to employ an HIV-positive individual as a cabin attendant violated the right to equality and freedom from discrimination. In the Malawian Industrial Relations Court case of *Banda v Lekha*⁴⁵ the court was asked to define the scope of Malawi’s constitutional right to be free from discrimination, and whether the right included the basis of HIV status. In answering this question, the Court examined its national law, national HIV policy and its obligations under international and regional law; the court held:

³⁸ CESCR, General Comment No. 20, 42nd Session, 2009, para. 27 and 33 Available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

³⁹ Commission on Human Rights Resolutions 1995/44 of 3 March 1995 and 1996/43 of 19 April 1996

⁴⁰ Human Rights Committee, General Comment No. 18 (37); Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), vol. I, annex VI

⁴¹ Art 27(1) Constitution of the Republic of Seychelles 1993; The Human Rights Committee has confirmed that a difference in treatment is not necessarily discriminatory if it is based on reasonable and objective criteria. This is reflected in Art 27(2) of the Constitution which states that clause (1) does not preclude any law, programme or activity which has as its object the amelioration of the conditions of disadvantaged groups.

⁴² In its Recommendations CCPR/C/SYC/CO/1 on 21st March 2011 to the Republic of Seychelles, the Committee on Civil and Political Rights recommended that the State party .“Take appropriate legislative measures to ensure the general non-discrimination clause of the Constitution accords with the provisions of the Covenant.” For the time being no action has been undertaken to address this recommendation.

⁴³ A “person” means an individual or a body corporate as is defined by Art 49 Constitution of Seychelles

⁴⁴ 2001 (1) SA 1 (CC). See also *Nanditume v Minister of Defence* 2000 NR 103.

⁴⁵ IRC 277 of 2004

“Section 20 of the Constitution prohibits unfair discrimination of persons in any form. Although the section does not specifically cite discrimination on the basis of one’s (sic) HIV status, it is to be implied that it is covered under the general statement of anti-discrimination in any form... Malawi ratified the African Charter which came into force on 21 October 1986 and it also ratified Convention 111 on 22 March 1965 both of which, place a constitutional duty on the State to pass protective legislation and formulate national policy that give effect to fundamental rights entrenched in the Charter and the Convention. Malawi has formulated the National AIDS policy, which among other things is aimed at ensuring that all people affected or infected with HIV are equally protected under the law.”

Additionally, the specific and more recent mention of HIV as a ground for non-discrimination in Seychellois employment legislation is arguably a strong indication that it is considered to be an important factor in national anti-discrimination provisions. The Employment Act 1995, last amended in 2008, states that “[w]here an employer makes an employment decision against a worker on the grounds of the worker’s age, gender, race, colour, nationality, language, religion, disability, **HIV status**, sexual orientation or political, trade union or other association, the worker may make a complaint to the Chief Executive stating all the relevant particulars.”⁴⁶ HIV status was specifically included as a ground for non-discrimination in a 2006 amendment to the Employment Act.

Article 16 of the Seychelles Constitution also guarantees the right to dignity of all persons.⁴⁷ Internationally, in some jurisdictions, the right to equality has been closely linked to the right to dignity. Canadian courts have interpreted human dignity as meaning “that an individual or group feels self-respect and self-worth” and recognises that human dignity is harmed by acts of unfair discrimination.⁴⁸ “Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.”⁴⁹ In the *Hoffmann* case the court held that “[a]t the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against.” The court used this test of dignity to read HIV status into the list of prohibited grounds in the Constitution, noting that people living with HIV were a minority who had been subjected to systemic disadvantage and discrimination making them one of the most vulnerable groups in society.⁵⁰ This suggests that equality and dignity rights should not only protect all people from unfair discrimination but should also pay special attention to the rights of marginalised populations.⁵¹

⁴⁶ S 46(a) Employment Act 1995

⁴⁷ Art 16 Constitution of the Republic of Seychelles 1993: Every person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel or degrading treatment or punishment.

⁴⁸ *Law v Canada* (1999) 1 SCR 497, para 53; See also *Hoffmann v SAA* 2001 (1) SA 1 (CC)

⁴⁹ *Law v Canada* (1999) 1 SCR 497, para 53

⁵⁰ *Hoffmann v SAA* 2001 (1) SA 1 (CC) at para 28

⁵¹ Malawi (2012) *Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi*

The GCHL's investigation into the impact of people living with HIV and AIDS, and how stigma and discrimination impact on universal access to HIV prevention, treatment, care and support illustrates the importance of rights-based responses to HIV. In Part III A, below, we examine specific acts of HIV-related discrimination in Seychelles.

ii) Right to Privacy

The right to privacy is guaranteed at the international level through various human rights treaties, which include Article 12 of the UDHR, Article 37 of the Convention on the Rights of the Child (CRC) and Article 17(1) of the ICCPR. The latter states that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence or to unlawful attacks on his honour and reputation”.

In the Seychelles, the right to privacy is guaranteed under Art 20 of the Constitution. Every person is provided with the right to privacy and is protected from unlawful invasions of the right. However, the Seychellois Constitution also provides that a law may limit the right to privacy for various reasons, including for purposes of, *inter alia*, public health and for purposes of protecting the rights and freedoms of other people.⁵²

There is limited Seychellois jurisdiction to interpret the right to privacy and what it means for HIV as well as what would be considered to be reasonable limitations of the right to privacy in the context of HIV and AIDS, in Seychelles. However, there is both international and regional guidance on the right to privacy, informed consent to HIV testing, confidentiality and disclosure which is helpful in interpreting the right to privacy in relation to HIV. The UNAIDS *International Guidelines* state that the right to privacy encompasses obligations to respect physical privacy, including the obligation to seek informed consent to HIV testing, as well as privacy of information, including the need to respect confidentiality of all information relating to a person's HIV status.⁵³

The *International Guidelines* argue that limiting the right to privacy, through mandatory HIV testing, is an unjustifiable and discriminatory limitation of human rights.⁵⁴ The *Guidelines* furthermore recommend against limiting privacy rights, through disclosures of a person's HIV status without the person's consent. They recommend that disclosures of a person's HIV status should only take place under exceptional circumstances, where there is a clear risk to a third person (e.g. a sexual partner) and only after various steps have been taken to encourage voluntary disclosure. These issues are discussed in further detail, in Part III, B dealing with health care laws and policies.

This means that in protecting the right to privacy, the State has a duty to protect the right to privacy, which includes the obligation to guarantee that adequate safeguards are in place to ensure that no testing occurs without informed consent, that confidentiality is protected,

⁵² Article 20 (2) (a) Constitution of the Republic of Seychelles 1993

⁵³ UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights*

⁵⁴ International Federation of Red Cross and Red Crescent Societies and Francois-Xavier Bagnoud Center for Health and Human Rights (1999) 'Human Rights: An Introduction' in Mann J et al (eds) *Health and Human Rights: A Reader* Routledge, New York

particularly in health and social welfare settings, and that information on HIV status is not disclosed to third parties without the consent of the individual. In this context, States must also ensure that HIV-related personal information is protected in the reporting and compilation of epidemiological data and individuals are protected from arbitrary interference with their privacy in the context of media investigation and reporting.⁵⁵

iii) Right to Marry and to Found a Family and Protection of the Family

The right to marry and to found a family is protected in the UDHR and encompasses the right of “men and women of full age, without any limitation due to race, nationality or religion,...to marry and to found a family”, to be “entitled to equal rights as to marriage, during marriage and at its dissolution” and to protection by society and the State of the family as “the natural and fundamental group unit of society”.⁵⁶

Article 32 of the Seychellois Constitution also guarantees the right to family life. “The State recognises that the family is the natural and fundamental element of society and the right of everyone to form a family and undertakes to promote the legal, economic and social protection of the family.”

The right to form a family extends to all people, including people living with HIV. This is recognised by the National HIV Policy, which provides that strategic programmes for discordant couples must be reoriented and geared towards family stability,⁵⁷ and that “special focus will also be placed on ensuring that all seropositive persons’ sexual and reproductive health rights shall be upheld.”⁵⁸

Acts that may violate a person living with HIV’s right to found a family may include pre-marital HIV testing that denies those testing positive the right to marry as well as acts that coerce or force people living with HIV not to have children, to terminate a pregnancy or to become sterilized.⁵⁹

iv) Right to Freedom of Movement

The right to freedom of movement encompasses the rights of everyone lawfully within a territory of a State to liberty of movement within that State and the freedom to choose his/her residence, as well as the rights of nationals to enter and leave their own country.

Article 25 of the Constitution guarantees that “every person lawfully present in Seychelles has a right of freedom of movement and for the purposes of this right includes the right to move freely within Seychelles, the right to reside in any part of Seychelles, the right to leave Seychelles and the right not to be expelled from Seychelles.” The right to freedom of movement may be restricted for various reasons, according to the Seychellois Constitution. It may be restricted in

⁵⁵ UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights*

⁵⁶ Article 16 of the Universal Declaration of Human Rights

⁵⁷ Para 83

⁵⁸ Para 63

⁵⁹ Although no incidents of forced or coerced sterilisation are known in Seychelles, the issue was raised as a concern during focus group discussions in order to ensure that the practice does not take place, as has been the case in several other countries in Southern Africa.

the interest of public safety, or public health; and for protecting the rights and freedoms of other person.⁶⁰ The right of freedom of movement can furthermore be restricted for the prevention of a crime or compliance with an order of a court; for the extradition of persons from Seychelles; and for the lawful removal from Seychelles of persons who are not citizens of Seychelles from Seychelles.⁶¹ The application of this limitation is seen in the Seychellois Immigration Decree, 1981, which contains a list of Prohibited Immigrants in Seychelles and may be used to deny entry to those applying to immigrate to Seychelles.

However, this limitation on the right to freedom of movement is generally unjustifiable in the context of HIV and AIDS. The UNAIDS *International Guidelines* have examined the issue of restricting freedom of movement (e.g. through HIV screening and denying entry to foreigners on the basis of HIV status) for purposes of public health, in the context of HIV and AIDS. They argue that there is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status and that measure to contain other infectious diseases should not be inappropriately applied to HIV and AIDS. These restrictions are argued to be discriminatory and unjustified by public health concerns.⁶² The *Guidelines* furthermore note that “Where States prohibit people living with HIV/AIDS from longer-term residency due to concerns about economic costs, States should not single out HIV/AIDS, as opposed to comparable conditions, for such treatment and should establish that such costs would indeed be incurred in the case of the individual alien seeking residency. In considering entry applications, humanitarian concerns, such as family reunification and the need for asylum, should outweigh economic considerations.”

This issue is discussed in further detail, in Part III, A below

v) Right to Liberty and Security of Person

Article 9 of the ICCPR provides that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law”.

The right to liberty is also reflected and guaranteed under Article 18 of the Seychellois Constitution which states that “[e]very person has a right to liberty and security of the person.”⁶³ Permissible restrictions of this rights in terms of the Constitution include “the arrest or detention to prevent the spread of infectious or contagious disease which constitute a serious threat to public health”,⁶⁴ as well as “the arrest and detention for the treatment and rehabilitation of a person who is, or reasonably suspected to be, of unsound mind or addicted to drugs to prevent harm to that person or to the community”.^{65 66}

⁶⁰ Art 25(3(a) & (b) Constitution of the Republic of Seychelles 1993

⁶¹ Art 25 (3) c-d Constitution of the Republic of Seychelles 1993

⁶² UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights*. According to the WHO (1969) *International Health Regulations*, the only disease which requires a certificate of inoculation for international travel is yellow fever.

⁶³ Art 18 Constitution of the Republic of Seychelles 1993

⁶⁴ Art 18(c) Constitution of the Republic of Seychelles 1993

⁶⁵ Art 18(d) Constitution of the Republic of Seychelles 1993

⁶⁶ These provisions have been applied to persons of unsound mind prior to the enactment of the Mental Health Act in 1996.

Although there has been limited discussion by UN committees on the right to liberty and security of the person in the context of HIV testing, the Special Rapporteur on the Right to Health has stated as follows:

“Guaranteeing informed consent is a fundamental feature of respecting an individual’s autonomy, self-determination and human dignity in an appropriate continuum of voluntary health care services . . . Informed consent invokes several elements of human rights that are indivisible, interdependent and interrelated. In addition to the right to health, these include the right to self-determination, freedom from discrimination, freedom from non-consensual experimentation, *security and dignity of the human person*, recognition before the law, freedom of thought and expression and reproductive self-determination.”⁶⁷

The *International Guidelines on HIV/AIDS and Human Rights* note that “compulsory HIV testing can constitute a deprivation of liberty and a violation of the right to security of a person” and that “respect for the right to physical integrity requires that testing be voluntary and that no testing be carried out without informed consent”. They furthermore note that these coercive measures are often used with regard to populations least able to protect themselves because they are within the ambit of government institutions (e.g. soldiers) or the criminal law (e.g. prisoners, sex workers, people who use drugs and men who have sex with men).⁶⁸ The *Guidelines* furthermore provide that deprivations of liberty (e.g. through quarantine, isolation or detention) on the basis of a person’s HIV status are not justified by public health concerns.⁶⁹ These issues are discussed in further detail in Part III, B, below.

The UNAIDS *International Guidelines* do recognize that restrictions on the right to liberty and security of the person may be warranted in exceptional cases concerning deliberate or dangerous behaviour (an example may be in the case of sexual violence that places others at risk of HIV infection). However, the *Guidelines* note that such exceptional cases should be handled under the ordinary provisions of public health, or criminal laws, with appropriate due process protection.⁷⁰

This has also been recognized under the National HIV Policy. This issue is discussed in further detail in Part III, C in the section on criminalization, below.

Excerpt of National HIV Policy

“Paragraph 64. Whilst human rights are at the centre of this policy, it is important to reiterate that rights also encompass responsibilities, especially those of respecting the rights of others to life and to health. Human rights do not mean that criminal behaviour will be tolerated. Appropriate legal procedures and proceedings will apply where national laws are not upheld.”

⁶⁷ Report of the Special Rapporteur on Health: Informed Consent (2009) at paras. 18-19, cited in Southern African Litigation Centre (2012) *Protecting Rights: Litigating Cases of HIV Testing and Confidentiality of HIV Status*.

⁶⁸ At para 135

⁶⁹ At para 133

⁷⁰ At para 134

vi) Right to Education

Article 26 of the UDHR states in part that “Everyone has the right to education. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship...”

The right to equal access to education is guaranteed under the Constitution. Under Article 33(b) “The State recognises the right of every citizen to education and with a view to ensuring the effective realisation of the right undertakes –(b)to ensure that the educational programmes in all schools are aimed at the complete development of the person; (c) to afford , on the basis of intellectual capacity, every citizen equal access to educational opportunities and facilities beyond the period of compulsory education.” This right is further guaranteed under the Education Act⁷¹ (and furthered in the Education Policy) which states that all persons are entitled to receive an educational programme appropriate to their needs in accordance with the Act.⁷²

Since all persons have the right to education, this right extends to people living with HIV. States should ensure that both children and adults living with HIV are not discriminatorily denied access to education, including access to schools, universities, scholarships and international education or subject to restrictions because of their HIV status. There is no public health rationale for such measures since there is no risk of transmitting HIV casually in educational settings. The Ministry of Education is currently developing an all-inclusive education policy that will cater for the special needs of all students; it should include provision for children living with HIV as well as children of people living with HIV.

vii) Right to the Highest Attainable Standard of Physical and Mental Health

The Universal Declaration of Human Rights states that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including... medical care”.⁷³ The International Covenant on Economic, Cultural and Social Rights (ICESCR) elaborates on this right, recognizing “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and placing an obligation on states to take steps to “achieve the full realization of this right”.⁷⁴ The right to the highest attainable standard of physical and mental health comprises, inter alia, “the prevention, treatment and control of epidemic...diseases” and “the creation of conditions which would assure to all medical service and medical attention in the event of sickness”.⁷⁵

International law obliges states to provide a range of available, accessible, acceptable and quality health care information and prevention and treatment services in recognising health rights. The CESCR’s General Comment No. 14 provides detailed guidance on the scope of Article 12(1) and the rights and duties it imposes on the state.⁷⁶ It recognises the importance of

⁷¹ Act 13 of 2004

⁷² S 40 Education Act 2004

⁷³ Article 27(1) *Universal Declaration of Human Rights* 1948.

⁷⁴ Article 12 *ICESCR* 1976

⁷⁵ Article 12, *ICESCR* 1976

⁷⁶ CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [*hereinafter* CESCR, General Comment No. 14], Available at

making a range of health services and information *available, accessible and acceptable* to allow individuals to engage in meaningful decision making regarding their health. This includes ensuring, *inter alia*, the following:

- Access to essential medicines as defined by the WHO Action Programme on Essential Drugs⁷⁷
- Health education and information, including sexual and reproductive health information should be available to all and should not be censored, withheld or intentionally misrepresented⁷⁸
- Provision for self-determination, including reproductive self-determination, through the protection of the right to freely consent to medical treatment⁷⁹
- Respect for medical ethics, including the confidentiality of medical information⁸⁰
- Provision for a system of health protection which provides equality of opportunity for people to enjoy the highest attainable standard of health,⁸¹ in terms of which “health facilities, goods and services have to be accessible to everyone without discrimination...especially the most vulnerable or marginalized sections of the population” including “persons with HIV/AIDS”⁸²

CESCR General Comment No 14 on the Right to the Highest Attainable Standard of Health

“The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.”⁸³

General Comment 14 furthermore recognises that the duties of States includes the duty, *inter alia*, “to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; [and] to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services”.³¹

In order to meet these obligations in the context of HIV, the UNAIDS *International Guidelines* recommend that States should ensure the provision of a range of services without discrimination and with a particular focus on vulnerable populations, including, *inter alia*, HIV-related information, education and support, including access to services for sexually transmitted diseases, the means of prevention (such as condoms and clean injection equipment), voluntary

<http://www2.ohchr.org/english/bodies/cescr/comments.htm>

⁷⁷ General Comment No. 14 at para 43 provides that central elements of the right to health also include medical care in the event of sickness, as well as the prevention, treatment and control of diseases, all of which depend upon access to medicines

⁷⁸ General Comment 14, para 34

⁷⁹ General Comment 14, para 8

⁸⁰ General Comment 14, para 12

⁸¹ General Comment No. 14 at para.8

⁸² General Comment No. 14 at para 12

⁸³ *Id.* at para. 8

and confidential HIV testing with pre-and post-test counseling as well as to treatment, care and support for those affected by HIV and AIDS.

Given that in practice, availability of medicines depends on affordability, which in turn depends on whether the price is within the reach of users, States are under a clear obligation to adopt measures to make medicines more affordable, and thus accessible. The *International Guidelines* recognise that this requires reviewing bilateral, regional and international agreements (such as those dealing with intellectual property) and national laws to promote access to affordable medicines.⁸⁴ Similarly, the recent GCHL report recognises the need for states to develop effective intellectual property regimes for pharmaceutical products that are consistent with international human rights law and public health needs, while safeguarding the justifiable rights of inventors. Part of the strategy to make medicines affordable must include, amongst other things, a patent framework that is flexible to incorporate public health needs.

With respect to marginalized populations, the *Guidelines* emphasise that “[s]tates may have to take special measures to ensure that all groups in society, particularly marginalized groups, have equal access to HIV-related prevention, care and treatment services. The human rights obligations of States to prevent discrimination and to assure medical service and medical attention for everyone in the event of sickness require States to ensure that no one is discriminated against in the health-care setting on the basis of their HIV status.”⁸⁵

In Seychelles, the Constitution guarantees the right to access to health care for all its citizens under Article 29, obliging the State to achieve the progressive realization of this right:

“(1) The State recognises the right of every citizen to protection of care health and to the enjoyment of the attainable standard of physical and mental health and with a view to ensuring the effective exercise of this right the State undertakes-

- (a) to take steps to provide for free primary health care in State institutions for all its citizens;
- (b) to take appropriate measures to prevent, treat and control epidemic, endemic and other diseases;
- (c) to take steps to reduce infant mortality and promote the healthy development of the child;
- (d) to promote individual responsibility in health matters; and
- (e) to allow, subject to such supervision and conditions as are necessary in a democratic society, for the establishment of private medical services.”

In terms of the Constitution, access to health care services is available to all citizens. The National HIV Policy furthermore recognises the importance of and commits to the provision of HIV-related prevention, treatment, care and support services without discrimination. It states that “[a]ll HIV-infected persons shall have access to appropriate and quality care including effective treatment of opportunistic infections, without discrimination. Anti-retroviral therapy will be made available to all HIV-positive patients.” It furthermore notes that “[s]pecial focus will also be placed on ensuring that all seropositive persons’ sexual and reproductive health rights shall be upheld.”

⁸⁴ At para 52 and 53

⁸⁵ UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights*, at para 146.

National HIV Policy - Paragraph 7: Policy and Position Statements

Seropositive persons shall have access to all types of health interventions (surgical, obstetric, gynecological or any other forms of health care) and social services (housing, education, employment and social security, bank loans, life and endowment insurance policies) as required. Freedom of movement shall not be restricted in any form.

The Public Health Act governs the provision of health care in Seychelles and is currently being updated. Likewise, in terms of intellectual property law, Seychelles is at a crucial point in time as it reviews its entire intellectual property framework under negotiations for accession to the World Trade Organization (WTO). Under that process, it is critical that Seychelles develop a patent law which makes full use of the flexibilities for public health. The specific obligations with respect to health services for HIV and AIDS and the extent to which these are met by Seychelles health law and policy is discussed in further detail in Part II, B, below.

viii) Right to an Adequate Standard of Living and Social Security Services

Article 25 of the Universal Declaration of Human Rights states that “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”. Similarly, Article 9 of the ICESCR recognizes the right of everyone to social security, including social insurance.

In the context of HIV and AIDS, the UNAIDS *International Guidelines* note the link between protecting people’s right to an adequate standard of living and reducing people’s vulnerability to the risk and consequences of HIV infection. They note that social security “is particularly relevant to meeting the needs of people living with HIV and AIDS, and/or their families, who have become impoverished by HIV and AIDS as a result of increased morbidity due to AIDS and/or discrimination which can result in unemployment, homelessness and poverty” and that people living with HIV should be prioritized as particularly vulnerable in the allocation of resources. States have to ensure that people living with HIV are not discriminatorily denied an adequate standard of living and/or social security and support services on the basis of their health status.⁸⁶

In Seychelles, the right to social security is guaranteed under Article 37 of the Constitution, which states that “[t]he State recognises the right of every citizen to a decent and dignified existence and with a view to ensuring that its citizens are not left unprovided for by reason of incapacity to work or involuntary unemploymentundertakes to maintain a system of social security.” This is further supplemented under the Social Security Act 2008 and its Social Security (Benefits) Regulations 2010 and the Agency for Social Protection Act, 2011;⁸⁷ both of which are administered by the Agency for Social Protection.

⁸⁶ At para 148

⁸⁷ Act 25 of 2011

The National HIV Policy furthermore recognises the needs of people living with HIV and provides that the existing social support system should be strengthened and expanded to meet the needs of people living with HIV, their carers and affected families, including orphans and vulnerable children it furthermore provides that welfare assistance and legal advice will be made available to people living with HIV and their families based on their needs. This is discussed further in Part III, F, below.

ix) Right to Work

The UDHR protects employment rights. It states that “[e]veryone has the right to work...[and] to just and favourable conditions of work”.⁸⁸ Article 6 of the ICESCR furthermore recognises 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”.⁸⁹ In the Seychelles, Article 35 of the Constitution guarantees the right to work. It provides as follows:

“[t]he State recognises the right of every citizen to work and to just and favourable conditions of work and with a view to ensuring the effective realization of the right undertakes –

(a) to take necessary measures to achieve and maintain a high and stable level of employment, as is practicable, with a view to attaining full employment;

(b) subject to such restrictions that are necessary in a democratic state, to protect effectively the right of every citizen to earn a dignified living in a freely chosen occupation, profession or trade;”

(d) to make and enforce statutory provisions for safe, healthy and fair conditions of work, including reasonable rest, leisure paid holidays, remuneration which guarantees as a minimum, dignified and decent living conditions for the workers and their families, fair and equal wages for work of equal value without distinction and stability of employment”

At an international level, the concept of non-discrimination on the basis of HIV status in the working environment is well established. Article 6 of the ICESCR read with the principle of non-discrimination in the Covenant has been recognized by the CESCR as requiring States to guarantee that the right to work is exercised without discrimination on the basis of health status, including HIV or AIDS:

“Under its article 2, paragraph 2, and article 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality.”⁹⁰

The UNAIDS *International Guidelines on HIV/AIDS and Human Rights* recognize that the right to work entails the right of every person to access to employment without any pre-condition

⁸⁸ Article 23 Universal Declaration of Human Rights

⁸⁹ Article 6(1) International Covenant on Economic, Social and Cultural Rights

⁹⁰ Committee on Economic, Social and Cultural Rights 35th session 2005 General Comment No.18 at para 12(b)

except the necessary occupational qualifications. For this reason, they argue that this right is violated when an applicant or employee is forced to test for HIV, is refused employment, dismissed or refused access to employee benefits on the basis of being HIV-positive.⁹¹ They furthermore recognize that the right to favourable conditions of work (including safe and healthy working conditions) requires employers to protect employees from the risk of occupational infection with HIV.⁹²

The International Labour Organisation (ILO) has also set out detailed guidance on HIV-related workplace rights. In its most recent *Recommendation concerning HIV & AIDS and the World of Work* 200 of 2010, it commits member states “to tap into the immense contribution that the world of work can make to ensuring universal access to prevention, treatment, care and support” for HIV and AIDS. The Recommendations apply to all workplaces, including the private and public sector, as well as to all workers including employees, job applicants, trainees, interns and members of the armed and security forces. They recognize the need to strengthen workplace prevention efforts and to facilitate access to treatment for persons living with or affected by HIV and AIDS and call for the design and implementation of national tripartite workplace policies and programmes on HIV and AIDS to be integrated into overall national policies and strategies on HIV and AIDS and on development and social protection. The Recommendation also invites member States to implement its provisions through amendment or adoption of national legislation where appropriate.⁹³

Recommendation Concerning HIV and AIDS & the World of Work 200 of 2010

General principles

- (a) the response to HIV and AIDS should be recognized as contributing to the realization of human rights and fundamental freedoms and gender equality for all, including workers, their families and their dependants;
- (b) HIV and AIDS should be recognized and treated as a workplace issue, which should be included among the essential elements of the national, regional and international response to the pandemic with full participation of organizations of employers and workers;
- (c) there should be no discrimination against or stigmatization of workers, in particular jobseekers and job applicants, on the grounds of real or perceived HIV status or the fact that they belong to regions of the world or segments of the population perceived to be at greater risk of or more vulnerable to HIV infection;
- (d) prevention of all means of HIV transmission should be a fundamental priority;
- (e) workers, their families and their dependants should have access to and benefit from prevention, treatment, care and support in relation to HIV and AIDS, and the workplace should play a role in facilitating access to these services;
- (f) workers’ participation and engagement in the design, implementation and evaluation of national and workplace programmes should be recognized and reinforced.

⁹¹ At para 149

⁹² At para 150

⁹³ ILO Recommendation 200 of 2010

With respect to workers' rights, the ILO Recommendation calls for, amongst other things:

- Non-discrimination on the basis of real or perceived HIV status
- Gender equality in the working environment
- Reasonable accommodation for workers with HIV within the working environment
- Protecting sexual and reproductive health rights of workers
- Prevention, treatment and care strategies within the working environment
- The provision of a safe and healthy working environment for all, including measures to prevent occupational infection with HIV
- A prohibition on compulsory HIV testing and disclosure of HIV status of workers, including migrant workers, job seekers and job applicants, while encouraging voluntary and confidential HIV testing

Recommendation Concerning HIV/AIDS and the World of Work, 200 of 2010

27. Workers, including migrant workers, jobseekers and job applicants, should not be required by countries of origin, of transit or of destination to disclose HIV-related information about themselves or others. Access to such information should be governed by rules of confidentiality consistent with the ILO code of practice on the protection of workers' personal data, 1997, and other relevant international data protection standards.

28. Migrant workers, or those seeking to migrate for employment, should not be excluded from migration by the countries of origin, of transit or of destination on the basis of their real or perceived HIV status.

In terms of accommodating workers with HIV, Recommendation 200 of 2010 provides that States should ensure that persons with living with HIV are allowed to work as long as they can carry out the functions of the job. Thereafter, as with any other illness, people living with HIV should be provided with reasonable accommodation to be able to continue working as long as possible and, when no longer able to work, be given equal access to existing sickness and disability schemes. The applicant or employee should not be required to disclose his or her HIV status to the employer nor in connection with his or her access to workers' compensation, pension benefits and health insurance schemes.

Other relevant international employment-related documents which States need to consider include the following:

- ILO Code of Practice on HIV and AIDS, 2001
- Discrimination (Employment and Occupation) Convention, 1958
- Termination of Employment Convention, 1982
- Occupational Safety and Health Convention, 1981,
- Promotional Framework for Occupational Safety and Health Convention, 2006
- Joint International Labour Office and WHO guidance documents.
- Tripartite Consultation (International Labour Standards) Convention, 1976
- Joint ILO/WHO Guidelines on Health Services and HIV/AIDS, 2005

Seychelles has ratified the Occupational Safety and Health Convention, 1981 and Tripartite Consultation (International Labour Standards) Convention, 1976. There are discussions for

future ratification of the Promotional Framework Occupational Health and Safety Convention, 2006.

In terms of national law, section 46A (1) of the Employment Act, 1995 specifically provides for non-discrimination in employment. It states that “Where an employer makes an employment decision against a worker on the grounds of the worker’s age, gender, race, colour, nationality, language, religion, disability, **HIV status**, sexual orientation or political, trade union or other association, the worker may make a complaint to the Chief Executive stating all the relevant particulars.”

The Republic of Seychelles (2007) *Policy on HIV and AIDS in the Workplace* (the “Workplace HIV Policy”) in 2007 recognises the ILO *Code of Practice on HIV and AIDS*, 2001 and incorporates many of the employment rights set out above. This is discussed in further detail in Part III, D, below. However, the Workplace HIV Policy was due for revision in 2009, two years after its adoption, although the review is yet to take place. A review of the Workplace HIV Policy should take into account the updated Recommendation 200 of 2010 which signals a move by ILO constituents to raise the response of the world of work to HIV and AIDS to a new level through the adoption of an international labour standard.

x) Freedom from Cruel, Inhuman or Degrading Treatment or Punishment

Article 7 of the ICCPR prohibits the use of torture, cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has said that the aim of article 7 is to “protect both the dignity and the physical and mental integrity of the individual”⁹⁴ from not only acts that cause physical pain but also acts that cause mental suffering.

In Seychelles Article 16 of the Constitution states that “Every person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment”.

In international law, the right to freedom from cruel, inhuman or degrading treatment or punishment often focuses on the treatment of prisoners, protecting prisoners from actions that cause physical and mental pain and suffering. In the context of HIV and AIDS, the *International Guidelines* emphasize that while imprisonment is punishment by deprivation of liberty, it should not result in the loss of human rights or dignity. The *Guidelines* provide that the duty of care owed to prisoners includes the duty to protect the rights to life and to health of all persons in custody. In the context of HIV and AIDS, they note that the denial to prisoners of access to HIV-related information, education and the means of prevention (bleach, condoms, clean injection equipment), voluntary testing and counseling, confidentiality and HIV-related health care and access to and voluntary participation in treatment trials, could constitute cruel, inhuman or degrading treatment or punishment.⁹⁵ The *Guidelines* furthermore provide that:

- The duty of care towards prisoners also comprises a duty to combat prison rape and other forms of sexual victimization that may result, *inter alia*, in HIV transmission;

⁹⁴ Human Rights Committee, 44th Session, 1992, General Comment No. 20 at para 2

⁹⁵ UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights* at para 15

- There is no public health or security justification for mandatory HIV testing of prisoners, nor for segregation or denying inmates living with HIV access to all activities available to the rest of the prison population; and
- Prisoners with terminal diseases, including AIDS, should be considered for early release and given proper treatment outside prison.⁹⁶

The Republic of Seychelles National HIV Policy notes anecdotal evidence regarding the risk of HIV infection in the prisons through sexual relationships, injecting drug use, rape and sexual assault. It commits to strengthening health care services to prisoners, to ensure that prisoners have a range of reproductive health services including condom availability and accessibility.

The main legislation governing the prisons service in the country is the Prisons Act, 1991. The Act outlines various principles by which the prison should be guided in its daily operation. These are further supplemented by the Prison Regulations 1999. In addition, the Seychelles Prison Service recently adopted its *Management and Rehabilitation Plan* for 2012-2016. The Plan has as its overall Strategic Imperative “to develop and implement a human rights approach to prison management which meets minimum international standards.”

A further analysis of the extent to which the prisons service currently meets international standards for HIV and AIDS is dealt with in Part III, C below.

In addition to prisoners, the right to freedom from cruel, inhuman or degrading treatment is important in various other ways in the context of HIV. It applies to all persons (the Human Rights Committee notes that it may protect, in particular, children, pupils and patients in teaching and medical institutions),⁹⁷ and to a range of acts, as noted above. The right to freedom from cruel, inhuman and degrading treatment may be relevant in any acts of discrimination on the basis of HIV or other status, which cause physical or mental suffering. Examples may include where a person living with HIV is stigmatized by health care workers and coerced into an unwanted medical procedure.⁹⁸ Violations may also include acts of physical and mental abuse, harassment and cruel treatment of key populations, such as people who inject drugs, commercial sex workers and men who have sex with men, at the hands of law enforcement officials. The GCHL investigation into the impact of punitive practices against key populations shows how these violations not only cause untold pain and suffering, but also block their access to critical HIV-related health care services.⁹⁹ This is dealt with in further detail in Part III, C below.

⁹⁶ At para 153

⁹⁷ Human Rights Committee General Comment No 20 at para 5

⁹⁸ Southern African Litigation Centre (2011) *Equal Rights for All: Litigating cases of HIV-related discrimination* at pg. 30

⁹⁹ Global Commission on HIV and the Law (2012), *Risks, Rights & Health*

PART III.

A. Equality/Anti-Discrimination Law and Policy

i) HIV-Related Stigma and Discrimination in Seychelles

The GCHL's recent investigation into HIV, law and human rights reported that around the world, people living with HIV continue to feel the impact of stigma, discrimination, marginalization and abuse, both verbal and physical, in their homes, families, communities and in public institutions.¹⁰⁰ In the Seychelles, CSOs working with people living with HIV and affected populations have provided anecdotal evidence of the kinds of stigma and discrimination experienced, including:

- HIV testing for purposes of marriage (in the case of marriage to foreigners);
- HIV testing for purposes of application for a dependent's permit (in the case of foreigners);
- HIV testing and denial of insurance and/or bank loans to people living with HIV;
- Discrimination in schools against children affected by HIV and AIDS;
- Discrimination in places of worship;
- Pre-employment HIV testing and denial of employment in certain employment sectors (e.g. hotel industry, airlines,) and of certain categories of employment (e.g. foreign / migrant workers);
- Dismissals from employment on the basis of HIV status;
- Stigmatizing and discriminatory treatment in access to health care services;
- Instances of HIV testing without voluntary and informed consent and without adequate pre- and post-test counseling (e.g. in health care services; for people who use drugs on entry into rehabilitation; for prisoners, on entry into prisons); and
- Breaches of confidentiality¹⁰¹

According to participants in these focus group discussions, stigma and discrimination leads to increased isolation, self-stigma and fear amongst affected populations and makes people unwilling or afraid of accessing HIV testing, prevention, treatment, care and support services.

Current Position

Stigmatizing and discriminatory policies and practices continue to affect people living with HIV, despite the constitutional right of every person to equal protection of the law and freedom from discrimination under Article 27 of the Constitution. This section examines discriminatory policies and practices with respect to non-citizens (in particular, foreigners and migrant workers) and with respect to people applying for insurance and bank loans. Discrimination within the health

¹⁰⁰ GCHL (2012) *Risks, Rights & Health*, pg 17

¹⁰¹ Focus Group Discussions, Prisoners, 3rd April 2013; Migrant Workers, 25th March 2013; People Living with HIV, 16th March 2013; Nurses: Hospital Services, 11th March 2013; People who use drugs, 5th March 2013; Community Nurses, 6th March 2013; Peer Educators, 9th March 2013.

care, employment and education sector is dealt with in further detail in Part III, B, D and E, respectively, below.

ii) Foreigners/Migrants

According to the GCHL *Risks, Rights & Health*, “[m]igration policies—restrictions on entry, stay and residence in a country - disempower people, exposing them to exploitation, changing their sexual behaviours and increasing the likelihood of unsafe practices. As a result, migrants face a risk of HIV infection that is as much as 3 times higher than that faced by people with secure homes.”¹⁰²

The rights of migrant workers, whose labour supports the global economy, have been fully articulated in numerous international conventions. The International Labour Organization’s 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, provides migrant workers and their families the right “to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with national of the State concerned.” As has been discussed in Part II, the ILO Recommendation 200 of 2010 specifically notes that migrant workers should not be required by countries of origin, transit or destination to disclose their HIV-related information nor should they be excluded from migration on the basis of their real or perceived HIV status.¹⁰³

However, in many countries, laws and policies erect barriers to access to HIV services for migrants. A UNAIDS review of HIV-related entry, stay and residence regulations found that 10 countries refuse entry to HIV-positive people and 22 countries deport individuals if their HIV status is discovered. Blanket exclusions of people living with HIV are often justified on the grounds of safeguarding public health. However, the GCHL argues that “evidence shows that they do no such thing. In fact, such policies give the dangerous mistaken impression that “outsiders” are contaminated and citizens are pure, and that their health is secure so long as the borders are secured.”¹⁰⁴

Current Situation

In the Seychelles, section 19(1)(a) of the Immigration Decree, 1981 states that applicants for a dependent’s permit,¹⁰⁵ a residence permit,¹⁰⁶ a visitors permit¹⁰⁷ and a gainful occupation permit¹⁰⁸ may be refused the above-mentioned permits if they are “Prohibited Immigrants”. Prohibited immigrants include, amongst others:

¹⁰² At page 59

¹⁰³ ILO (2010) *Recommendation Concerning HIV & AIDS in the World of Work* at paras 27 and 28

¹⁰⁴ GCHL (2012), *Risks, Rights & Health*, at page 61.

¹⁰⁵ S 14 Immigration Decree 1981

¹⁰⁶ S 15 Immigration Decree 1981

¹⁰⁷ S 16 Immigration Decree 1981

¹⁰⁸ S 17 Immigration Decree 1981

- any person who is infected or inflicted with or is a carrier of a prescribed disease and who is capable or likely to become capable of infecting any other person with such disease or of transmitting to him such disease¹⁰⁹
- any prostitute or any person who in Seychelles has knowingly lived wholly or in part on the earnings of prostitution or has procured any other person for immoral purposes¹¹⁰
- any person who is likely to become a charge on the Republic in consequence of his inability to support himself or any of his dependants in Seychelles and to provide for the removal of himself or such dependants from Seychelles,¹¹¹ and
- any person who has been sentenced in any country including Seychelles to a term of imprisonment following on his conviction for an offence and has not received a free pardon¹¹²

In addition, a permit may be revoked for similar reasons, in which case a prohibited immigrant would be served a notice to leave Seychelles within the specified time frame.¹¹³ An immigration officer may arrest and detain a person on whom a notice has been served while arrangements are made for their departure. Furthermore, under section 22 an immigration officer is empowered to detain a person whom he reasonably suspects of being a prohibited immigrant for a period of up to 14 days to make enquiries, including submitting the immigrant to a medical examination. A prohibited immigrant who fails to leave Seychelles within the prescribed time period may be arrested, detained and deported.

It is important to note that Article 25(5) of the Constitution of Seychelles states that “[a] law providing for the lawful removal from Seychelles of persons lawfully present in Seychelles shall provide for the submission, prior to removal, of the reasons for the removal and for review by a competent authority of the order of removal.” This means that the Immigration Decree would need to ensure provision of submission of reasons for the removal of a Prohibited Immigrant as well as make allowances for the review of any such decisions. Currently, the provisions of the Immigration Decree allowing for this are as follows:

S 20.(1) An immigrant officer may, and, in the case of a person to whom section 19 (a) (i) relates, shall, by notice served on any prohibited immigrant, require him to leave Seychelles; (2) A notice served under subsection (1) shall specify in relation to the person on whom it is served- (a) the reason why he is considered to be a prohibited immigrant; (b) the period within which he is required to leave Seychelles; and (c) the manner and route by which he shall travel in leaving Seychelles.

21.(1) Any person served with a notice under section 20 to leave Seychelles who, on receipt of such notice, has lawfully remained in Seychelles no longer than 7 days, may, within 48 hours of receiving such notice, deliver to any immigration officer, police officer or prison officer written representations to the Minister against such notice and such representations shall be placed before the Minister without delay; (2) If, after considering such representations, the Minister

¹⁰⁹ Section 19(1)(a)

¹¹⁰ Section 19(1)(b)

¹¹¹ Section 19(1)(e)(i)

¹¹² Section 19(1)(h)

¹¹³ Section 20

does not think fit to exercise his powers in relation to the issue of permits or the exemption of persons under section 19 (2), the person who made such representations ...have been unsuccessful; and (3) The decision of the Minister under this section shall be final and shall not be challenged in any court.

In Seychelles, foreigners wishing to apply for a Gainful Occupation Permit have to submit their application form together with a medical fitness certificate. A list of minimum requirements is attached with the form and it includes provision for HIV testing. In practice, the candidates undertake the tests at an approved institution in their country of origin. The results are verified by the Ministry of Health, the only accredited facility locally. The Ministry then forwards the medical fitness certificate to Immigration without stating details of the tests undertaken.¹¹⁴ The Gainful Occupation Permit is valid for 2 years and upon renewal, the medical examination is required to be renewed. Depending on the type of employment (e.g. food handlers) regular medical tests may be required on the basis of public health requirements.¹¹⁵

Similarly, Applications for residence permits and for dependent's permit require a medical fitness certificate from any doctor. Additionally, in the past foreigners wishing to marry a Seychellois were required to undertake pre-marital HIV testing; however this practice is reported to have been discontinued.¹¹⁶

In all cases, applicants testing HIV-positive may be refused entry or asked to leave Seychelles. The reason for this is argued to be on the grounds of the costs in medical care that the government may incur in providing treatment for immigrants with HIV.¹¹⁷

In the Public Service, 'expatriate employees' are permitted to access primary health care at state facilities, provided that they have a special identification card issues to them by the Public Service.

Public Service Order 2011

36. Health Services for Expatriate Employees

“Government is responsible to meet the primary health care costs of expatriates in Government employment and that of their dependants who are provided with special identification cards to be issued by the Authority responsible for Public Administration, which shall be presented at government health facilities for this purpose. An expatriate who does not present the designated government employee identification, will be charged for services provided at government health facilities. The cards will remain the property of the government.

Each card will be valid for the duration of the expatriate's contract of employment with government. It must be surrendered, together with those of any dependants, to the Authority responsible for Public Administration upon completion or determination of the contract, or upon the demand of Government.”

¹¹⁴ Personal Communication with Dr. Shoba Harjanis, national consultative workshop on 21st February 2013

¹¹⁵ Public Services Orders 2011 paragraph 35

¹¹⁶ KII Civil Status Department, 7 February 2013; Discussions TWG; FGD PLHIV, 16 March 2013; KII HASO 12 December 2012

¹¹⁷ KII Immigration Department, 7 February 2012; Discussions TWG Meeting Feb 21 2013

The mandatory HIV testing of foreigners and denial of entry or right to stay in Seychelles on the basis of HIV status is contrary to the recommendations of the UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights* which views this as a violation of the right to freedom of movement which is not justified on the basis of public health.¹¹⁸ The *Guidelines* furthermore note that “Where States prohibit people living with HIV/AIDS from longer-term residency due to concerns about economic costs, States should not single out HIV/AIDS, as opposed to comparable conditions, for such treatment and should establish that such costs would indeed be incurred in the case of the individual alien seeking residency. In considering entry applications, humanitarian concerns, such as family reunification and the need for asylum, should outweigh economic considerations.” The GCHL also argues that restrictions such as these are not only inconsistent with human rights obligations but also do not promote effective responses to HIV.

Recommendations

The GCHL (2012) *Risks, Rights & Health* recommends that, to ensure an effective, sustainable response to HIV that is consistent with human rights obligations States should:

- Offer the same standard of protection to migrants, visitors and residents who are not citizens as they do to their own citizens.
- Repeal travel and other restrictions that prohibit people living with HIV from entering a country and/or regulations that mandate HIV tests for foreigners within a country.
- Implement regulatory reform to allow for legal registration of migrants with health services and to ensure that migrants can access the same quality of HIV prevention, treatment and care services and commodities that are available to citizens. All HIV testing and STI screening for migrants must be informed and voluntary, and all treatment and prophylaxis for migrants must be ethical and medically indicated.

This would require the amendment and review of Seychelles law and/or policy to ensure that:

To ensure an effective, sustainable response to HIV that is consistent with human rights obligations:

- Repeal those provisions of immigration legislation and regulations that exclude migrant workers from employment or foreigners from residing in the Seychelles solely on the basis of their HIV status (i.e. ensure that HIV and AIDS is not viewed as a “prescribed disease” in terms of the Immigration Decree and that HIV and AIDS is not viewed as a justifiable public health concern for excluding persons from Seychelles).
- Ensure that medical examinations for purposes of immigrant applications do not include a compulsory HIV test,
- Implement regulatory reform to ensure that migrant workers and foreigners can access the same quality of HIV prevention, treatment and care services and commodities that

¹¹⁸ UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights*. According to the WHO (1969) *International Health Regulations*, the only disease which requires a certificate of inoculation for international travel is yellow fever.

are available to citizens. All HIV testing and STI screening for migrant workers and foreigners must be confidential, voluntary and with informed consent¹¹⁹.

- Ensure that employers' contracts with migrant workers and foreigners make provision for the employer to assume responsibility for all health care costs of the employee during the period of the employee's employment with the employer.
- Enact legislation to give legal effect to the provisions of the Policy on HIV and AIDS in the Workplaces, including on the prohibition of HIV-related discrimination in the workplace.

iii) Access to Insurance/Bank loans

HIV and AIDS impact on the lives of those affected in a multitude of ways, including economic impacts due to, for example, costs of medical care or loss of earnings. For this reason, discrimination which denies access to facilities such as insurance or loans, against people living with HIV, serves to exacerbate the impact of HIV and AIDS upon their lives. The UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights* recommend, in Guideline 5, that States should enact or strengthen anti-discrimination and other protective laws that protect people living with HIV and vulnerable populations from discrimination in both the public and the *private* sectors. This should include protection from discrimination in insurance; the *Guidelines* say that “[e]xemptions for superannuation and life insurance should only relate to reasonable actuarial data, so that HIV is not treated differently from analogous medical conditions.”¹²⁰

This is supported by the Republic of Seychelles' National HIV Policy which specifically states that “[s]eropositive persons shall have access to ... social services (housing, education, employment and social security, bank loans, life and endowment insurance policies) as required.”¹²¹

Current situation

In Seychelles, some insurance policies (including life insurance and medical insurance) currently require medical examinations as part of the application process, including HIV tests.¹²²

A medical practitioner acting on behalf of the insurance company is required to complete the medical report on an applicant's application form. Applicants are asked whether they have undertaken HIV tests or AIDS tests in the past and are required to disclose details of previous HIV test results. Any declarations that include false or misleading information may result in a policy not being approved. In addition, in some cases the application form provides for the applicant to give

¹¹⁹ In terms of Public Service Order 2011 para 36 Government is responsible for meeting the primary health care costs of expatriates in Government employment and that of their dependants. This applies however only to Government employees. It is also not clear whether primary health care covers the provision of antiretroviral treatment.

¹²⁰ At page 32

¹²¹ Paragraph 62

¹²² Information provided by: KII Harry Savy Insurance Company, 28 February 2013; www.sacos.sc; See also Focus Group Discussions, People Living with HIV, 16th March 2013; KII HASO, 12 December 2012

consent for the assurer to access the applicant's previous medical information from any doctor and as well to access information from previous insurance applications or agreements.¹²³

Persons who are found to be HIV-positive are either refused insurance or are given insurance at very high premiums. This not only impacts upon the ability of people living with HIV to access insurance, but may also impact on access to bank loans. According to bank regulations, persons seeking bank loans, including home loans, may require life insurance as a guarantee for the loan. Where they are unable to access life insurance due to testing HIV-positive, they may be unable to access a bank loan.¹²⁴

Recommendations

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

¹²³ Application forms for Harry Savy Insurance Company and State Assurance Company of Seychelles Group Ltd.; KII Harry Savy Insurance Company, 28 February 2013; www.sacos.sc ;

¹²⁴ Personal communication Mauritius Union Assurance Company Ltd. January 2013; KII Harry Savy Insurance Company, 28 February 2013; KII HASO, 12 December 2012

B. Health laws, policies and plans

International guidance on creating enabling legal frameworks for HIV responses recommends that public health and related laws protect and promote rights in the context of HIV and AIDS, rather than provide for coercive, punitive and/or discriminatory responses.¹²⁵ The *International Guidelines on HIV/AIDS and Human Rights* recommend that states should review, amend and adopt, where necessary, appropriate public health laws, policies, plans and programmes to protect rights in the context of HIV and AIDS and to provide universal access to HIV prevention, treatment, care and support for all populations. This includes reviewing intellectual property laws to ensure access to affordable medicines, as furthermore recommended by the Global Commission on HIV and the Law's *Risks, Rights & Health*.

UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights*

Guideline 3: Public Health Legislation

States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV and that they are consistent with international human rights obligations.

Guideline 6: Access to prevention, treatment, care and support (as revised in 2002)

States should enact legislation to provide for the regulation of HIV-related goods, services and information, so as to ensure widespread availability of quality prevention measures and services, adequate HIV prevention and care information, and safe and effective medication at an affordable price.

States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV prevention, treatment, care and support, including antiretroviral and other safe and effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV and related opportunistic infections and conditions.

States should take such measures at both the domestic and international levels, with particular attention to vulnerable individuals and populations.

The commentary to the various guidelines set out above provides detailed recommendations to states on the kinds of laws, policies and programmes that should be put in place, in line with international and national human rights commitments, in order to develop rights-based and effective responses to HIV.

They stipulate that public health and related laws should do the following, amongst other things:

- Provide for HIV testing only with voluntary and informed consent (apart from surveillance and other unlinked epidemiological testing) and with pre- and post-test counseling and

¹²⁵ See, for instance, OHCHR and UNAIDS (2006) *International Guidelines on HIV and Human Rights*; UNAIDS (2010) *Getting to Zero*; Global Commission on HIV and the Law (2012) *Risks, Rights & Health*.

require any exceptions to voluntary HIV testing to take place only on specific judicial authorization, granted only after due evaluation of the important considerations involved in terms of privacy and liberty.

- Protect people from coercive measures such as isolation, detention or quarantine on the basis of their HIV status.
- Protect the right to confidentiality, including:
 - Ensuring that HIV and AIDS cases reported to public health authorities for epidemiological purposes are subject to strict rules of data protection and confidentiality.
 - Authorising (but not requiring) disclosures of a person’s HIV status by a health care worker in defined circumstances where a real risk of HIV transmission exists, following counseling and discussions with the person with HIV.

UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights*

Commentary to Guideline 3:

“Public health legislation should authorize, but not require, that health-care professionals decide, on the basis of each individual case and ethical considerations, whether to inform their patients’ sexual partners of the HIV status of their patient. Such a decision should only be made in accordance with the following criteria:

- (i) The HIV-positive person in question has been thoroughly counselled;
- (ii) Counselling of the HIV-positive person has failed to achieve appropriate behavioural changes;
- (iii) The HIV-positive person has refused to notify, or consent to the notification of his/her partner(s);
- (iv) A real risk of HIV transmission to the partner(s) exists;
- (v) The HIV-positive person is given reasonable advance notice;
- (vi) The identity of the HIV-positive person is concealed from the partner(s), if this is possible in practice; and
- (vii) Follow-up is provided to ensure support to those involved, as necessary.”

- Ensure that the blood/tissue/organ supply is free of HIV and other blood-borne diseases.
- Require the implementation of “universal precautions” to prevent transmission in settings such as hospitals, doctors’ offices, dental practices and acupuncture clinics.
- Require that health-care workers undergo a minimum of ethics and/or human rights training and encourage professional societies of health-care workers to develop and enforce codes of conduct based on human rights and ethics, including HIV-related issues such as confidentiality and the duty to provide treatment
- Provide (through the review, amendment and adoption of laws, policies, plans and programmes where appropriate) universal and equal access, without discrimination, to available, accessible, appropriate, affordable and quality medicines, diagnostics and related technologies for HIV and AIDS

- Include positive measures to address factors that block equal access to prevention, treatment, care and support for vulnerable populations and to strengthen the involvement of communities in the HIV response.

The Global Commission on HIV and the Law's *Risks, Rights & Health* looks in particular at the impact of intellectual property and other laws on access to treatment for HIV and AIDS. It notes that a growing body of international trade law and the over-reach of intellectual property protections are impeding the production and distribution of low-cost generic medicines, which impacts most severely on low and middle-income countries. It recommends that countries develop an effective intellectual property regime that is consistent with international human rights laws and public health needs, while safeguarding the justifiable rights of inventors. In particular, it recommends amongst other things:

- All countries must adopt and observe a global moratorium on the inclusion of any intellectual property provisions in any international treaty that would limit the ability of countries to retain policy options to reduce the cost of HIV-related treatment
- All countries should, to the extent possible, incorporate and use TRIPS flexibilities, consistent with safeguards in the own national laws
- Countries with manufacturing capacity and those reliant on the importation of pharmaceutical products must retain the policy space to use TRIPS flexibilities as broadly and simply as they can
- Low and middle-income countries must facilitate collaboration and sharing of technical expertise in pursuing the full use of TRIPS exceptions (for instance, by issuing compulsory licenses for ARVs and medicines for co-infections such as hepatitis C). Both importer and exporter countries must adopt straightforward, easy-to-use domestic provisions to facilitate the use of TRIPS flexibilities.
- Developing countries should desist from adopting TRIPS-plus provisions including anti-counterfeiting legislation that inaccurately conflates the problem of counterfeit or substandard medicines with generics and thus impedes access to affordable HIV-related treatment.
- Countries must proactively use other areas of law and policy such as competition law, price control policy and procurement law which can help increase access to pharmaceutical products.

Current position

Constitutional Rights

As set out in above, article 29 of the Constitution of the Republic of Seychelles, 1993 protects the right to health care. This right extends to all persons including those affected by HIV and AIDS.

Article 20 furthermore guarantees the right to privacy, which also encompasses obligations to respect a person's physical privacy. This right is also relevant to health rights, particularly since

the Constitution states that the right to privacy may be limited for reasons of public health.¹²⁶ As discussed in Part II, above, the right to privacy requires that all health interventions (such as HIV testing) be undertaken only with an individual's consent and with due respect for the confidentiality of all information relating to a person's HIV status, mandatory HIV testing is viewed as an unjustifiable limit on the right to privacy for public health reasons.

Finally, article 18 guarantees the right of every person to liberty and security of the person. This protects the rights of all people, including people living with or affected by HIV, from unjustifiable detention or quarantine and is furthermore argued to protect affected populations from being forced to undergo medical interventions (such as mandatory HIV testing), as set out in Part II, above. The Seychellois Constitution specifically provides that the right to liberty may be restricted in certain circumstances including "arrest or detention to prevent the spread of infectious or contagious disease which constitute a serious threat to public health"¹²⁷ and "arrest and detention for the treatment and rehabilitation of a person who is, or reasonably suspected to be, of unsound mind or addicted to drugs to prevent harm to that person or to the community".¹²⁸

Although there is no HIV-specific legislation in Seychelles, the current health rights of people living with and affected by HIV and AIDS are reflected in national health and related laws, policies, plans and programmes. These are discussed broadly, below. Following that, specific key issues of concern (such as isolation and detention of patients, HIV testing, confidentiality, access to HIV-related prevention, treatment, care and support) are discussed in further detail.

Public Health Legislation

The current Public Health Act, 1960 regulates public health in Seychelles. The Act is currently under review and there is a Public Health Bill, 2012. Regulations made in terms of the existing Act will remain in force until such time as they are replaced in terms of the new Act. The existing Public Health Act, 1960 does not contain specific provisions relating to HIV and AIDS. However, the broad provisions of the Act, applicable to all persons and to all matters of public health, would apply equally to people affected by HIV and AIDS.

Health and HIV Policies, Strategies and Plans

Seychellois health strategies, policies and plans reflect recognition of health, including sexual and reproductive health, as a fundamental human right and a commitment to protecting human rights in the provision and enjoyment of health. The Ministry of Health's *National Strategic Plan*

¹²⁶ Section 20(2)(a) states that "[a]nything contained in or done under the authority of any law shall not be held to be inconsistent with or in contravention of clause (1) (a) to the extent that the law in question makes provision (a) that is reasonably required in the interest of defence, public safety, public order, public morality, **public health**, the administration of Government, town and country planning, nature conservation and the economic development and well-being of the country.

¹²⁷ Art 18(c) Constitution of the Republic of Seychelles, 1993

¹²⁸ Art 18(d) Constitution of the Republic of Seychelles, 1993. These provisions under the Constitution were used in relation to persons with mental disabilities prior to the enactment of the Mental Health Act in 1996.

2006-2016 and the *National Health Strategic Framework 2006-2010* provide a broad overall framework for health. The *Strategic Framework* aims to provide all the people in Seychelles with the highest possible level of physical, social, spiritual and mental well-being. It recognises that health is a fundamental right of every citizen. The *National Health Policy* of 2005 confirms government's commitment to ensure that health services are available to all Seychellois without discrimination. The Republic of Seychelles (2007) *National Population Policy for Sustainable Development* aims to improve the quality of life and standard of living of the people through population and development policies and programmes designed to provide sustainable development. The Policy recognises HIV and AIDS as a concern. It includes a commitment to human rights, gender equality and the right of all individuals to have proper prevention and treatment for HIV and AIDS, amongst other things.

In addition, the recent *Draft National Policy on Sexual and Reproductive Health* affirms the government's commitment to respect the right of every person to the highest attainable standard of health and to ensure that services are provided in an equitable way to those that need them, regardless of their individual characteristics. The main goal of the sexual and reproductive health policy is to ensure that all Seychellois have the best possible chance of enjoying safe and satisfying sexual relationships, can determine whether and how often they have children and give their children the best possible start in life. All programmes are encouraged to consider gender differences and encourage positive attitudes regarding sexuality and gender roles for greater gender equity and equality.

More specifically in the context of HIV and AIDS, the new Republic of Seychelles (2011) *National Policy for the Prevention and Control of HIV & AIDS and STIs* ("National HIV Policy") provides more specific guidance on the health rights of people in the context of HIV and AIDS. It recognises that human rights of the individual are the foundations of all actions in the national response to HIV and AIDS.

National HIV Policy

Paragraph 6.3.2 Guiding Principles

"In line with the UNAIDS 2011 – 2015 Strategy: Getting to Zero, one of the key thrusts is to advance human rights and gender equality for the HIV response. It is considered essential to address the issue of social and legal environments that fail to protect against stigma and discrimination or to facilitate access to HIV programmes continue as they block universal access. In particular, greater efforts are needed to realize and protect HIV-related human rights of women and girls, of PLWHAs, Key Populations, MARPS and most vulnerable communities."

Paragraph 7: Policy and Position Statements

"It is hereby established that the rights of individuals as set out in the ICCPR, the ICESCR, the Seychellois Charter of Fundamental Rights and Freedoms, as well as other laws in support of the aforementioned instruments shall be respected. Violations shall be condemned, investigated and remedies sought as soon as possible. All services provided by state and non-state actors who choose to work in this field shall hold the human rights of

their beneficiaries to the highest standards possible and consider these to be primordial and overriding all other considerations.

Seropositive persons shall have access to all types of health interventions (surgical, obstetric, gynecological or any other forms of health care) and social services (housing, education, employment and social security, bank loans, life and endowment insurance policies) as required. Freedom of movement shall not be restricted in any form.

Human rights include gender equity. Thus, all persons, boys and men, girls and women, shall be provided with the utmost level of care and support available, without any form of discrimination. Special focus will also be placed on ensuring that all seropositive persons' sexual and reproductive health rights shall be upheld.”

The National HIV Policy provides for access to appropriate and quality care for people living with HIV, including effective treatment of opportunistic infections, without discrimination, and specifically provides that anti-retroviral therapy will be made available to all HIV-positive patients. It furthermore states that “[s]pecial focus will also be placed on ensuring that all seropositive persons' sexual and reproductive health rights shall be upheld.”

In terms of provision for populations considered to be particularly vulnerable in the context of HIV and AIDS, the National HIV Policy recognises that there has been an inadequate focus on the needs of key and vulnerable populations in previous policies and plans. The policy objectives include a focus on prevention, including harm reduction measures, for key populations at higher risk of HIV exposure.¹²⁹ In addition, section 8 deals with dedicated HIV and AIDS programmes to be included in the national response and includes:

- Provision for voluntary HIV counseling and testing, anti-retroviral treatment to prevent mother-to-child transmission of HIV as well as to treat pregnant women with HIV
- Programmes for drug-dependent mothers to prevent HIV and other blood borne diseases from being transmitted to their babies
- Harm reduction programmes for key populations.

Similarly, the Republic of Seychelles *National Strategic Framework for HIV & AIDS and STIs 2012-2016* (“National Strategic Framework” or “NSF”) also notes the failure to sufficiently prioritise key populations at higher risk of HIV exposure in previous plans and commits to their prioritization. In particular, it includes the following notable provisions:

- The protection and promotion of human rights in the context of HIV and AIDS as a core, overarching value for the NSF
- The consolidation of existing HIV prevention programmes and the targeting of vulnerable populations and key populations such as men who have sex with men, people who inject drugs, sex workers, prisoners, migrants and young people, in prevention and behaviour change programmes
- Specific provision for harm reduction services for key populations, including needle and

¹²⁹ Paragraph 59

syringe exchange programmes, needle exchange programmes and opioid substitution therapy for men who have sex with men, people who inject drugs, sex workers, prisoners and others as needed

- The commitment to strengthening the involvement of communities/community-based organizations in the national HIV response

Below, we consider selected, specific issues of concern in the context of HIV and AIDS in terms of the current legal/regulatory position and the extent to which this meets international, regional and national human rights commitments and promotes effective HIV responses.

i) Isolation and detention of patients

Isolation and detention of patients may be a reasonable public health response in certain circumstances, in order to contain the spread of infectious diseases. However, public health provisions for the isolation and detention of patients should not be inappropriately applied to HIV and AIDS. In addition, any considerations of isolation and detention (e.g. in the case of tuberculosis (TB) patients) should be done in accordance with principles of due process.¹³⁰

Current Position

The Public Health Act, 1960 contains several provisions, particularly coercive provisions such as detention, isolation and quarantine, for the prevention and control of “infectious diseases”, defined as “any disease which can be communicated directly or indirectly by any person suffering therefrom to any other person.”¹³¹ Sections 36 and 37 of the Act include provision for the isolation and detention of persons infected or likely to be infected by an infectious disease.¹³²¹³³

It appears that this provision is not applied to persons on the basis of HIV status. The National HIV Policy clearly states that a person’s right to freedom of movement shall not be restricted on the basis of his or her HIV status.¹³⁴ It furthermore states that no person living with HIV will be isolated from normal health care service provision except where the individual in addition suffers from a contagious disease for which isolation is part of the management procedure, or where

¹³⁰ UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights*

¹³¹ Section 2 Public Health Act, 1960

¹³² Section 36 Public Health Act, 1960 :”Where in the opinion of a medical officer of health any person is suffering from an infectious disease and is not accommodated or is not being treated or nursed in such manner as adequately to guard against the spread of disease such medical officer of health may cause such person to be removed, if necessary without his consent or without the consent of his parent or guardian to a hospital or other place which in the opinion of the medical officer of health is suitable for the reception of infectious sick and a person so removed shall be detained in such hospital or place until the medical officer of health or medical practitioner authorised in that behalf by the Director certifies that he can be discharged without danger to the public health.”

¹³³ Section 37 Public Health Act, 1960: “Where in the opinion of a medical officer of health any person has recently been exposed to the infection of and may be in the incubation stage of any infectious disease and is not accommodated in such manner as adequately to guard against the spread of disease, such person may, on a certificate signed by the medical officer of health, be removed, at the expense of the Government to a place of isolation and there detained until, in the opinion of the medical officer of health, he can be discharged without danger to the public health.”

¹³⁴ Paragraph 62

the individual needs to be isolated from a source of infection in accordance with the Public Health Act for all infectious diseases.¹³⁵

However, this provision does affect persons with TB, irrespective of their HIV status. Tuberculosis is defined as an infectious disease in terms of the Act. The Public Health (TB) Regulations enacted in terms of the Act require that persons infected with tuberculosis may be detained in a hospital or sanatorium for the purposes of treatment, with or without their consent, until such time as they are medically certified as able to be discharged without danger to public health. Any attempts to escape amount to an offence.

International bodies and partnerships such as the Global Fund and the Stop TB Partnership have issued guidance on human rights issues that affect people with TB, recognizing that in the same way that law and human rights issues place people at higher risk of HIV exposure; similarly human rights violations may exacerbate vulnerability to TB. They also note the potentially harmful social and economic impact of punitive public health responses to TB. The Stop TB Partnership TB Human Rights Task Force notes that involuntary detention or treatment for people tested or treated for TB should only take place with *due process* and *justification*, to ensure that these processes do not violate rights unnecessarily.¹³⁶

Public Health (TB) Regulations 1964

Regulation 6

“Where in the opinion of a medical officer of health a person suffering from or is infected with tuberculosis he may direct that such person shall submit to treatment in a hospital or sanatorium or to domiciliary treatment.”

Regulation 7

“A person in respect of whom a medical officer of health has directed that he shall submit to treatment in a hospital or sanatorium who refuses or fails to submit to such treatment may be removed and detained in such hospital or sanatorium in accordance with ... section 36 of the Act for the purposes of treatment.”

Regulation 8

“A person detained in a hospital or sanatorium in accordance with the provisions of section 36 of the Act for the purpose of treatment for tuberculosis who escapes or attempts to escape is guilty of an offence.”

Likewise, there are similarly coercive provisions for treatment and rehabilitation of people who use drugs under the Misuse of Drugs Act, 1995 as amended by Act 4 of 2012 and the Mental Health Act, 1996. Under the Misuse of Drugs Act, admission to treatment for drug addiction may be voluntary or the person may be committed to such treatment.¹³⁷ The Mental Health Act

¹³⁵ Paragraph 79

¹³⁶ Stop TB Partnership TB Human Rights Task Force (undated) *Working Document on TB and Human Rights*

¹³⁷ S 38(1) “The Commissioner of Police, or any other person appointed by the Minister for the purposes of this Part may after consultation with the Attorney General, by order in writing, require any person whom he reasonably suspects to be a drug addict to be medically examined or observed by a medical practitioner.”

provides that patients may be admitted as a patient to a mental health facility either at his own request if the person has attained the age of 18 years¹³⁸ or may be admitted as an involuntary patient for persons who are mentally ill.¹³⁹ Mental illness under the Mental Health Act is defined as “a significant occurrence of a mental or behavioural disorder exhibited by symptoms indicating a disturbance of mental functioning, including symptoms of disturbance in thought, mood, volition, perception, orientation or memory which are present to such a degree as to be considered pathological”.¹⁴⁰

It is unclear to what extent the provisions in the Misuse of Drugs Act or Mental Health Act have been used to commit people who inject drugs for treatment, against their will, and the impact of this on their long-term rehabilitation and their risk of HIV exposure. Currently, a voluntary opioid substitution therapy programme (for purposes of detoxification, not long term treatment) is being undertaken at the Wellness Center, at Les Canelles, in the Seychelles. Those who take part in the programme are protected in terms of section 38(5) of the Misuse of Drugs Act which states that “[a] statement made by a drug addict or any other person for the purpose of obtaining voluntary admission to an approved institution for the purpose of undergoing treatment or rehabilitation shall not be admissible in evidence against that person in connection with an offence in relation to section 5¹⁴¹ or section 6¹⁴²”.

(2) “If as a result of a medical examination or observation under subsection (1) it appears to the Commissioner of Police or person appointed by the Minister under subsection (1) that it is necessary for the person to undergo treatment or rehabilitation or both at an approved institution, the Commissioner of Police, or the person appointed by the Minister under subsection (1), may, after consultation with the Attorney General, make an order in writing requiring the person to be admitted to the approved institution specified in the order for the purpose specified in the order.”

(4) “A person who is a drug addict may volunteer to undergo treatment or rehabilitation or both at an approved institution and the approved institution may admit the drug addict for treatment or rehabilitation or both on such terms and conditions as may be prescribed.”

S39(1) “Where a person has been convicted of an offence in treatment by relation to section 5 or section 6, the court may, if it reasonably court suspects that the person is a drug addict, order that the person be medically examined or observed by a medical practitioner.”

(2) “If as a result of a medical examination or observation under subsection (1) it appears to the court that it is necessary for the person examined or observed to undergo treatment or rehabilitation or both in an approved institution, the court may make an order that the person be admitted for treatment or rehabilitation or both to the approved institution specified in the order for such period of his term of imprisonment for the offence as the court may specify in the order.”

(3) “The court may at any time amend an order made under subsection (2).”

(4) “Where a person has been admitted under this section, he shall not be discharged or transferred from the approved institution specified in the order without an order of the court.”

(5) “Any period served by a person in an institution pursuant to subsection (2) shall be counted as a similar period of imprisonment served by the offender pursuant to a sentence for the offence for which he has been convicted.”

¹³⁸ S 16(1) Mental Health Act, 1996

¹³⁹ S 16(2) Mental Health Act 1996 :“...a person who is mentally ill and incapable of consenting to treatment may be admitted on the application of the person’s next of kin”

¹⁴⁰ S 2 Mental Health Act, 1996

¹⁴¹ Trafficking in a controlled drug

¹⁴² Possession of a controlled drug

Recommendations

Current health legislation contains some punitive public health responses for dealing with infectious diseases. It is unclear to what extent coercive provisions regarding the isolation and detention of patients are applied to HIV and AIDS; however the provisions are also applied to populations affected by HIV and AIDS such as people who inject drugs and people with TB.

The following law review and reform measures are recommended to strengthen health rights in law and current policy for all affected populations in the context of HIV and AIDS:

- A clear prohibition on the use of coercive public health measures such as isolation, detention or quarantine in the response to HIV or AIDS.
- The review of the Public Health TB Regulations to ensure that patients subjected to involuntary detention for TB are accorded due process and that detention does not take place without appropriate justification.

In addition, further research into the use and impact of coercive public health measures, such as those contained in the TB Regulations and Mental Health Act, on people living with and at risk of exposure to HIV, is recommended.

ii) Informed Consent to HIV Testing and Treatment

During this Situational Analysis, discussions with key informants and focus groups reported cases of HIV testing without consent and without adequate pre- and post-test counselling in the health care sector,¹⁴³ in prisons¹⁴⁴ and on admission to rehabilitation centres.¹⁴⁵ Health workers felt that often their patients were afraid of testing for HIV and of getting their test results.¹⁴⁶ In addition, there were reports of mandatory employment HIV testing (both pre- and during employment) in certain sectors, with employees refusing to hire or terminating the services of those testing HIV-positive.¹⁴⁷

Protecting the right to HIV testing only on the basis of voluntary and informed consent is viewed as a critical public health response to encourage people's willingness to access health care services, as well as a human rights imperative in terms of human rights commitments.¹⁴⁸ Mandatory HIV testing is discouraged by both the World Health Organisation as UNAIDS as an ineffective measure to achieve public health goals. In addition, court cases in Southern Africa, such as the South African case of *Hoffmann v South African Airways*¹⁴⁹ and the Namibian case of *Nanditume v Minister of Defence*¹⁵⁰ have held that HIV testing is not only discriminatory but

¹⁴³ Focus Group Discussion, People Living with HIV, 16th March 2013.

¹⁴⁴ Some prisoners said they were forced to test for HIV on entry, others say they were advised they could refuse to do so. See Focus Group Discussion, Prisoners, 3rd April 2013.

¹⁴⁵ Focus Group Discussion, People who use drugs, 5th March 2013.

¹⁴⁶ Focus Group Discussions, Community Nurses: Ministry of Health, 6th March 2013; Nurses: Hospital Services, 11th March 2013.

¹⁴⁷ See Focus Group Discussion, Migrant Workers, 25th March 2013; Focus Group Discussion, Peer Educators, 9th March 2013.

¹⁴⁸ UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights*

¹⁴⁹ *Hoffmann v SAA* 2001 (1) SA 1 (CC)

¹⁵⁰ *Nanditume v Minister of Defence* 2000 NR 103

is also irrational as it cannot serve to determine a person's fitness to carry out the requirements of a particular job nor can it serve to reduce the risk of HIV infection in the working environment.

See Part III D, below for more information on HIV testing in the working environment.

Current Position

The Public Health Act, 1960 contains limited guidance on informed consent to HIV testing and treatment, including on the age at which a person may consent to medical testing or treatment.

Informed Consent to HIV Testing:

The new National HIV Policy deals specifically with the issue of informed consent to HIV testing. It provides for written informed consent for HIV testing and for the disclosure of results of HIV tests for all persons including members of the armed forces, students proceeding on overseas studies, persons seeking all types of insurance, migrant workers, for research purposes, prison inmates and any other persons in any other types of circumstances.¹⁵¹

The Ministry of Health (2011) *Seychelles HIV Testing and Counselling Guidelines*, currently still in draft form, aim to provide more detailed guidance on national standards for HIV testing and counseling services for all institutions, organisations and individuals. The draft guidelines reiterate the principles of informed consent, conducting pre- and post-test counseling and maintaining confidentiality.

The guidelines propose a system of both client-initiated and provider-initiated testing in Seychelles, where provider-initiated HIV testing should be offered to all persons attending medical outpatient and in-patient facilities especially adults adolescents and children presenting with signs suggestive of underlying HIV infection, patients with tuberculosis and sexually transmitted infections, children known to have been exposed to HIV during pregnancy and delivery and pregnant women at antenatal clinics. The draft guidelines furthermore recognize that HIV testing may also take place in other circumstances including at the request of employers, for purposes of accessing prevention of mother-to-child transmission (PMTCT) services and for dealing with occupational incidents involving possible exposure to HIV. However, it is not entirely clear from the draft guidelines what the consent requirements are to be for these additional forms of HIV testing, although the guidelines do specify that HIV testing for purposes of PMTCT services is voluntary.

So, while further clarity in the draft HTC guidelines is required, it appears that current policy guidelines nevertheless reflect a commitment to providing HIV testing only on the basis of voluntary and informed consent and with pre- and post-test counseling. However, the policy protection appears inadequate at present, to protect people living with HIV and key populations at higher risk of HIV exposure from instances of mandatory HIV testing.

Age of consent to testing and treatment

With regard to age of consent to medical treatment, including HIV testing, there appears to be a lack of clarity with no clear legal guidance and conflicts in law and policy.

¹⁵¹ Paragraph 74

Civil law suggests that a person below 18 years is a minor and thus unable to act independently of their parent or guardian. Article 488 of the Civil Code as well as section 2 of the Age of Majority Act, 1980 provide for a person to attain the age of majority at 18 years at which point he or she attains full legal capacity. Article 372(1) and (2) of the Civil Code, 1976¹⁵² provides for a child to remain under the authority of the parent or guardian until majority (or emancipation) and for the parental authority to be exercised in the interest of the child. This suggests that a person below the age of 18 years will be prohibited from providing independent consent to medical interventions; his or her parent or guardian will provide the requisite consent on behalf of the child.¹⁵³ This position is also taken in the draft Ministry of Health (2011) *Seychelles HIV Testing and Counseling Guidelines* which provide that HIV testing of children should take place with the consent of a parent or guardian, in the case of a child below 18 years of age. The guidelines furthermore provide that HIV testing should be in the best interests of the child, to improve the child's health, survival, development and social well-being. In the case of children without a parent or guardian, consent may be obtained from the head of the institution, health centre, hospital or clinic.¹⁵⁴

The effect of these provisions is that a young person aged 15 to 17 years can legally consent to sex, but requires parental consent in circumstances where they may require HIV testing, treatment for sexually transmitted infections, hormonal contraceptives and other sexual or reproductive health services. Research shows that very few young people are willing to seek their parent's permission to access services and in many cases even health practitioners are unclear of their patient's rights and their responsibilities with regard to sexual and reproductive health services. This, combined with the poor attitudes of health care workers to young people's access to sexual and reproductive health services, contributes to poor management of reproductive health services for young people, who may be at higher risk of HIV exposure.¹⁵⁵

However, a different approach is taken by the National Council for Child Protection, established in terms of the Children Act with regard to contraception.¹⁵⁶ Noting the difficulties experienced by adolescents in accessing sexual and reproductive health services, it recommends that a person of 16 years be entitled to access medical treatment and contraception. In practice, it appears that young people are able to access free condoms.

Further recent policies have attempted to address the problems created by the law; however, the policies themselves cannot change the law. The draft *National Policy on Sexual and*

¹⁵² Last amended Act 8 of 1992

¹⁵³ The Public Health (TB) Regulations, 1964 add credence to this view in Regulation 3(2) which sets out parental responsibilities in the case of a child with suspected TB; it stipulates that "where a medical officer of health on being satisfied that a child may reasonably be suspected to suffer from or to be infected with TB, a parent or guardian of a child may be called upon to cause the child to submit to the required medical examination and on being called upon he shall have the duty to cause the child to do so."

¹⁵⁴ Section 4.4 of the draft guidelines

¹⁵⁵ Republic of Seychelles (2011) *Implementation of the Convention on the Elimination of All Forms of Discrimination against Women 1993-2009*. The CEDAW Report cites the Child Well Being study of 2008 which indicates that 46% of children aged 12 to 19 have had sexual intercourse; the majority of both boys and girls indicated they did not use protection.

¹⁵⁶ Section 3 A Children Act, 1982

Reproductive Health, for instance, includes reviewed guidelines for the provision of contraceptives and sexual and reproductive health services for adolescents at higher risk who are unable to obtain parental consent. The National HIV Policy also recognises the barriers created by the lack of independent access to sexual and reproductive health services, such as HIV testing, for young people. It furthermore recognises the conflict created between these laws and the laws relating to sexual offences which allow young people aged 15 upwards to consent to sexual intercourse.¹⁵⁷ The National HIV Policy therefore recommends that young people be provided with independent access to sexual and reproductive health services from the age of 15 years onwards and that relevant laws be reviewed and amended to provide for such.¹⁵⁸ This is in keeping with the recommendations made by the Committee on the Convention of the Rights of the Child with respect to Seychelles.¹⁵⁹

National HIV Policy

Improving and Increasing Access to Contraceptive Services and Voluntary Counseling and Testing for 15 to 17 year olds

“It is hereby established that 15 to 17 year olds, by the fact that they are legally able to give consent to sexual intercourse, can also have access to contraceptives and HCT without the consent of their parents. The National Policy recognizes the possible moral, spiritual and other forms of reservations expressed by various sectors of the population. However, pragmatism indicates that consent to sex also implies a certain maturity and thus a level of responsibility in matters of reproductive and sexual health. Access to reproductive health services for 15-17 years will be guided by the “Fraser guidelines” for health professionals working with adolescent (National Reproductive Policy)¹⁶⁰.

Henceforth, all state and non-state service providers shall provide the necessary services (VCT / HTC, contraceptives) and deliver programmatic actions (education, outreach, psychosocial support, spiritual and moral counseling, harm reduction measures) upon demand for all and any 15 to 17 year olds requesting such, and that without the express

¹⁵⁷ S130 (1) Penal Code 1955: “Any person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years.

(3) A person does not consent to an act which if done without consent constitutes an assault under this section if –
(b) the person is below the age of fifteen years;”

S 135(3) Penal Code 1955: “ A girl under the age of fifteen years cannot in law give any consent which would prevent an act being an assault for the purposes of subsection (1): Provided that it shall be a sufficient defence to a charge under that subsection if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of fifteen years.”

¹⁵⁸ To add to the confusion, paragraph 76 of the National HIV Policy says, in another section, dealing with consent to HIV testing and disclosure that, “in the case of minors, parental or guardian consent need to be sought.”

¹⁵⁹ **CRC/C/SYC/CO/2-4** which recommends that Seychelles “Takes all necessary measures to allow access to contraceptives for adolescents under the age of 18”.

¹⁶⁰ It must be noted that the National Reproduction Policy is yet to be officially endorsed by government and that the policy statement, while providing clear guidance on enabling legal recommendations, cannot take effect until such time as enabling legislation is passed to give effect to its recommendations.

consent of their parents and or guardians. However, for further support, the clients shall be encouraged to share information with their parents and guardians, and other formal and informal support systems.

All laws in contradiction of this recommendation shall be reviewed and amended, as needed.
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Recommendations

The following law review and reform measures are recommended to strengthen protection for the right to HIV testing only on the basis of voluntary and informed consent:

- Provision in law, as well as in policy (in terms of the finalisation of the Ministry of Health (2011) *Seychelles HIV Testing and Counselling Guidelines*) for HIV testing to take place only on the basis of voluntary and informed consent (save for exceptional circumstances such as unlinked surveillance testing or testing of blood donations), as is currently provided for in the National HIV Policy
- Law and policy review and reform to create legal certainty on the age of consent for medical testing and treatment, and to align the age of consent to sexual and reproductive health services to that of consent to sexual intercourse, in accordance with the provisions of the National HIV Policy and draft *National Sexual and Reproductive Health Policy*.¹⁶²

iii) Confidentiality

Confidentiality of medical information, including HIV status, is vital to promoting confidence in public health systems. The South African case of *Jansen van Vuuren v Kruger*¹⁶³ has confirmed the medical practitioner's obligation to, as well as public health importance of, maintaining a patient's right to confidentiality regarding HIV status. There are suggestions that actual or perceived poor maintenance of confidentiality in current health care services may discourage people from accessing HIV-related services.¹⁶⁴ Participants in focus group discussions carried out during the Situational Analysis spoke of both instances of poor maintenance of confidentiality as well as a general mistrust that confidentiality would be maintained, leading to fear and discouraging access to HIV testing and other services.

¹⁶¹ Paragraphs 71 to 73

¹⁶² Note that these policies recommend that children aged 15 years and older be given the authority to provide independent consent to medical treatment. The Republic of Seychelles (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016* in fact recommends that children aged 14 to 18 years be provided with authority to consent without parental involvement. Note in addition that the National Committee on Child protection has agreed on the following: harmonisation of laws to align age of consent to sex and age of consent for reproductive health services at 16 years; 18 years for consent to marriage for both girls and boys.

¹⁶³ 1993 (4) SA 842 (A)

¹⁶⁴ See, for instance, Focus Group Discussion: Peer Educators, 9th March 2013; Prisoners, 3rd April, 2013; People living with HIV, 16th March 2013; Nurses: Hospital Services, 11th March 2013; People who use drugs, 5th March 2013; Peer Educators, 9th March 2013; Migrant Workers, 25th March 2013.

Current Position

The Public Health Act, 1960 contains limited provision for the confidentiality rights of patients or justifiable limitations to confidential medical information. Neither HIV nor AIDS is listed as a notifiable disease in terms of the current Public Health Act or the Draft Public Health Bill.¹⁶⁵

However, the National HIV Policy does specifically provide for the confidentiality rights of patients with HIV. It in fact speaks of “shared confidentiality” and states that “shared confidentiality shall be promoted in state and non-state services and programmatic actions” since it is “required for efficient and holistic management of clients admitted to hospitals and attending health facilities. However, the person’s informed consent is still required to proceed with such in non-emergency situations.” While the concept of shared confidentiality is not defined in the policy, it nevertheless clearly states that the patient him or herself must consent to any disclosures of his or her HIV status (in the absence of an emergency situation) in pursuance of shared confidentiality.

The draft Ministry of Health (2011) *Seychelles HIV Testing and Counseling Guidelines* deal extensively with the right to confidentiality with regard to a person’s HIV status. They provide that in the event of an HIV test, HIV test results only be sent to the clinician or counselor who conducted the pre-test counseling, and not to an insurance agent or employer or any other 3rd party.¹⁶⁶ They furthermore recognize that disclosure of a client’s HIV test results to a 3rd party may only take place with the written consent of the client him or herself.¹⁶⁷ Although the guidelines suggest encouraging disclosure of HIV test results to a partner, they note that this should take place with the consent of the client and the support of the counselor, where required.

In the case of children, the draft guidelines recommend that counselors assess the situation carefully in considering whom to provide with the information regarding a child’s HIV status. However, it is not entirely clear from the guidelines at what age or under what circumstances a child should receive his or her HIV test results. The guidelines furthermore recommend disclosure of a child’s HIV status at schools “only in the interest of the child and only to trustworthy teachers or school nurses who have received training in HIV counseling.”¹⁶⁸ They do not, however, clearly state that HIV disclosure is not required within the educational setting.

¹⁶⁵ Where an inmate of an institution or organisation other than a hospital or occupier of any dwelling is suffering from a notifiable disease, this is required to be notified to the public health authorities.

¹⁶⁶ Section 5.1

¹⁶⁷ Section 5.4.1

¹⁶⁸ Section 5.4.3

Ministry of Health (2011) *Seychelles HIV Testing and Counseling Guidelines (Draft)*

Section 5.4.2

In post-test counseling of minors, counselors should be careful in making a decision as to whom to give results. Children should not be tested simply for the parents or guardians to know their own status. Before disclosing results, the counselor should assess if the parent or guardian is willing to discuss HIV and the test results with the child openly. If the child is HIV positive the counselor should work with the parent or guardian to plan for the child's future care. The counselor should provide ongoing support and counseling until the child is old enough to be disclosed to. Children, whose HIV test results have not been disclosed to them until they reach an age when they can understand, should be specially counseled before disclosure. The parent or guardian should also be counseled at both times. Minors, who are already married in a relationship, or are parents themselves, should be managed as adults.”

In addition, the draft guidelines refer to possible lawful instances of disclosure of a person's confidential health information in the interests of public health;¹⁶⁹ however, they fail to provide clarity or examples of such instances where a disclosure may be lawful.

Ministry of Health (2011), *Seychelles HIV Testing and Counseling Guidelines (draft)*

Section 5.4

Disclosure to client or patient: Disclosure of HIV/AIDS may be necessary for public health and is enshrined in the laws and policies of the country, such as the Public Health Act and the HIV and AIDS prevention and control Act.

The provision in policy for confidentiality of a person's HIV status is strong. However, it seems that much needs to be done to ensure that the right to confidentiality is maintained in all instances as well as to increase awareness of the right to confidentiality and strengthen confidence amongst patients that this right will be protected. In addition, it is important to ensure that lawful disclosures of the right to confidentiality are clearly set out in policy to avoid creating an overly broad discretion to disclose “on public health grounds”. The UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights* recognise that in the case of a clearly identified 3rd party at risk, disclosures of confidentiality may be reasonable, where various steps have first been taken to ascertain risk and to obtain consent for disclosure.

¹⁶⁹ Section 5.4

Recommendations

Seychellois law as well as policy (in terms of the finalization of the Ministry of Health (2011) *Seychelles HIV Testing and Counseling Guidelines*) should make clear provision for the following:

- the right of all people to medical confidentiality, including in the case of HIV and AIDS
- the rights of children to medical confidentiality with regard to their HIV status, and for children who are able to consent independently in law to HIV testing to receive the results of their HIV tests
- the right to be protected from disclosure of confidential medical information and for disclosure of confidential medical information, including HIV status, only on the basis of the informed consent of the person him or herself / person with the capacity to provide consent or by a qualified health care professional to an identified, third party where a real risk of HIV transmission exists after following step-by-step procedures, and after ensuring that there is no risk of harm to the patient, as recommended in the *International Guidelines on HIV/AIDS and Human Rights*¹⁷⁰

iv) Access to HIV Prevention, Treatment, Care and Support

Laws, regulations, policies and guidelines need to provide equitable access to HIV-related health care services in order to ensure effective responses to HIV and AIDS. Access to HIV prevention, treatment, care and support services should be available to all people without discrimination and in particular should prioritise access for key populations at higher risk of HIV exposure. This requires developing appropriate HIV laws and policies as well as ensuring training for health care workers on non-discrimination and on the provision of HIV-related health care to key populations.

In terms of access to medicines for HIV, the Seychelles National Medicines Policy notes that “increasing medicine and health care costs require that new ways of financing be explored if current gains in access to medicines are to be sustained... It is however important that prices for essential medicines are kept within certain limits, so that access to them is not denied to some sections of the population.”¹⁷¹ Patent law is a key factor affecting access to treatment. Patents often restrict access by creating protections on drugs which give patent holders exclusive control to license, manufacture and distribute their product. As a consequence, the lack of competition on many patented drugs generally leads to high prices, meaning that poor patients cannot afford, and therefore, access essential medicines.

Key informant interviews and focus group discussions with stakeholders and affected populations, during the course of the Situational Analysis, revealed that access to HIV-related treatment and care at the Communicable Diseases Control Unit (CDCU) was greatly improved

¹⁷⁰ Guideline 3, UNAIDS and OHCHR, *International Guidelines on HIV/AIDS and Human Rights*, UNAIDS, Geneva, 2006.

¹⁷¹ Seychelles National Medicines Policy, <http://apps.who.int/medicinedocs/documents/s19286en/s19286en.pdf>

and that they received supportive services.¹⁷² However, there were also reports of several issues with regard to access to HIV prevention, treatment, care and support in general:

- Patients reported discriminatory behaviour at the hands of health care workers¹⁷³ as well as a general feeling or perception that health care workers did not understand their particular needs; this discouraged access to health care services¹⁷⁴
- Patients reported the need for some improvements in services including increased counselling and psychological support for HIV and AIDS as well as equipment (e.g. to test CD4 count and viral load)¹⁷⁵
- Employees (migrant workers) reported that there was inadequate information, awareness and access to services for HIV and AIDS in their working environment¹⁷⁶
- Although access to treatment was not currently reported as being problematic, there are reports of poor adherence to ART with reportedly insufficient information provided to patients on the importance of adhering to treatment and insufficient follow-up of patients who stop treatment¹⁷⁷
- People living with HIV felt that certain populations were not willing to join existing support groups and that there is a need for specific support groups for separate populations, such as women and youth.¹⁷⁸

Health care workers themselves reported difficulties they faced in dealing with HIV and AIDS including a heavy workload, limited awareness of and training on all HIV-related guidelines and provision of services (including HIV counseling), inadequate support for preventing and managing occupational exposure to HIV as well as feeling ill-equipped to understand or deal with the needs of key populations at higher risk of HIV exposure. In the case of key populations, and in particular people who use drugs, health care workers who participated in the focus group discussions indicated some fears of dealing with people who use drugs and felt that their HIV status should be known.¹⁷⁹

Current Position

As set out in the introduction to this chapter, the National HIV Policy and NSF provide the most detailed expositions of the rights of affected populations to HIV prevention, treatment, care and support services without discrimination. Notably, HIV policies and plans provide for the specific prioritization of the rights of key populations at higher risk of HIV exposure (such as MSM, people who use drugs, sex workers, prisoners, migrants and young people). These broad

¹⁷² Focus Group Discussion, People living with HIV, 16th March 2013.

¹⁷³ Such as being denied access to certain health services until testing for HIV and being advised not to have children if they are HIV-positive.

¹⁷⁴ Focus Group Discussions, Prisoners, 3rd April 2013; People living with HIV, 16th March 2013; People who use drugs, 5th March 2013; Peer Educators, 9th March 2013.

¹⁷⁵ Focus Group Discussions, People living with HIV, 16th March 2013

¹⁷⁶ Focus Group Discussion, Migrant Workers, 25th March 2013

¹⁷⁷ Focus Group Discussions, People living with HIV, 16th March 2013; Peer Educators, 9th March 2013; Community Nurses: Ministry of Health, 6th March 2013.

¹⁷⁸ Focus Group Discussions, People living with HIV, 16th March 2013

¹⁷⁹ Focus Group Discussions, Nurses: Hospital Services, 11th March 2013; Community Nurses: Ministry of Health, 6th March 2013.

policies are furthermore supplemented by health guidelines on treatment for HIV. However, there may be a need for stronger protection for these rights in law, as well as for further training and strengthening of implementation, in order to ensure that these rights in policy translate into provision for the needs of affected populations.

In terms of access to medicines, the Patents Act, 1901¹⁸⁰ dates back to 1901, with several, but non-fundamental amendments up to 1991. Since Seychelles is not a Member of the World Trade Organisation (WTO), the legislation is outdated in terms of global intellectual property standards. While it contains some patent flexibilities, such as provisions for compulsory licensing, it does not yet maximize mechanisms that can be used to source the most affordable treatment for HIV and its co-infections.

Seychelles is in the process of acceding to the WTO and is, as a result, revising its entire patent legislation to comply with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Because TRIPS sets the global minimum standards for intellectual property (IP) protection, while at the same time provides flexibilities in its implementation, the process of WTO accession and TRIPS adoption presents both a possible threat and opportunity for access to essential medicines in Seychelles.

The threat is that Seychelles will be pressured to adopt what are known as ‘TRIPS-plus’ measures – so named because they grant intellectual property protection which goes beyond the minimum standards required by TRIPS. These measures often have access-restricting effects, because they result in strengthened or extended periods of monopoly protection on medicines. Several countries that have joined the WTO after the commencement of TRIPS in 1995 have been pressured to agree to TRIPS-plus commitments as a condition for being allowed to join the WTO (for example China, Russia and Ukraine all agreed to data exclusivity, a tool which can delay generic competition, and others, such as Laos, have waived the transition period).

On the other hand, the opportunity presented by WTO accession is the chance to develop a patent framework which takes full advantage of ‘public health flexibilities’, contained in the TRIPS Agreement. These flexibilities, or provisions, allow countries to balance intellectual property protection with public health needs. In the 2001 Declaration on the TRIPS Agreement and Public Health (the ‘Doha Declaration’), the WTO Ministerial unequivocally affirmed that the TRIPS Agreement “does not and should not” prevent WTO Members from protecting public health (Paragraph 4).¹⁸¹ A 2011 Policy Brief, released jointly by UNDP, UNAIDS and WHO, provides further background on the TRIPS flexibilities, and points out several occasions when they were successfully used by developing countries to lower cost and increase access to essential medicines.¹⁸²

¹⁸⁰ Patents Act 1901 (last amended Act 15 of 1996)

¹⁸¹ Doha Declaration on the TRIPS Agreement and Public Health, www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

¹⁸² UNDP, UNAIDS, WHO Policy Brief, ‘Using TRIPS flexibilities to improve access to HIV treatment’ http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2049_PolicyBrief_TRIPS_en.pdf

Recommendations

The following measures are recommended to strengthen protection for the rights of people to HIV-related prevention, treatment, care and support services

- Legal provision for the right of all people to available, accessible, appropriate, affordable and quality medicines, diagnostics and related technologies for HIV and AIDS, without discrimination, for prevention, treatment, care and support of HIV and AIDS, as is currently set out in the National Strategic Framework for HIV & AIDS and STIs 2012-2016.
- Legal provision for the prioritization of the needs of particularly vulnerable populations and key populations at higher risk of HIV exposure, in access to health care services, as is currently set out in the National Strategic Framework for HIV & AIDS and STIs 2012-2016.
- Legal provision to give effect to the commitment to providing harm reduction programmes for people who use drugs, as set out in the National Strategic Framework for HIV & AIDS and STIs 2012-2016, including the repeal of laws that restrict the availability of preventive measures such as clean needles and syringes.¹⁸³
- Ensure health care workers have training, including rights-based and sensitization training, to adequately implement and provide non-discriminatory services to key populations at higher risk of HIV exposure.

In terms of continued access to affordable medicines, Seychelles is at a critical point in time for implementing access-friendly patent law. With WTO accession and development of its new laws, the full range of TRIPS flexibilities must be incorporated; and TRIPS-plus measures must be avoided.

- In developing the new patent law, Seychelles should be guided by its National Medicines Policy,¹⁸⁴ which provides that “ “In relation to legislation and regulations, the objective of the Seychelles National Medicine Policy is to put in place the appropriate legislative and regulatory frameworks for the implementation of the present policy and enable effective control of the national pharmaceutical sector... The Government will: Enact comprehensive legislation and regulations with provision for, among other things, establishment of a medicine regulatory authority.....parallel importation and compulsory licensing in accordance with TRIPS...”
- Seychelles should seek technical assistance on the WTO accession process from UNDP. UNDP can work with developing countries to implement and utilize the flexibilities in the TRIPS Agreement to facilitate treatment access and ensure the long-term sustainability of treatment programs. The exact form of assistance can be negotiated with Seychelles, but could take the form of policy, legislation and technical guidance; training and enhancing capacity; direct country support; and/or monitoring and analysis.
- The assistance provided around WTO accession usually starts with an analysis of the Working Party Report (on WTO accessions), followed by a comparative analysis of the national legislation. UNDP provides recommendations on how to integrate the TRIPS public health flexibilities in national legislation, while remaining compliant with the commitments before the WTO. Recommendations are also made as to how avoid TRIPS-plus provisions

¹⁸³ See section on criminal law for further detail of laws that create barriers to the provision of harm reduction programmes for people who use drugs.

¹⁸⁴ Seychelles National Medicines Policy Available at <http://apps.who.int/medicinedocs/documents/s19286en/s19286en.pdf>

in accession, and how to mitigate the negative effects of intellectual property protection on public health and access to medicines.

v) Regulation of Health Carers

The Ministry of Health *National Health Strategic Framework 2006-2010* included, as one of its core values, the value of 'professionalism and ethics'. It stated that "health workers shall live up to the expectations and standards set by the Ministry of Health and the respective regulatory bodies. We are guided by professional principles and values which ensure that all patients receive care with respect and dignity irrespective of status, color or creed."

Having said that, people affected by HIV and AIDS including people living with HIV, key populations such as people who use drugs as well as young people are said to seldom seek treatment and report receiving inadequate and sometimes stigmatizing and discriminatory treatment at the hands of health care professionals as has been set out above. To reiterate, complaints include HIV testing without voluntary and informed consent and without pre-test counseling, limited protection of rights to confidentiality, insufficient information provided on HIV-related medication, limited understanding of and stigmatization of key populations and young people who access sexual and reproductive health services. It appears possible that health care workers receive inadequate training and support to provide HIV counseling and testing services and are reluctant to do so in the absence of such training and health care workers themselves feel they have inadequate information and understanding of how to deal with key populations including people who use drugs and the health needs of men who have sex with men.¹⁸⁵

Current Position

The Nurses and Midwives Act, 1985 establishes the Nurses and Midwives Council, to make provision for the registration of nurses and midwives and for their training, qualification and disciplinary control. Section 11 of the Act provides the Council with disciplinary functions; in the event that a nurse or midwife is convicted of an offence punishable with imprisonment or has been guilty of malpractice, negligence or misconduct or has contravened any rule of conduct prescribed under this Act, the Council may order the person's removal from the register.

The Nurses and Midwives Regulations, 1989 contain a Code of Practice to which all nurses and midwives are bound.¹⁸⁶ The Regulations provide, amongst other things, that all nurses and midwives are obliged to act as an advocate for the patient and guard against the infringement of people's rights to make decisions about and set goals for their health care.

Similarly, the Seychelles Medical and Dental Council regulates the professional conduct of medical and dental practitioners in Seychelles. Their *Code of Practice on Standards of Professional Conduct and Medical Ethics*, adopted in 1997 also provide guidelines for ethical standards to which medical and dental practitioners are bound. Medical practitioners are bound to respect the rights and to protect the dignity of their patients; they are also specifically bound

¹⁸⁵ See, for instance, Focus Group Discussion: Peer Educators, 9th March 2013; Focus Group Discussion: Community Nurses, Ministry of Health, 6th March 2013; Nurses: Hospital Services, 11th March 2013; Focus Group Discussion: People who use drugs, 5th March 2013.

¹⁸⁶ Second Schedule, Nurses and Midwives Regulations, 1989

to respect a patient's right to provide informed consent to an intervention or research¹⁸⁷ as well as to protect the confidentiality rights of patients.¹⁸⁸

There was no information available to the researchers on the use of regulatory bodies, such as the Nurses and Midwives Council and Seychelles Medical and Dental Council, to challenge misconduct by health care professionals. It is unclear whether affected populations are aware of these bodies and their powers and functions.

Recommendations

It is recommended that research be conducted into the knowledge of and use of regulatory bodies, such as the Nurses and Midwives Council and the Seychelles Medical and Dental Council and other professional bodies, to challenge misconduct or negligence by health care professionals by populations in the context of HIV and AIDS.

¹⁸⁷ Seychelles Medical and Dental Council (1997) *Code of Practice on Standards of Professional Conduct and Medical Ethics* at para 2

¹⁸⁸ *Ibid* at para 16

C. Criminal Law and Law Enforcement

i) Men who have sex with men

Men who have sex with men (MSM) people are disproportionately affected by HIV and AIDS and are often stigmatized, socially excluded, and have severely diminished access to healthcare. While there is limited data available on HIV prevalence rates within MSM communities in Southern Africa, a study conducted by Johns Hopkins University, for example, concluded that there is a 21.4% HIV prevalence among gay men in Malawi compared with a national prevalence of only 12%. MSM are at an increased risk of HIV infection in African countries which suffer a generalized HIV epidemic. In 2007, Baral found that MSM in Africa were 3.8 times as likely to be HIV positive as heterosexual men. Smith (2009) found HIV prevalence rates in MSM which range from 10.6% in a Namibian to 34.3% in a South African study.

A set of diverse factors contribute to this increased prevalence:

- High levels of discrimination and human rights violations that increase vulnerability to HIV and deter access to HIV prevention, treatment, care and support services.
- MSM report negative experiences with healthcare providers¹⁸⁹. They report strong stigma on the part of healthcare workers, which they felt resulted in discrimination against them in healthcare settings. Many report avoidance rather than dealing with such treatment.¹⁹⁰
- The majority of countries in southern Africa criminalise same-sex sexual relations between consenting adults.

Despite this, MSM needs, issues and concerns are largely ignored in national HIV and AIDS policies (or at best, paid lip service to) and are generally not addressed at all in government interventions.

Exclusion from national health surveillance, stigma and discrimination and laws that criminalise same-sex sex and low access to services hampers HIV prevention efforts. This conclusion was recently endorsed by the US government, and World Bank research concluded that the human rights of MSM are important to the future course of AIDS epidemics in Africa. In successive Declarations on HIV/AIDS, heads of state have acknowledged that full realization of human rights and fundamental freedoms is crucial to the global AIDS response, including eliminating discrimination against people living with HIV and vulnerable groups, and ensuring legal protection and access to services. Increased participation by people living with HIV and key populations was also emphasized. Non-discrimination is also highlighted in regional commitments such as the Maseru and Abuja Declarations. However, laws that criminalise male same-sex sexual relations stand in the majority of countries in southern Africa. This leads to the exclusion of MSM from many national AIDS plans or to a lack of implementation of such plans insofar as they do refer to MSM.

¹⁸⁹ http://www.out.org.za/images/library/pdf/Healthcare_in_Gauteng_Research_Findings.pdf

¹⁹⁰ Report by the PCB NGO representative 29th Meeting of the UNAIDS Programme Coordinating Board Geneva, Switzerland 13-15 December 2011 at http://www.unaids.org/en/media/unaids/contentassets/documents/pcb/2011/12/20111123_Report%20by%20the%20PCB%20NGO%20Representative.pdf

The Human Rights Committee has found that the right to privacy is violated by laws that criminalise private homosexual acts between consenting adults and has noted that “the criminalisation of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS...” as such criminalization not only interferes with the right to privacy but it also impedes HIV/AIDS education and prevention work.¹⁹¹

Current position

Article 151 of the Penal Code criminalises same sex between males but not between females.¹⁹²

This notwithstanding the National Strategic Framework recommends that the appropriate legal framework be instituted before the end of 2012 to ensure that the sexual and reproductive health rights and all other human rights are upheld in the development of programmes and in service delivery at all levels. This includes consensual sex between adults, including men who have sex with men, and shall be not used as an impediment to care, treatment and support. The National Policy calls for the end of laws making consensual sex between adult men in any form illegal. Appropriate legislation shall thus be enacted to ensure that no institutional and legal barriers exist to the provision of prevention, care, treatment and support programmes and services.¹⁹³

Despite the fact that same sex between males is illegal, no one has been charged or convicted in the last 15 to 20 years¹⁹⁴.

As in many countries in Africa, MSM in Seychelles remain ‘hidden’ and are difficult-to-reach for research purposes due to social stigma and discrimination. Many MSM often feel the need to hide their same-sex relations from friends and family, thereby increasing their vulnerability to HIV and other infections. In addition, stigma and discrimination towards MSM foster an environment whereby MSM marry and have sexual relationships with females in order to maintain a heterosexual persona. Males, who feel the need to hide their sexual preference for male sexual partners in order to appear heterosexual, not only increase their own vulnerability for HIV infection, but also increase the risk of HIV transmission to their female sexual partners.

In a recent survey conducted in 2011¹⁹⁵ it was found that HIV prevalence among men who have sex with men in the Seychelles was 13.2% (compared to 0.1% prevalence in the general population). The survey also found that:

¹⁹¹ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

¹⁹² S 151 Penal Code 1955: “Any person who - (a) has carnal knowledge of any person against the order of nature; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony, and is liable to imprisonment for fourteen years.”

¹⁹³ National Policy on HIV and AIDS at paras 65 and 66

¹⁹⁴ Input from K Karunakaran, State Counsel at Stakeholders Consultation 21 /2/2013

¹⁹⁵ J Bibi et al (draft) (2011) *Men who have sex with men in the Seychelles, Integrated Biological and Behavioural Surveillance Study*

- MSM have multiple types of sexual partners, including occasional and commercial. More than half of MSM reported having anal sex with commercial partners and 37.3% reported having anal sex with occasional partners in the past six months. MSM reported inconsistent condom use with all partner types.
- Most men self-identified as bi-sexual or heterosexual, indicating active sex with females, including partners considered to be wives and girlfriends. Among those who reported having sex with a female in the past six months, 41.7% reported having ≥4 female sex partners. Less than half of MSM used a condom during intercourse with their last non-paid female sex partner.
- More than half of MSM reported ever injecting drugs (54.2%) and injecting drugs in the past 6 months (51.1%). Among those who reported injecting drugs in the past 6 months, 82.1% did so daily or almost daily and 12% reported using a needle/syringe previously used by someone else at last injection.
- Forty-one percent of MSM reported that they had received verbal insults and 3.8% reported being hit, kicked or beaten in the past 12 months because someone believed respondent has sex with other men. Twenty-seven percent of MSM reported being forced to have sexual intercourse when they did not want to at some point in their lives and, among those, 50.3% reported having been forced to have sexual intercourse in the past 12 months.
- Forty-four percent of MSM reported being arrested in the past 12 months.¹⁹⁶

A focus group discussion held with community nurses in the course of this assessment revealed that many community nurses feel that they do not have sufficient expertise or knowledge about MSM sexual health needs to adequately meet their needs.

Recommendations

It is recommended that:

- The provisions of the Penal Code be amended to decriminalize consensual sex between adults in accordance with the provisions of its own National Strategic Framework and National HIV Policy and in accordance with international human rights law and good practice¹⁹⁷.
- Given the high percentage of MSM who inject drugs services for MSM, should include linkages to injecting drug use services, including evidence-based risk reduction programs such as syringe exchange and opiate substitution therapy.

¹⁹⁶ This may point to harassment of MSM by law enforcement officials given that there have been no prosecutions for sex between men for many years.

¹⁹⁷ Republic of Seychelles; National AIDS Council (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016* at page 59 recommends the elimination of punitive laws that criminalise certain behaviours and groups of people, namely migrant populations, IDUs, SWs and MSM and which restrict access to education, insurance and other services and freedom of movement.

- Law enforcement officials, and health and social care providers need to be trained to recognize and uphold the human rights of MSM, and held accountable if they violate the rights of sex workers, including the perpetration of violence.

ii) Sex workers

Like all human beings, sex workers are entitled to the full protection of their human rights, as specified in international human rights instruments. Human rights include the rights to non-discrimination; security of person and privacy; recognition and equality before the law; due process of law and the highest attainable standard of health; employment, and just and favourable conditions of employment; peaceful assembly and association; freedom from arbitrary arrest and detention, and from cruel and inhumane treatment; and protection from violence.

Sex workers are essential partners and leaders in effective HIV and sexual health programmes, and for developing solutions that respond to the realities of the environments in which they live and work. Laws that directly or indirectly criminalize or penalize sex workers, their clients and third parties, and abusive law enforcement practices, stigma and discrimination related to HIV and sex work can undermine the effectiveness of HIV and sexual health programmes, and limit the ability of sex workers and their clients to seek and benefit from these programmes.

Of particular concern is violence perpetrated against sex workers, as well as repressive police practices, including harassment, extortion, arbitrary arrest and detention, and physical and sexual violence. Also of concern are health-care settings where there is stigma, discrimination and denial of health care to sex workers. Since sex worker-led organizations are crucial for enabling sex workers to protect themselves from discrimination, coercion and violence, measures that prevent them from assembling and organizing themselves are also of significant concern.

Attention and resources are needed to prevent, address, report and redress violence against sex workers, especially by supporting sex workers' individual and collective self-organization and self-determination.

The promotion of a legal and social environment that protects human rights and ensures access to information, services and commodities related to HIV prevention, treatment, care and support, without discrimination, is essential for achieving an effective and rights-based response to the HIV epidemic and promoting public health, including in the context of sex work.

Current position

In terms of section 143 of the Penal Code: "Whoever for purposes of gain -

- (a) procures, entices or leads away, for purposes of prostitution, another person (even with the consent of that other person); or
- (b) exploits, or is an accessory in, the prostitution of another person (even with the consent of that other person), or the illicit carnal connection of two other persons,

is guilty of a misdemeanour.

Section 144 prohibits procurement or enticement of persons under the age of 21 as well as trafficking: "Whoever -

- (a) procures, entices or leads away, for purposes prostitution, another person (even with the consent of that other person); or
- (b) exploits, or is an accessory in, the prostitution of another person (even with the consent of that other person),

where the person procured, enticed, led away or exploited is less than twenty-one years old at the time of the offence, or is procured, enticed, led away or exploited for the purpose of being sent abroad, or by the use of fraud, deceit, threat, violence or any other means of duress, is guilty of a misdemeanour.

Under S 154 Penal Code soliciting is an offence: "A person who solicits another person in a public place for prostitution is guilty of an offence and liable to imprisonment for 2 years."

Section 155 makes it a criminal offence "to keep or manage a brothel or to permit any premises to be used as a brothel:

- (1) A person who –
 - (a) keeps or manages, or acts or assists in the keeping or management of a brothel;
 - (b) being the owner, tenant, lessee or occupier or person in charge of any premises, knowingly permits the premises or any part of the premises to be used as a brothel;
 - (c) being the owner, lessor or landlord or the agent of the owner, lessor or landlord, of any premises –
 - (i) lets out the premises or any part of the premises knowing that the premises or any part of the premises is to be used as a brothel; or
 - (ii) is wilfully a party to the continued use of the premises or any part of the premises as a brothel,

is guilty of an offence and liable to imprisonment for three years.

- (2) In this section "brothel" means any premises or any part of any premises resorted to or used by any person for the purposes of prostitution or lewd sexual practices."

Section 156 provides that: "A person who –

- (a) procures, entices or leads away, for the purposes of prostitution, another person;
- (b) knowingly lives wholly or in part on the earnings of prostitution of another person;
- (c) knowingly exploits the prostitution of another person;
- (d) for the purposes of gain, exercises control, direction or influence over the movements or action of another person in a manner as to show that the person is aiding, abetting, encouraging or compelling the prostitution of that other person,

is guilty of an offence and liable to imprisonment for five years."

Section 173 of the Penal code provides that: The following persons -

- (a) every common prostitute behaving in a disorderly or indecent manner in any public place;
- (b) every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children so to do;
- (c) every person playing at any game of chance for money or money's worth in any public place, or on private property without the consent of the occupier;
- (d) every person who in any public place conducts himself in a manner likely to cause a breach of the peace;
- (e) every person wandering about and endeavouring by the exposure of wounds or deformation to obtain or gather alms;
- (f) every person found drunk and incapable or drunk and disorderly in any street or public place;
- (g) every person who in any public place uses any indecent or obscene language;
- (h) every person found in a public place wandering or placing himself so as to cause an obstruction,

shall be deemed idle and disorderly persons, and shall be liable to imprisonment for one year or to a fine not exceeding Rs.1, 000 or to both.

Notwithstanding the provisions of the Penal Code the National Strategic Framework recommends that the appropriate legal framework be instituted before the end of 2012 to ensure that the sexual and reproductive health rights and all other human rights are upheld in the development of programmes and in service delivery at all levels. This includes consensual sex between adults, including men who have sex with men and sex work, be the latter transactional or commercial or otherwise, and shall be not used as an impediment to care, treatment and support. The National Policy calls for the end of laws making consensual sex between adult men and sex work in any form illegal. Appropriate legislation shall thus be enacted to ensure that no institutional and legal barriers exist to the provision of prevention, care, treatment and support programmes and services.¹⁹⁸

All 33 sex workers interviewed in a Drug and Alcohol Council survey in 2010 were IDUs¹⁹⁹.

Recommendations²⁰⁰

It is recommended that:

- Consideration should be given to decriminalising consensual sex work and the elimination of unjust application of non-criminal laws and regulations against sex workers for harm reduction purposes.^{201 202 203}

¹⁹⁸ National Policy on HIV AIDS at paras 65 and 66

¹⁹⁹ Republic of Seychelles; National AIDS Council (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016* at page17

²⁰⁰ See WHO, UNAIDS, UNFPA, NSWP (2012) *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low and Middle Income Countries: Recommendations for a Public Health Approach*”

- Consideration should be given to discontinuing the use of public order statutes and the “Idle and Disorderly” provisions of the Penal Code currently used as the basis to arrest sex workers in public places.
- Law should be enacted to protect against discrimination²⁰⁴ and violence, and other violations of rights faced by sex workers in order to realize their human rights and reduce their vulnerability to HIV infection and the impact of AIDS. Antidiscrimination laws and regulations should guarantee sex workers’ right to social, health and financial services.
- Programmes should be put in place to provide legal literacy and legal services to sex workers so that they know their rights and applicable laws, and can be supported to access the justice system when aggrieved.
- Health services should be made available, accessible and acceptable to sex workers based on the principles of avoidance of stigma, non-discrimination and the right to health.
- Programmes should be put in place to sensitize and educate health-care providers on non-discrimination and sex workers’ right to high-quality and non-coercive care, confidentiality and informed consent.
- Sex workers’ groups and organizations should be made essential partners and leaders in designing, planning, implementing and evaluating health services.
- Essential health services for sex workers must include universal access to male and female condoms and lubricants, as well as access to comprehensive sexual and reproductive health services, and equitable access to all available health-care services including primary health care.
- Violence against sex workers is a risk factor for HIV and must be prevented and addressed in partnership with sex workers and sex worker led organizations.
- Violence against sex workers needs to be monitored and reported, and redress mechanisms established to provide justice to sex workers.
- Law enforcement officials, and health and social care providers need to be trained to recognize and uphold the human rights of sex workers, and held accountable if they violate the rights of sex workers, including the perpetration of violence.
- Support services need to be provided to sex workers who experience violence.

²⁰¹ See Global Commission on HIV and the Law (2012) *Risks, Rights & Health*; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/14/20, 2010; UNAIDS (2012) *Guidance Note on HIV and Sex Work*

²⁰² Republic of Seychelles; National AIDS Council (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016*

at page 59 recommends the elimination of punitive laws that criminalise certain behaviours and groups of people, namely migrant populations, IDUs, SWs and MSM and which restrict access to education, insurance and other services and freedom of movement.

²⁰³ It was suggested at the stakeholder’s consultation that clients soliciting sex workers should be criminalised. This runs contrary however to international recommendations. See Global Commission on HIV and the Law (2012) *Risks, Rights & Health*; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/14/20, 2010; UNAIDS (2012) *Guidance Note on HIV and Sex Work*

²⁰⁴ UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights*

5, para.22: “States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV and people with disabilities from discrimination in both the public and private sectors, that will ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation and provide for speedy and effective administrative and civil remedies.”

iii) People who use drugs

Treating drug use as a criminal offence fuels the transmission of HIV through several mechanisms²⁰⁵.

Laws that criminalise possession and use of drugs and the possession of drug injecting paraphernalia and aggressive drug law enforcement practices aimed at suppressing the drug market drive drug-addicted individuals away from public health services and into hidden environments where HIV risk becomes markedly elevated. Police harassment, confiscation of clean syringes and arrest for possession of syringes are also common, and all of these practices have repeatedly been shown to increase the sharing of used syringes and other risky drug injection practices.

In addition to promoting the sharing of syringes and other HIV risk behaviour, punitive drug law enforcement measures create barriers to HIV testing and treatment. These barriers to treatment include stigma and discrimination within healthcare settings, refusal of services, breaches of confidentiality, requirements to be drug-free as a condition of treatment, and the use of registries that lead to denial of such basic rights as employment and child custody. As a result, research has repeatedly shown that drug users have lower rates of antiretroviral therapy use and higher AIDS related death rates. Punitive drug law enforcement policies and practices also have broader implications for public health. Given the demonstrated prevention benefits of antiretroviral therapy the public health benefit of providing all segments of the population, including persons who inject drugs, with access to HIV treatment is undeniable. However, numerous studies have demonstrated that coercive drug law enforcement measures and the frequent incarceration of people who use drugs hinder them from seeking HIV testing and treatment, and contribute to the interruption of HIV treatment once it has begun.

The incarceration of non-violent drug law offenders is a significant factor in the epidemic. This is a critical public health issue in many countries where HIV prevalence and AIDS cases behind bars are many times higher than among the general population. High rates of incarceration among drug users with or at risk of HIV infection are a matter of deep concern given that incarceration has been associated with syringe sharing, unprotected sex and HIV outbreaks in many places around the world. Incarceration also drives risk of HIV infection and disease by interrupting antiretroviral HIV treatment. Thus drug law enforcement measures often disrupt HIV treatment efforts, promote HIV drug resistance and increase risk of HIV transmission.

Prohibitions or restrictions on opioid substitution therapy and other evidence-based treatment result in untreated addiction and avoidable HIV risk behaviour. Multiple systematic reviews of evidence have shown that countries or jurisdictions that have legalised comprehensive harm reduction services that include needle exchange and opioid substitution therapy have significantly reduced HIV infections among people who use drugs, compared with persistent or

²⁰⁵ <http://www.opensocietyfoundations.org/reports/war-drugs-and-hiv-aids-how-criminalization-drug-use-fuels-global-pandemic>

growing rates in countries or jurisdictions where such services are restricted or blocked by law.²⁰⁶

In addition, countries that have decriminalised possession and use of small quantities of drugs for own use, such as Portugal, have seen marked reduction in new HIV infections amongst people who use drugs.²⁰⁷

Current position

In terms of Section 6 of the Misuse of Drugs Act: a person shall not -

- (a) have in his possession, or
- (b) smoke, consume or administer to himself, a controlled drug.
- (c) Section 7 prohibits the possession any pipe, syringe, utensil, apparatus or other article intended for the smoking, consumption or administration of a controlled drug.
- (d) In terms of section 15 “a person who is proved to have had in his possession or custody or under his control -
- (e) anything containing a controlled drug;
- (f) the key of anything containing a controlled drug;
- (g) the key of any place or premises or any part thereof in which a controlled drug is found, or
- (h) a document of title relating to a controlled drug, or any other document intended for the delivery, or which would require the delivery to him, of a controlled drug,

shall, until he proves the contrary, be presumed to have had the controlled drug in his possession.

- (2) The fact that a person never had physical possession of a controlled drug shall not be sufficient to rebut a presumption under this section.”

Similarly, in terms of section 16(1): “Where a pipe, syringe, utensil, apparatus or other article intended for the smoking, consumption or administration of a controlled drug is found in any place or premises, it shall be presumed, until the contrary is proved, that the place or premises is used for the purpose of smoking, consumption or administration of a controlled drug.”

Provisions for treatment and rehabilitation exist under both the Misuse of Drugs Act and the Mental Health Act.

Part V of the Misuse of Drugs Act provides for treatment and rehabilitation on both voluntary and involuntary bases. In terms of section 38:

- “(1) the Commissioner of Police, or any other person examined and appointed by the Minister for the purposes of this Part may, after consultation with the Attorney General, by order in writing, require any person whom he reasonably suspects to be a drug addict to be medically examined or observed by a medical practitioner.

²⁰⁶ Global Commission on HIV and the Law (2012) *Risks, Rights & Health* pages 29-35

²⁰⁷ 17% reduction between 1999 and 2003 after decriminalisation in 2001

- (2) If as a result of a medical examination or observation under subsection (1) it appears to the Commissioner of Police or person appointed by the Minister under subsection (1) that it is necessary for the person to undergo treatment or rehabilitation or both at an approved institution, the Commissioner of Police, or the person appointed by the Minister under subsection (1), may, after consultation with the Attorney General, make an order in writing requiring the person to be admitted to the approved institution specified in the order for the purpose specified in the order.
- (3) The Commissioner of Police or the person appointed by the Minister under subsection (1) may delegate the power vested in him under this section to -
 - (a) in the case of the Commissioner of Police, a Deputy Commissioner of Police, and
 - (b) in the case of the person appointed by the Minister, his deputy or such other person who usually acts in his place during his absence.
- (4) A person who is a drug addict may volunteer to undergo treatment or rehabilitation or both at an approved institution and the approved institution may admit the drug addict for treatment or rehabilitation or both on such terms and conditions as may be prescribed.
- (5) A statement made by a drug addict or any other person for the purpose of obtaining voluntary admission to an approved institution for the purpose of undergoing treatment or rehabilitation shall not be admissible in evidence against that person in connection with an offence in relation to section 5 or section 6.
- (6) A drug addict or any other person who has been admitted to an approved institution under this section shall be detained in the institution for a period of six months unless earlier discharged by a court or the person in charge of the institution.
- (7) If the person in charge of an approved institution or two medical officers are of the opinion that the period of detention of a person detained in an approved institution under this section is about to expire but that the person detained requires further treatment or rehabilitation or both, the person in charge of the institution or the two medical practitioners may by an order in writing direct that the person detained be detained in the institution for a further period of six months or further periods of six months: Provided that the aggregate periods of detention shall not exceed three years.

Section 39 provides for an order of treatment by the court and provides that "Where a person has been convicted of an offence in relation to section 5 or section 6, the court may, if it reasonably suspects that the person is a drug addict, order that the person be medically examined or observed by a medical practitioner and that if as a result of a medical examination or observation it appears to the court that it is necessary for the person examined or observed to undergo treatment or rehabilitation or both in an approved institution, the court may make an order that the person be admitted for treatment or rehabilitation or both to the approved institution specified in the order for such period of his term of imprisonment for the offence as the court may specify in the order. Where a person has been admitted under this section, he

shall not be discharged or transferred from the approved institution specified in the order without an order of the court.

Notwithstanding the provisions of section 39, courts do not currently make orders for treatment. It has been suggested that the reason for this is that the court is required in terms of this section to 'reasonably suspect that the person is a drug addict' before it can make such an order and that in many cases, particularly in the case of first time offenders, no such reasonable suspicion exists.²⁰⁸

The Mental Health Act also has provisions that form the legal basis for treatment of people who use drugs in a rehabilitation programme. Patients may be admitted as a patient to a mental health facility either at his own request if the person has attained the age of 18 years²⁰⁹ or may be admitted as an involuntary patient for persons who are mentally ill.²¹⁰ There is however no available data on whether and to what extent these provisions of the Mental Health Act are invoked. Anecdotal evidence suggests that admission to rehabilitation programmes is voluntary.

Harm reduction programmes are specifically provided for in the National Strategic Framework 2012-2016 and the National Policy for Prevention and Control of HIV & AIDS and STIs.

The UNAIDS Rapid Assessment on Most-At-Risk-Populations in the Indian Ocean: Injecting Drug Users, Men who have Sex with Men and Sex Workers²¹¹ notes a strong increase in the abuse of heroin in the last few years, strong increase in crime related to drug abuse and reports that since 2007 young female heroin users have been involved in sex work and have been soliciting in the city centre of Victoria. The reports highlights a very aggressive "marketing" by drug dealers traffickers especially aimed at young people, according to key informants: widespread availability of heroin and access to heroin as easy as access to cannabis; low availability and accessibility of services for injecting drug users. The report also identify a lack of effective coordination between the various stakeholders involved in the prevention of substance abuse and the treatment of drug abusers, and the prevention of HIV/AIDS and the treatment of people living with HIV, and concludes that despite the lack of data (especially on seroprevalence), the situation seems worrying as there are many trends in substance abuse similar to what happened in Mauritius before the surge in HIV infections related to drug injection.

In a recent survey conducted in 2011²¹²; it was found that HIV prevalence among people who inject drugs in the Seychelles was 5.8% (compared to 0.1% prevalence in the general population). The survey also found that:

²⁰⁸ Input from K Karunakaran, State Counsel at Stakeholders Consultation 21 /2/2013

²⁰⁹ S 16(1) Mental Health Act 1996

²¹⁰ S 16(2) Mental Health Act 1996 "...a person who is mentally ill and incapable of consenting to treatment may be admitted on the application of the person's next of kin"

²¹¹ UNAIDS (2008) *Rapid Assessment on Most-At-Risk-Populations in the Indian Ocean: Injecting Drug Users, Men who have Sex with Men and Sex Workers*

²¹² J Bibi et al (draft) (2011) *Injection Drug Use in the Seychelles Integrated Biological and Behavioural Surveillance Study*

- High percentages of people who inject drugs share needles and syringes previously used by someone else as well as give, lend or sell needles or syringes to someone else after already using it them. In addition, high percentages of people who inject drugs share cookers, vials and containers, cotton and filters, and/or rinse water and draw up drug solutions from common containers shared by others.
- Forty one percent of intravenous drug users reported ever receiving help or treatment because of drug use and among those, 10% reported that they were currently receiving help or treatment because of drug use. Among those who reported ever receiving help or treatment because of drug use, the majority reported receiving detoxification with drugs other than methadone (67%), followed by outpatient counseling (27%) and residential rehabilitation (26%). As a result recidivism appears to be very high.
- People who inject drugs in Seychelles suffer from high levels of stigma and discrimination. Sixty eight percent of people who inject drugs reported being refused a service in the past 12 months because of their injection drug use and just over 50% had been arrested in the past twelve months.

Participants in focus group discussions conducted in the course of this assessment raised the following issues:

- There is no law in place to people who inject drugs
- Some people know their rights but feel that less educated people may not know their rights
- Penalties for drug offences are too severe. Penalties for drug users should not be the same as for drug trafficking
- Provision should be made for alternative sentencing/rehabilitation for convicted drug users instead of imprisonment
- Legislation should allow for clean needle exchange
- Some drug users and their family members suffer ill treatment and brutality at the hands of law enforcers
- Corruption of law enforcers
- The National Drugs Enforcement Agency throws away of needles and syringes when effecting arrests which forces users to share or utilise used syringes which exacerbates the transmission risks of Hepatitis, HIV or other blood borne diseases.
- Law enforcement agencies should differentiate between dealers and users in enforcing the law

Despite this, the Seychelles currently has no programmes ensuring the availability of clean needles to people who inject drugs. It is essential that the Seychelles develop harm reduction programs to reduce needle sharing, increase access to clean needles and syringes through needle and syringe exchange programs, and to promote safer injecting practices, including the proper cleaning of needles, syringes and other injection equipment.

In addition there are currently no proven and effective treatment opportunities for addiction such as substitution therapy with methadone and other substitutes.

The only current government rehabilitation programme at Mont Royal on Mahe, Centre Mont Royal, which opened in 1998, offers a 6 week or longer residential service at the Location North

East Point Hospital. Prior to entering the programme clients must have already seen a doctor for treatment for withdrawal symptoms. If treatment symptoms are not severe the client may be admitted with medication for withdrawal symptoms. If withdrawal symptoms are severe, the client must first be admitted to the Les Cannelles Wellness Centre. The programme is psycho-therapeutic and addresses physical, social, emotional and spiritual dimensions of the clients' lives. After physical stabilization clients are assisted with group counselling, 1-1 counselling and given life skills to assist them to recover and to live a sober and functional life. Centre Mont Royal does not offer opiate based substitution therapy. Centre Mont Royale also offers a Day Care service for clients who have completed their detoxification as well as their residential programme²¹³.

The Center D'Accueil de La Rosiere is affiliated to the Roman Catholic Church and offers a rehabilitation programme for people suffering from drug and alcohol abuse. The Center also requires patients to undergo medically supervised withdrawal prior to engaging in their programme, which is for a 12 week period and offers counseling and skills development²¹⁴.

Recommendations

- Replace ineffective measures focused on the criminalization and punishment of people who use drugs with evidence-based and rights affirming interventions proven to meaningfully reduce the negative individual and community consequences of drug use, including the promotion of referrals to rehabilitation programmes rather than the imposition of custodial services for persons convicted of possession for own use.
- Amend the Misuse of Drugs Act to provide for needle exchange and substitution therapy programmes.
- Consideration should be given to decriminalise possession of drugs for own use and halt the practice of arresting and imprisoning people who use drugs but do no harm to others²¹⁵.
- Scale up evidence based strategies to reduce HIV infection and protect the health of persons who use drugs, including sterile syringe distribution and other safer injecting programmes.
- Invest in an easily accessible range of evidence-based options for the treatment and care for drug dependence, including substitution and heroin-assisted treatment.
- Build the capacity of law enforcement officials, judicial officers and health care service providers on the importance of evidence-based and rights affirming interventions proven to meaningfully reduce the negative individual and community consequences of drug use.

²¹³ Personal communication with the Director, Mont Royale Centre on 28th February 2013

²¹⁴ Personal communication with the Director, CAR on 22nd Befruart 2013

²¹⁵ Republic of Seychelles; National AIDS Council (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016* at page 59 recommends the elimination of punitive laws that criminalise certain behaviours and groups of people, namely migrant populations, IDUs, SWs and MSM and which restrict access to education, insurance and other services and freedom of movement.

These strategies reduce disease and death, and also limit the size and harmful consequences of drug markets by reducing the overall demand for drugs.

International bodies²¹⁶ recommend a comprehensive package for the prevention, treatment and care of HIV amongst intravenous drugs users which includes the following:²¹⁷

- Clean- needle and syringe exchange programmes
- Opioid substitution therapy and other evidence-based drug dependence treatment
- HIV testing & counseling
- Antiretroviral therapy
- Prevention and treatment of STIs
- Condom distribution
- Targeted information and education
- Vaccination, diagnosis and treatment of viral hepatitis
- Prevention, diagnosis and treatment of tuberculosis

Source: WHO, UNODC, UNAIDS (2009)

iv) Criminalization of HIV transmission and exposure²¹⁸²¹⁹

Recent years have seen the enactment in many countries around the world of HIV-specific laws that criminalize HIV transmission and exposure, driven by the wish to respond to serious concerns about the ongoing rapid spread of HIV in many countries, coupled by what is perceived to be a failure of existing HIV prevention efforts. In some instances, particularly in Africa, these laws have been a response to the serious phenomenon of women being infected with HIV through sexual violence or by partners who do not reveal their HIV diagnoses to them.

While these issues must be urgently addressed, a closer analysis of the complex issues raised by criminalization of HIV exposure or transmission reveals that criminalization is unlikely to prevent new infections or reduce women's vulnerability to HIV. In fact, it is more likely to harm women rather than assist them, and negatively impact both public health and human rights.

Applying criminal law to HIV transmission can have the effect of **detering people from getting tested** and finding out their HIV status, as lack of knowledge of one's status could be the best defense in a criminal lawsuit. Indeed, in jurisdictions with HIV-specific criminal laws, HIV testing counselors are often obliged to caution people that getting an HIV test will expose them to criminal liability if they find out they are HIV-positive and continue having sex. These same counselors are sometimes forced to provide evidence of a person's HIV status in a criminal trial. This creates distrust in relationships between PLHIV and their health care providers and thus

²¹⁶ UNGA ; UN Commission on Narcotics Drugs ; UN HR bodies ; WHO

²¹⁷ Harm Reduction International (2010) *What is harm reduction?* Available at http://www.ihr.net/files/2010/08/10/Briefing_What_is_HR_English.pdf; Global Commission on HIV and the Law (2012) *Risks, Rights and Health*

²¹⁸ <http://www.opensocietyfoundations.org/publications/ten-reasons-oppose-criminalization-hiv-exposure-or-transmission>

²¹⁹ Global Commission on HIV and the Law (2012) *Risks, Rights & Health* at pages 20-25

interferes with the delivery of quality health care and frustrates efforts to encourage people to come forward for testing.

In addition, criminalising HIV transmission and exposure **creates a sense of false security** by placing legal responsibility exclusively on people living with HIV for preventing the transmission of the virus. This undermines the public health message that everyone should practice safer behaviors, regardless of their HIV status, and that sexual health should be a shared responsibility between sexual partners. People may (wrongly) assume their partners are HIV-negative because they have not disclosed, and thus not take measures to protect themselves from HIV infection.

Applying criminal law to HIV exposure or transmission, except in very limited circumstances **reinforces the stereotype that people living with HIV are immoral and dangerous criminals**, rather than, like everyone else, people endowed with responsibility, dignity and human rights.

Prosecutions for HIV transmission or exposure also **spread myths and misinformation about how HIV is (and is not) transmitted**. In some jurisdictions, serious criminal charges have been laid against HIV-positive people for activities such as biting, spitting, or scratching, despite evidence that the risk of HIV transmission in this fashion is extraordinarily small (and in some cases, non-existent). Such prosecutions not only undermine efforts to educate the public about HIV, but further engender fear of people living with HIV.

Applying criminal law to HIV transmission also **does nothing to address the epidemic of gender-based violence or the deep economic, social, and political inequality that are at the root of women's and girls' disproportionate vulnerability to HIV**. On the contrary, these laws are likely to be used to prosecute women more often than men.

Women engage with the health system more often (including during pregnancy and child birth), and are thus more likely to find out about their positive HIV status before their male partners. Where laws criminalizing HIV exposure or transmission are in place women who test HIV-positive have to disclose their HIV status to their partners, refuse to have sex, or insist on condom use to avoid the risk of being prosecuted for exposing their partner to HIV. However, for many women these actions carry the risk of violence, eviction, disinheritance, loss of their children, and other severe abuses. Thus women are faced with an impossible choice: either to risk violence by trying to protect their partners, or to risk prosecution by failing to do so.

Laws that criminalise HIV exposure and transmission can also be used to prosecute women who transmit HIV to a child during pregnancy or breastfeeding. For millions of women living with HIV/AIDS—but often denied access to family planning, reproductive health services, or medicines that prevent mother-to-child transmission of HIV—this effectively makes pregnancy, wanted or not, a criminal offense. There are many more effective ways to prevent mother-to-child transmission of HIV, beginning with supporting the rights of all women to make informed decisions about pregnancy and providing them with sexual and reproductive information and services, preventing HIV in women and girls in the first place, preventing unwanted pregnancies among all women, and providing effective medication to prevent mother-to-child transmission of HIV to HIV-positive women who wish to have children.

Criminalization of HIV exposure or transmission also will not protect women and girls from coercion or violence that can transmit HIV, including rape and rape in marriage.

Given the stigma that still surrounds HIV and the persistence of HIV-related discrimination, criminal sanctions are often directed disproportionately at those who are socially and/or economically marginalized and thus there is a **risk of selective or arbitrary prosecution**. For example, in one jurisdiction a homeless man living with HIV was sentenced to 35 years in prison because he spat at the police officer who was arresting him for disorderly conduct. Many other cases suggest that criminal law is invoked in sensational circumstances, often in relation to those who are most marginalized and stigmatized in a society, including immigrants and refugees, foreigners, or sex workers, and occasionally in response to emotional media campaigns.

Proving that an accused person was HIV-positive at the time of an alleged offense, as well as proving who infected whom and when, is a serious challenge. To prove guilt, scientific evidence of transmission by the accused person is required. In recent years, where resources exist, prosecutors handling cases of HIV transmission increasingly have resorted to “phylogenetic testing,” which seeks to establish a genetic relationship between the HIV viruses of the two parties. However, such evidence only indicates similarities in the viruses; it does not prove beyond a reasonable doubt the source of the virus. Such technical evidence and its limitations are not well understood by police, prosecutors, defense lawyers, courts, the media, or people living with HIV or HIV organizations. Phylogenetic testing is also very expensive to apply and thus unaffordable in many low-resource countries. As a result of all these factors, there is **considerable potential for a conviction without sufficient evidence**.

For these reasons the enactment of HIV-specific laws that criminalise HIV transmission and exposure are counter-productive. **Criminalisation is justified under one condition only:** where individuals maliciously and intentionally transmit or expose others with the express purpose of causing harm. In the rare instances where this does occur however existing laws—against assault, homicide and causing bodily harm, or allowing intervention where a person is spreading communicable diseases—suffice to prosecute people in those exceptional cases. Defining specific HIV offences is not warranted and, in fact, violates international human rights standards.²²⁰

Current position

There are currently no laws in place that specifically criminalise HIV transmission or exposure. The Public Health Act creates such an offence only in relation to infectious diseases. This applies to exposure of any person while knowingly suffering from any infectious disease who exposes himself without proper precautions against spreading such disease in any street, shop, public building, public vehicle or vessel without previously informing the person in charge thereof that he is so suffering is considered a criminal offence.²²¹ This also applies to a person

²²⁰ For instance, in the International Guidelines on HIV and Human Rights, Guideline 4 directs States to ensure that their criminal laws “are not misused in the context of HIV/ AIDS or targeted against vulnerable groups”

²²¹ S 41(1)(a) Public Health Act 1960

in charge of a person he knows is suffering from an infectious disease and so exposes the sufferer.²²² A person who gives, lends, sells, transmits or exposes infected bedding, clothing rags or other things without previous disinfection is also committing an offence.²²³ In the current PHA and the draft Public Health Bill, HIV/AIDS is not considered an Infectious disease and this offence thus has no application in the context of HIV.

The National HIV Policy provides that: “Whilst human rights are at the centre of this policy, it is important to reiterate that rights also encompass responsibilities, especially those of respecting the rights of others to life and to health. Human rights do not mean that criminal behaviour will be tolerated. Appropriate legal procedures and proceedings will apply where national laws are not upheld.” This contemplates the use of existing criminal law to prosecute those rare instances where individuals maliciously and intentionally transmit or expose others with the express purpose of causing harm in accordance with international human rights standards.

Recommendations

- It is recommended that HIV-specific laws that criminalise HIV transmission and exposure are not enacted and that in the rare instances where individuals maliciously and intentionally transmit or expose others with the express purpose of causing harm existing laws— against assault, homicide and causing bodily harm, or allowing intervention where a person is spreading communicable diseases—suffice to prosecute people in those exceptional cases.
- In the event of sexual violence such as rape, sexual assault or defilement that results in the transmission of HIV or creates a significant risk of HIV transmission, the HIV-positive status of the offender may be considered an aggravating factor in sentencing if the person knew he or she was HIV-positive at the time of committing the offence. Provision in law for compulsory HIV testing of an accused or an offender should not be considered to constitute evidence of knowledge of HIV status.
- Guidelines should be developed to support law enforcement agents and the judiciary to ensure that criminal sanctions are applied reasonably, where elements of foreseeability, intent, causality and consent are clearly and legally established and where considerations and circumstances that mitigate against criminal prosecutions (such as the age, gender or disability) or aggravation of sentence are considered.

v) Prisoners

HIV rates among detainees that are estimated at twice to 50 times those of general adult populations.²²⁴ This is attributable to tattooing with homemade and unsterile equipment, drug use and needle sharing, high-risk sex and rape. Overcrowding abets the spread of opportunistic infections, and stress, malnutrition, violence and drugs weaken the immune system, making HIV-positive individuals more susceptible to getting ill.

²²² S 41(1)(b) Public Health Act 1960

²²³ S 14(1)© Public Health Act 1960

²²⁴ International HIV/AIDS Alliance and Commonwealth HIV and AIDS Action Group, (2010) *Enabling legal environments for effective HIV responses: A leadership challenge for the Commonwealth* Available at: <http://www.hivpolicy.org/Library/HPP001810.pdf>

International human rights law recognises the prerogative of the state to deprive people of certain rights—the most obvious one being liberty—through incarceration. But imprisonment does not justify denial of the human rights to humane treatment and dignity.²²⁵ Detainees have a right to a standard of health care equivalent to that available outside of prisons, and agents of the state have an obligation to refrain from inflicting harm on inmates. Among the rights that prison authorities are obligated to protect, and courts including the European Court of Human Rights have upheld, are those to health and life, which include adequate access to HIV prevention and health services. The majority of prison inmates do not have this access.

The State, through prison authorities, owes a duty of care to prisoners, including the duty to protect the rights to life and to health of all persons in custody. In the context of HIV this includes ensuring access by prisoners to HIV-related information, education and means of prevention (bleach, condoms, clean injecting equipment), voluntary testing and counseling, confidentiality and HIV treatment and access to and voluntary participation in treatment trials. The duty of care also comprises a duty to prevent rape and other forms of sexual assault in prison that may result, inter alia, in HIV transmission.

There is no public health or security justification for mandatory HIV testing of prisoners, nor for denying inmates living with HIV access to all activities available to the rest of the prison population.

Prisoners with terminal diseases, including AIDS, should be considered for early release and given proper treatment outside prison.²²⁶

Although inmates have restricted rights, they may have a range of reproductive health needs which need to be addressed to reduce the harm caused to that individual or their community on their release.²²⁷

Current position

The National HIV AIDS Policy states that²²⁸:” Health services for inmates include routine periodic visits by a nurse and doctor for minor health problems. Inmates are taken to specialist services as required on referral. There have been anecdotal reports of sexual relationships, drug abuse (including injecting), rape and sexual assault amongst prison inmates and this has been evidenced in prison populations around the world. Access of prison inmates and remandees to health services commodities must be strengthened to ensure continuity of therapies. Condom availability and accessibility must be viewed as one of the fundamental issues as part of harm reduction strategies in prison settings, in conformation with the UNODC principles.

Although inmates have restricted rights, they may have a range of reproductive health needs

²²⁵ Article 10, International Convention on Civil and Political Rights. Available at: <http://www2.ohchr.org/english/law/ccpr.htm>

²²⁶ UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights*

²²⁷ UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights*

²²⁸ At paras 86 and 87

which need to be addressed to reduce the harm caused to that individual or their community on their release. Female inmates may be pregnant, deliver, or be nursing when convicted. They may be sexually active or become pregnant in prison. They may require contraception, STI testing and treatment, Pap smear, breast examination, and menopause advice. Male inmates may also be sexually active in prison with other inmates (male or female) and need to access condoms.”

Despite these specific provisions in the National Policy, neither condoms nor clean needles are available in prison as a result of laws in place that criminalise men having sex with men, injecting drug use and the possession of drug injecting paraphernalia .²²⁹ In addition, access to medical services is limited and nutrition and prison conditions are generally poor. Ex-prisoners interviewed during a focus group discussion complained that cells are overcrowded and rat-infested with inadequate ventilation and that nutrition is poor. Vegetables and fruits are seldom provided and cooking facilities are unsanitary. Although a doctor from Anse Boileau clinic visits prison facilities 3 times a week it would appear that not all prison facilities are as regularly visited. One ex-prisoner from Coetivy reported having only seen a doctor once during a 19 month period²³⁰.

The main legislation governing the prisons service in the country is the Prisons Act of 1991. The Act outlines various principles by which the prison should be guided in its daily operation. These are further supplemented by the Prison Regulations 1999. The health related provisions under the Act are detailed below. The Act is currently being revised with the assistance of UNODC.

HEALTH RELATED PROVISIONS

17. (1) Every prison shall have a Medical Officer of Prisons who shall be a government medical officer.

(2) The Medical Officer of Prisons shall be detailed for duty in the prison by the chief executive officer of the Ministry responsible for health in consultation with the chief executive officer of the Ministry responsible for prisons.

(3) The Medical Officer of Prisons shall, subject to the control of the Superintendent, have the general care of health of the prisoners and shall perform such other duties as may be prescribed.

(4) The Medical Officer of Prisons, while acting as such, shall have all the powers, authority, protection and privilege of a prison officer of a rank below that of the Superintendent.

18. (1) The Minister may appoint one or more Prison Welfare Officers.

20. (2) Regulations may provide for, medical prisoners’ examination, ... and other records of prisoners, diet,..... maintenance,, treatment of prisoners...

23. (1) Where the incidence of an infectious or contagious of disease in a prison in the opinion of the Superintendent, infectious renders it necessary, any prisoner confined in the prison may be removed to any other prison or place although such place contagious may not have been declared under section 3 to be a prison.

²²⁹ National HIV AIDS Policy paras 86 and 87

²³⁰ Focus group discussion with PLHIV, 3 April 2013

24.(1) Where in the opinion of the Medical Officer of Prisons prisoners or, in the case of emergency, in the opinion of the Superintendent, a prisoner requires treatment in a hospital, the prisoner may be removed to a Government hospital for treatment.

(2) A prisoner removed to a Government hospital under subsection (1) shall, so long as he remains in the hospital, be deemed to be in lawful custody.

(3) The medical officer in charge of a hospital to which a prisoner is removed under subsection (1) shall take such measures as are necessary to prevent the escape of the prisoner from the hospital which in the opinion of the medical officer are not likely to be prejudicial to the health of the prisoner.

Prisons Act 1991

The Seychelles Prison Service recently adopted its Management and Rehabilitation Plan for 2012-2016. The Plan has as its overall Strategic Imperative “to develop and implement a human rights approach to prison management which meets minimum international standards”.

HEALTH RELATED GOALS AND ACTIONS

Strategic Goal 1: Improve the provision of appropriate care and safety of prisoners, one of the objectives is to raise health care standards and facilities and actions include: that the Prison Service has a resident doctor; an MOU is signed between Prison Service and MOH; and the infirmary is refurbished.

Strategic Goal 2: Develop a solid framework for rehabilitation and social reintegration of prisoners including the development and implementation of drug rehabilitation programmes for prisoners which will involve the Prison Service implementing a wholesome drug rehabilitation programme for the prisoners; an MOU between Prison Service and MOH, Drug Rehabilitation Centre, probation; Prison Service collaborating with CSOs.

Seychelles Prison Service Management and Rehabilitation Plan 2012-2016.

The achievement of these goals is however based on the assumption that the Prison Service has the required resources and commitment to improve health care standards and facilities and that it will receive the necessary support from the Ministry of Health and the Drug Rehabilitation Centre to implement the relevant programmes.

Recommendations

It is recommended that all prisoners convicted and on remand, are afforded access to acceptable, affordable and accessible quality HIV voluntary testing and counseling and prevention, treatment and care services including²³¹:

- Information, education and communication
- HIV testing and counselling
- Treatment, care and support

²³¹ See UNODC, ILO, UNDP *Policy brief HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions* Available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/publication/wcms_187290.pdf

- Prevention, diagnosis and treatment of tuberculosis
- Prevention of mother-to-child transmission of HIV
- Condom programmes
- Prevention and treatment of sexually transmitted infections
- Prevention of sexual violence
- Drug dependence treatment
- Needle and syringe programmes
- Vaccination, diagnosis and treatment of viral hepatitis
- Post-exposure prophylaxis
- Prevention of transmission through medical or dental services
- Prevention of transmission through tattooing, piercing and other forms of skin penetration
- Protecting staff from occupational hazards

D. Employment

The right to work entails the right of every person to access to employment without any pre condition except the necessary occupational qualifications²³² which is guaranteed by Art 35 of the Constitution.

i) Workplace Policy

A workplace policy provides the framework for action to reduce the spread of HIV and AIDS and manage its impact. It provides a basis for putting in place a comprehensive workplace programme, combining prevention, care and the protection of rights.²³³

Current Situation

Seychelles adopted the National Policy on HIV and AIDS in the Workplace in 2007.

One of the key principles the policy is based on is tripartism. This requires synergic collaboration of the ministry responsible for employment and representatives of workers' and of employers' associations. A Tripartite Committee has been established to that effect. However, meetings are not held regularly due to lack of commitment of either members or the Ministry of Employment.

The policy establishes a set of guidelines to protect the rights, health as well as the earning power of the workers and productivity of Seychelles business and industry in the face of the challenges presented by the HIV/AIDS epidemic. The specific objectives of the policy are to:

- (i) Develop concrete response at workplace, community, sectoral and national levels to deal with issues of HIV/AIDS prevention, stigma and discrimination, the productivity of workers and businesses, and the care and support of workers infected or affected by HIV/AIDS.
- (ii) Promote processes of dialogue, consultations, negotiations and all forms of cooperation between government, employers and workers and their representatives, occupational health personnel, specialists in HIV/AIDS issues, and all relevant stakeholders including non-governmental organizations.
- (iii) Give effect to its contents in consultation with social partners;
 - In national laws, policies and programmes of action
 - Workplace/enterprise agreements and
 - Workplace policies and plans of action

This Policy applies to:

- (i) All employers, workers in the public and private sectors in the Republic of Seychelles and
- (ii) All aspects of work (e.g. physical, intellectual, individual, team) both formal and informal.

²³² UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights*

²³³ <http://www.saf aids.net/pt-pt/content/why-hiv-and-aids-workplace-policy>

The policy establishes responsibilities which are detailed below:

7.1 All employer, employees and workplaces shall be held responsible and accountable for complying with this policy.

7.2 All employers must ensure that all members of staff are aware of and understand the contents of this policy.

7.3 All employers are responsible for implementing this policy ensuring compliance with the knowledge of its terms, and for taking immediate and appropriate corrective action where necessary.

7.4 All employers must ensure that every new employee has access to this policy.

7.5 All employers must open and maintain communication channels to raise awareness concerning HIV/AIDS.

7.6 The administration of any complaint procedures arising from this policy are assigned to the Department of Employment.

7.7 Employment Department is responsible for ensuring that this policy is properly distributed in workplaces and that every employer has personally received a copy of the policy.

7.8 The Employment Department in collaboration with the Ministry responsible for Health shall be responsible for the compilation of information on HIV/AIDS for policy formulation, including modes of transmission, preventive measures, addressing the myths or misconception, and other general information.

7.9 The Department of Employment and the Ministry responsible for Health in collaboration with NGOs shall be responsible for the dissemination of HIV/AIDS information to all workplaces.

Republic of Seychelles (2007) National Policy of HIV and AIDS in the Workplaces

The Ministry of Employment has accepted that it has failed in its obligations to implement its responsibility in ensuring that this policy is properly distributed in workplaces.²³⁴ As a result the remaining obligations fall also short of being implemented. Most employees interviewed in the process of compiling this report are not aware of the existence of this document.

The policy further provides for Focal Points to be appointed in all places of work for the implementation of the policy and in particular to follow up on policy issues and challenges in relation to HIV and AIDS in the workplace.

The policy recognises the 10 key principles of the ILO Code of Practice on HIV/AIDS and the World of work as basis for action on HIV/AIDS. It must be noted in 2007, the ILO constituents decided that the time had come to raise the response of the world of work to HIV and AIDS to a different level through the development and adoption of an international labour standard. This resulted in the adoption of Recommendation 200.²³⁵ The existing national policy will need to be

²³⁴ KII Ministry of Labour and Human Resources Development, 6 February 2013

²³⁵ ILO Recommendation No. 200

realigned to Recommendation 200. A workshop is being planned in April 2013 by ILO and the Ministry responsible for Employment on Recommendation 200.

In addition the policy was due to be revised two years after its adoption. The revision is yet to take place.

Recommendations

- Review the Policy on HIV and AIDS in the Workplaces 2007 in line with ILO Recommendation 200.
- Establish the mechanisms for implementing the Policy on HIV and AIDS in the Workplaces as well as for monitoring this implementation.
- Ensure the Tripartite Committee fulfills its obligations.
- Ratify the relevant outstanding international obligations.
- Legislate the necessary provisions of the Policy on HIV and AIDS in the Workplaces.

ii) Mandatory workplace testing

The right to work is violated when an applicant or employee is required to undergo mandatory testing for HIV and is refused employment or dismissed or refused access to employee benefits on the grounds of a positive result.²³⁶

Current Situation

The Public Services Orders 2011 paragraph 35 states that all candidates for appointment /re-engagement may be required to undergo a medical examination by a registered medical practitioner or a medical practitioner. Appointments of drivers, expatriate employees and food handlers will be subject to a certificate of medical fitness being granted.

The requirements for medical examination for all expatriate employees shall apply to all public sector organizations irrespective of their organizational status.

Locally recruited expatriates shall be required to undergo a medical examination and produce a medical certificate attesting to good health, at their own cost.

The National Policy of HIV and AIDS in the Workplaces, 2007 specifically states that there shall be no screening solely for the purposes of exclusion from employment or work processes.²³⁷

However, anecdotal evidence²³⁸ suggests some organizations require mandatory testing of candidates. The consultants have not been able to locate the necessary guidelines and procedures detailing this. In some instances this has not been confirmed by the organizations in question. Such testing can be seen as hindering access to employment.

There have been reports of mandatory testing in the Police Force²³⁹; in the airline industry; in the army for recruitment purposes and for in service staff who are required to undertake testing prior to going on missions and upon their return. Mandatory testing is also being undertaken in

²³⁶ UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights*

²³⁷ Chap 5.9 National Policy of HIV and AIDS in the Workplaces, 2007

²³⁸ From FGS and KIIs

²³⁹ KII Police Force, 19 March, 2013

the tourism sector, in particular at hotel establishments where staff is being forced to undertake such tests.²⁴⁰ There have also been reports of dismissals within the tourism sector based on the status of employees.²⁴¹

It must be noted that, to date, no cases have been lodged with the Employment Tribunal or the Ministry responsible for Employment regarding unfair dismissal on the grounds of an employee's HIV status or on the grounds of unfair treatment or discrimination contrary to S 46A of the Employment Act 1995.

Foreigners seeking employment in Seychelles have to obtain a Gainful Occupation Permit (GOP) in order to be able to work in the country. Applicants wishing to apply for a GOP have to submit their application form together with a medical fitness certificate. This requires an HIV test to be undertaken amongst other medical tests. Prospective applicants have their test done in an accredited facility in their country of origin and this is certified by the Ministry of Health (MOH) in Seychelles, being the only accredited facility within the country entitled to do so. The MOH, either issues or refuse the medical fitness certificate based on the results and forwards this to the Immigration Department. The GOP is valid for 2 years. Upon renewal of a GOP, the medical test must be renewed.

The reason given by government for pre-testing of foreigners applying for a work permit by prohibiting long-term stays of foreigners who are HIV-positive is to reduce the burden of free of treatment on government.

Recommendations

Ensure that the provisions of the Policy of HIV and AIDS in the Workplaces, 2007 are implemented and enforced to ensure that mandatory testing for access to or continued employment or promotion is not permitted.

iii) Occupational health and safety, in the health care and law enforcement sectors

As part of favourable conditions of work, all employees have the right to safe and healthy working conditions. In the vast majority of occupations and occupational settings, work does not involve a risk of acquiring or transmitting HIV between workers, from worker to client, or from client to worker. However, where a possibility of transmission does exist in the workplace such as in health-care settings, States should take measures to minimize the risk of transmission. In particular, workers in the health sector must be properly trained in universal precautions for the avoidance of transmission of infection and be supplied with the means to implement such procedures.²⁴²

²⁴⁰ FGDs Peer Educators, 9th March 2013 and PLHIV, 16th March 2013; KII HASO, 12 December 2012

²⁴¹ FGDs Peer Educators, 9th March 2013 and PLHIV, 16th March 2013; KII HASO, 12 December 2012

²⁴² UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights*

Current Situation

The Occupational Health and Safety Decree 1978²⁴³ provides for the following: S4.(1) “It shall be the duty of every employer to ensure, in accordance with the Decree and any other written law, the health, safety and welfare at work of all his employees.

(2) Without prejudice to subsection (1) those duties include- (b) arrangement for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances; (e) the provision and maintenance of a working environment for his employees that is safe, without risks to health and adequate as regards facilities and arrangements for their welfare at work, (f) the provision of protective equipment for his employees and training them to use such equipment.

Under S 32(4) “ a medical practitioner attending on or visiting a person who suffers from a disease specified in Part IV of the Schedule, or illness related to an occupation specified in Part V of the Schedule shall forthwith inform the Director thereof in the form set out in Part IV of the Schedule.” This includes (q) health care workers and occupations subject to biological hazards.

The Policy on HIV and AIDS in Workplaces 2007 paragraph 5.8 requires that employers as well as workers shall share a responsibility to ensure that the work environment is healthy. This should include maximizing the safety of workers from contamination with the HIV virus (e.g. needle sticks, blood transmission). It requires government to ensure that workers and owners of business achieve and maintain a healthy work environment and observe the provision of the Occupational Health and Safety Decree and Regulations.

The staff of the Ministry of Health is aware of what universal precautions entail despite no formal training being undertaken. The health care workers are provided with some measures to implement the universal precautions through the provision of gloves and sharps boxes. However, specific equipment to recap needles is not available and this is being done manually using forceps hence increasing the risk of needle pricks.²⁴⁴

Protocols are in place with the MOH for post exposure prophylaxis for members of staff who have been in contact with blood /has had a needle prick. The service is provided by CDCU with initial treatment available at the Intensive Care Unit for incidents occurring outside of working hours with a doctor from CDCU available at all times. Access to such treatment is generally available. However, limitations to this service includes support and counseling for health care workers; limited assistance outside of working hours and weekend; limited transport for access for Health Care Centres located away from Victoria; uncooperative and violent patients.²⁴⁵

²⁴³ Last amended by Act 10 of 1999

²⁴⁴ FGDs Health Care Workers – Community Nurses, 6th March 2013 and Hospital Services, 11th March 2013

²⁴⁵ *ibid*

It must be noted that staff other than health care workers are also at risk of exposure due to the nature of their work. Police officers do arrest intravenous drug users and are of the opinion that they are therefore at risk especially as they do not have the necessary equipment to protect themselves in these situations.²⁴⁶

The Public Services Order 2011 Paragraph 68 (Refer to the Procedures Manual No. 39) provides for allowances which are defined as a monetary amount other than the basic salary, used as a temporary measure to compensate an employee for a specific purpose. There are different allowances being paid by organizations. It provides for the following: (a) All allowances shall be subject to the limit prescribed and approved by the Authority responsible for Public Administration and shall be effected based on criteria, circumstances for payment recorded data or as per the provisions of the schemes of service; (b) All new and revised schemes of service shall contain allowances specific to the profession. The allowances take into consideration educational qualifications and experience required for the post, the physical and mental fatigue exerted to do the work and the conditions under which the work has to be performed.

According to the revised Payment Allowances Coding List effective from 1st March 2012, there are different types of allowances currently being paid in organizations, some of which are paid through the payroll as establishment allowances as part of the salary package while some are paid as reimbursement of expenses periodically.

Below are the approved establishment allowances that are paid through the payroll by using a payroll code that would apply for health care workers for occupational health hazards:

- Paragraph 19: Inducement Allowance that compensates for:(i) unpleasant working environment/location; (ii) where it is hazardous to health; (iii) in a particular location of job where recruitment and retention is difficult.
- Paragraph 22: Scheme of Service Allowance (to be phased out in 2013) contained in an approved scheme, of a permanent nature, specific to the profession. The scheme of service allowance takes into consideration educational qualifications and experience, the physical and mental fatigue exerted to do the work and the working conditions under which the job has to be performed.²⁴⁷

However, these allowances are applied across the board to all departments and staff that might be at risk.

Recommendations

- Ensure that all health care workers and law enforcement officials receive comprehensive training on universal precautions and that the necessary procedures are in place and equipment is accessible and available to enable health care workers and law enforcement officials to implement universal precautions at all times.
- Effectively implement paragraph 5.8²⁴⁸ of the Policy on HIV and AIDS in Workplaces 2007.

²⁴⁶ KII Police Officers, 19th March 2013

²⁴⁷ Status: Approved – attachment to circular NO.1 of 2012. Effective from 1 March 2012. DPA

²⁴⁸ Employers as well as workers shall share a responsibility to ensure that the work environment is healthy. This should include maximizing the safety of workers from contamination with the HIV virus (e.g. needle sticks, blood

- Ensure that post exposure prophylaxis is available for all health care workers and other service providers, including law enforcement officials, who need it and ensure that procedures are in place for access to support and counseling and assistance outside working hours.
- Provide appropriate allowances for all health care workers and other service providers at risk of infection.
- Amend the Occupational Health and Safety Decree and regulations to make provision for the classification of HIV as an occupational disease for health care workers and other service providers at risk of infection in the course and scope of their employment.

transmission). Government will endeavour to ensure that workers and owners of business achieve and maintain a healthy work environment and observe the provision of the Occupational Health and Safety Decree and Regulations.

E. Education and Information

States should ensure that both children and adults living with HIV are not discriminatorily denied access to education, including access to schools, universities, scholarships and international education or subject to restrictions because of their HIV status. There is no public health rationale for such measures since there is no risk of transmitting HIV casually in educational settings.

In the context of HIV and AIDS, both children and adults have the right to receive age-appropriate HIV-related information and education, particularly regarding prevention and treatment. Access to information and education concerning HIV is an essential life-saving component of effective prevention and treatment programmes. It is the State's obligation to ensure, in every cultural and religious tradition, that appropriate means are found so that effective age-appropriate HIV information and education is included in educational programmes inside and outside schools.

Guideline 9 of the *International Guidelines* furthermore recommends that States also develop creative education, training and media programmes to change attitudes of discrimination and stigmatization associated with HIV and AIDS, to understanding and acceptance.

Current Situation

The right to equal access to education is guaranteed under Art 33 of the Constitution, the Education Act and the Education Policy including the right to access universities, scholarships and international education irrespective of a person's HIV status. There is no public health rationale for such measures since there is no risk of transmitting HIV casually in educational settings.

Locally, mandatory testing is required for access to overseas education. Students applying for government scholarships for further tertiary education are required by the National Human Resources Development Council (NHRDC) to undertake a medical test, including an HIV test to determine their status. Such tests are conducted by the Ministry of health. However the requirement for the HIV test is not specified on the form for the medical test but the request is made though a letter to the MOH. It is the view of MOH and NHRDC that the State should be aware of the status of the students in order to provide adequate treatment for them. Students who are positive do proceed on their studies whilst receiving treatment. However, certain countries (Australia and South Africa) do refuse scholarships to HIV positive students on the basis that the host country will not be able to provide adequate treatment. It must be noted that so far NHRDC does not officially have any overseas students who are HIV positive though CDCU states that there are some students who are currently on antiretroviral therapy.²⁴⁹ This requirement can be seen to restrict access to further education.

²⁴⁹ KII NHRDC, 18 February 2013

This obligation for children and adults to receive age-appropriate HIV-related information and education, is recognized in the National HIV Policy, which includes a specific objective “[t]o educate, inform and raise awareness of the population about HIV and AIDS and other STIs and other related issues”,²⁵⁰ through prevention and behaviour change programmes (development of effective Information, Education and Communication materials, mass media messages and outreach activities in communities); primary prevention programmes, including healthy alternatives and life choices; and targeted behaviour change programmes and communications.

The Personal and Social Education Programme is normally taught in all schools in Seychelles. The national curriculum for this programme was developed in 2001. The programme includes developing attitudes and values to adopt safe and healthy lifestyles and promote general health, safe and responsible behaviours including tolerance and acceptance of others as well as learning about the definition, transmission and prevention of HIV and AIDS and STIs. Though not specifically addressing HIV and AIDS-related discrimination, the tolerance and acceptance component of the course aims to reduce stigma and discrimination in general.

However, certain limitations have been noted in the implementation of the programme and this includes the following: teachers are reluctant to teach the subject due to the nature of issues being discussed; some parents do not wish for their children to be taught sexually related information at a young age; the programme is not taught at all in some school or it features at an inappropriate time on the time table when students are less receptive to what is being taught e.g. Friday afternoon; the fact that the subject is not examinable.²⁵¹

Education and information has been identified as one of the main priorities to be considered in the way forward.²⁵²

Recommendations

- HIV Education and awareness for vulnerable groups, in particular prisoners and migrant workers.
- The Personal and Social Education programme curriculum should be revised to ensure that it includes age appropriate information about HIV, stigma and discrimination and human rights and this should include safe sex education at an early age.
- Stigma and discrimination reduction campaigns should be strengthened amongst communities as well as amongst service providers (e.g. health care workers) and law enforcement officials, to reduce HIV-related discrimination as well as discrimination against vulnerable and key populations at higher risk of HIV exposure.
- Community awareness and education campaigns on HIV, law and human rights (“Know Your Rights” campaigns) should be intensified, including the development of media in local languages on HIV and human rights issues. Programmes should ensure that they also specifically target and include information on issues and laws relevant to all

²⁵⁰ Para 59

²⁵¹ KII Ministry of Education, 13th December 2012

²⁵² Validation Workshop 22nd March 2013

vulnerable and key populations and on new, protective laws and policies (e.g. the proposed Disability Act).

- Human rights education and training should be strengthened in various sectors including in the school curricula, in the health system, within the working environment and amongst law enforcement officials.
- Information and sensitization campaigns should be introduced for judicial officers, to ensure on-going and updated information for all judicial officers on HIV and human rights issues.
- Information and sensitization campaigns should be introduced for law and policy-makers, to support the efforts of all decision-makers to develop supportive and effective legal and regulatory frameworks for HIV and AIDS.
- Awareness and education on HIV and AIDS as well as training on reporting on HIV specific issues for the media personnel.

F. Social Welfare

As guaranteed under UDHR “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.²⁵³

Current Situation

The right to social security is guaranteed under Art 37 of the Constitution. “The State recognises the right of every citizen to a decent and dignified existence and with a view to ensuring that its citizens are not left unprovided for by reason of incapacity to work or involuntary unemploymentundertakes to maintain a system of social security.”

The National Policy on HIV and AIDS states that the existing social support system will be strengthened and expanded so as to meet the needs of people living with HIV and AIDS, their carers and affected families, including orphans and vulnerable children.

The Agency for Social Protection Act, 2011²⁵⁴ provides for the granting of social welfare assistance to persons of insufficient means. It also provides for the administration of payment of benefits in accordance with the Social Security (Benefits) Regulations, 2010.²⁵⁵ “Social assistance” is defined as “all welfare assistance received under the Agency for Social Protection Act 2011 and the Social Security Act”.²⁵⁶

Any Seychellois citizen above the age of 18 and resident in Seychelles whose means are insufficient to meet his or her basic household needs may apply for social welfare assistance under the Act.²⁵⁷ “Resident in Seychelles” is defined as being in the country for an aggregate period of 11 months in a given year.²⁵⁸

Under the Act, the amount of supplementary income to which a person is entitled is based on income eligibility. This is calculated as the shortfall of a person’s basic household needs ascertained with the standard measures prescribed by regulations.²⁵⁹

Under S 3(5) Social Security Act 2008 “(a) a person who is a citizen of Seychelles and is resident in Seychelles; (b) a person who is not a citizen of Seychelles, who contributes to the Fund²⁶⁰ and is resident in Seychelles; or(c) a person who is not a citizen of Seychelles and does not contribute to the Fund but who is a dependent and a member of the household of a person

²⁵³ Art 25UDHR

²⁵⁴ S 2 Agency for Social Protection Act 2011

²⁵⁵ S 5 Agency for Social Protection Act 2011

²⁵⁶ S 2 Agency for Social Protection Act 2011

²⁵⁷ S 17(1) Agency for Social Protection 2011

²⁵⁸ S 17(2) Agency for Social Protection 2011

²⁵⁹ S 20 Agency for Social Protection 2011

²⁶⁰ Social Security Fund as established under S 26 of the Act

referred to in paragraph (a) or (b) and is resident in Seychelles, is covered under this Act in respect of contingencies in relation to which benefits are payable under this Act.”

Benefits payable under this Act are sickness; maternity; injury; invalidity; disablement; survivors; funeral; retirement; dependent’s; orphan’s and abandoned child’s benefits.

Normally sickness benefits are paid for each working day on which the beneficiary is incapable of work. However, there is a limitation applies where the benefit is paid for a continuous period, the beneficiary ceases to be entitled to benefit after a continuous period of 130 days.²⁶¹ In practice the Agency for Social Protection does assist people where this time has lapsed if they produce a medical certificate attesting they are unable to working even if the law provides otherwise.

Invalidity and disablement benefits could apply to people living with HIV and AIDS where they no longer qualify for sickness benefits as a prescription period of 130 days applies for both invalidity and disablement benefits²⁶²

Assistance for people living with HIV and AIDS may be provided under the above mentioned provisions if they meet the required criteria. That means that families affected by growing medical costs, families taking in orphaned children should in theory be able to apply if this impacts on their means.

Recommendations

Ensure that there is no discrimination in access to social welfare benefits on the basis of HIV status.

²⁶¹ Reg 11 Social Security (Benefits) Regulations, 2010

²⁶² Reg 21 and 25 Social Security (Benefits) Regulations, 2010

G. Women and Gender Based Violence

Women bear the heaviest burden of HIV in Southern Africa where women represent 58% of the people living with HIV and bear the greatest burden of care. The lower socioeconomic and political status women are assigned, including unequal access to education and employment, and fear or experience of violence compound women's greater physiological vulnerability to HIV. Because of social and economic power imbalances between men and women and the associated limitations in access to services, many women and girls have little capacity to negotiate sex, insist on condom use or otherwise take steps to protect themselves from HIV.

Sexual, physical and emotional abuse of women is among the most brutal manifestations of gender inequality. In addition to violating women's human rights, gender-based violence is both a cause and effect of HIV transmission. Fear of violence undermines the capacity of women and girls to negotiate safer sex, and the experience of violence is associated with increased sexual risk behaviour in later years.²⁶³

Denial of property and inheritance rights means that many women lose their homes, possessions, livelihoods and custody of their children if they lose their partner. This may force women to adopt survival strategies that increase their vulnerability to HIV.

The current position²⁶⁴:

The Constitution of Seychelles which is the supreme law, guarantees equal rights and protection to women and men without discrimination in all areas of political, social, economic and cultural life. Over the years, continuous efforts have been made to review subsidiary laws that are not in conformity with the Constitution or that discriminate against women and children in order to bring them up to international standards and give better protection to women in a modern and evolving society.

The Children Act 1982 (last amended in 1998) makes provision for the creation of a Family Tribunal to tackle problems of custody, care and maintenance of children because of the rising numbers of single mothers and children born out of wedlock. It allows for a parent to claim maintenance from a defaulting parent for financial support of a child. An amendment to the Act in 2005 makes provision for extended maintenance to be paid to support children between the ages of 18-21 pursuing further studies.

The Family Violence (Protection of Victims) Act 2000 offers protection to victims of "family violence", through protection orders. It can also prohibit the respondent from taking possession of movables such as furniture and household effects. The Act does not impose penalties for domestic violence but rather for the breach of a protection order. A person who contravenes an order made under the Act is liable on conviction to a fine of SCR 30,000 or to 3 years imprisonment or to both.

²⁶³ Global AIDS Report 2012, UNAIDS at page 70

²⁶⁴ Seychelles CEDAW Country Report 2011

Protection from discrimination is further provided under the Employment Act 1995 which applies to all workers in the public and private sector. S 46A (1) Employment Act states: *“Where an employer makes an employment decision against a worker on the grounds of the worker’s age, gender, race, colour, nationality, language, religion, disability, HIV status, sexual orientation or political, trade union or other association, the worker may make a complaint to the Chief Executive stating all the relevant particulars.”*

Reg. 16(1) of the Employment (Conditions of Employment) Regulations, 1991 makes provision for paid maternity leave of 14 weeks and 4 weeks unpaid leave for all female workers in full time or part time employment. (Paid maternity leave has risen from 8 to 14 weeks over the period 1994-2009)

The 1996 Amendment to the Penal Code (130-153) makes it easier to prosecute sexual abuse offenders, increases chances of conviction on evidence of victim and without the need for corroborating evidence and allows for prosecution for rape within marriage or relationships.

Although the country does not currently have a national gender policy, the **National Population Policy for Sustainable Development (2007)** and its **Plan of Action** and the **Social Development Strategy for Seychelles Beyond 2000**, reaffirm the need to promote gender equality and equity and to integrate gender into all economic and social policies and plans at all levels. In 2007, the Ministry of Health and Social Development launched the **National Strategy for Domestic Violence 2008-2012**. Its objectives are, inter alia, to strengthen and synthesise activities of multi-stakeholders for an integrated and efficient response to domestic violence; and to reduce vulnerability of women and men to domestic violence, both victimisation and perpetration;

The National on HIV and AIDS and Other STIs (at para 41) recognises the need for greater efforts are needed to realize and protect HIV-related human rights of inter alia, women and girls.

Despite the presence of this legal and policy framework and in spite of the tremendous strides made by Seychellois women in recent years, there are still unequal power dynamics in relations which impact on the incidence of HIV. Women and girls still have problems negotiating issues like condom use, HTC and contraceptives with their male partners. There is thus a need to address these issues with girls and boys in family education programmes, in PSE in schools and various other forms of interventions in communities²⁶⁵.

In addition, women and men’s status and position in the public and private sphere in Seychelles remain unequal in some areas in spite of facilitative legislation and frameworks. Traditional expectations of roles of men and women in the home and public life in *some* segments of the society continue to undermine government’s efforts at promoting equal opportunities²⁶⁶.

Whilst Seychelles society is said to be matriarchal and the women to wield great influence

²⁶⁵ UNAIDS Seychelles Country Progress Report 2012 at page 45

²⁶⁶ Seychelles CEDAW Progress Report 2011 at page 39

in the home and in the public sphere women headed households have a higher dependency rate and poverty is more prevalent among women. Inequalities in the home still exist and women bear the brunt for household work and child care. Traditional beliefs about the father as head of household and breadwinner are deeply entrenched although alternative models of more egalitarian partnerships were slowly emerging among the better educated families. Students from a very young age had very stereotyped notions of masculinity and femininity. The image of the man as the provider and protector was deeply entrenched in boys and girls psyche. Girls were positioned as weak and dependent despite the positive image projected by the girls in school²⁶⁷.

A rising trend in domestic violence is attributed to unequal power relationships in the home. It is presumed that many men feel threatened by women's economic and social empowerment and resort to violence in the home to resolve conflicts. Alcohol and drugs related problems perhaps leading to a reduced sense of self also aggravate the problem. Women in dual career families seemed unable to negotiate more equitable sharing of responsibilities in the home because of cultural norms and stereotyped expectations of the role and position of women²⁶⁸.

At the end of 2006 the Gender Secretariat in the Social Development Division launched a nationwide survey on domestic violence, to investigate its extent, causes and consequences in the Seychelles context.

From the sample of people surveyed²⁶⁹:

- 62% of women and 64% of men have witnessed an incidence of domestic violence.
- 46% of women and 38% of men have ever personally experienced an incident of domestic violence (victim to emotional/physical/economic/sexual violence by an intimate partner).
- 31% of women and 24% of men admitted to ever being abused by an intimate partner (victim to physical/sexual/economic violence).
- 42% of women and 36% of men have been emotionally abused by an intimate partner.
- 27% of women and 23% of men admitted to experiencing moderate physical violence at the hands of an intimate partner (ever been: pushed/shook/threw object/slapped by an intimate partner).
- 28% of women and 26% of men admitted to being a victim of severe physical violence (ever been: punched/threatened with a weapon/actually abused with a weapon/kicked/choked/ burnt/threatened or actually abused pets/destroyed property by an intimate partner).
- 4% the female respondents and 2% of the male respondents admitted to having been economically coerced by an intimate partner.
- 11% women admitted to having been raped by an intimate partner.

As at December 31st 2012, 502 persons (290 males and 212 females) had been tested positive for HIV infections²⁷⁰

²⁶⁷ *ibid*

²⁶⁸ *ibid*

²⁶⁹ “Statistics from Preliminary Findings of Domestic Violence Survey” accessed at <http://www.genderseychelles.gov.sc/Resources/Preliminary%20Findings%20female.pdf> on 12 April 2013

Although available data show that there are currently more men than women living with HIV, which is contrary to the trend in other countries in the region, gender based violence is reported to be on the increase and as it is recognized that gender-based violence is both a cause and effect of HIV transmission in that fear of violence undermines the capacity of women and girls to negotiate safer sex ²⁷¹ attention should be given to the strengthening of the legal and policy framework to protect women against gender based violence and to the implementation of programmes to effectively reduce levels of gender based violence.

Recommendations:

It is recommended that the legal and policy framework be strengthened to facilitate and ensure:

- Elimination of all forms of violence and discrimination on the basis of HIV status, gender, and sexual orientation
- Women’s enjoyment of equal rights in marriage and co-habitation, and protection of rights with respect to separation, divorce, and child custody
- Women’s property and inheritance rights
- Women’s access to justice and equal protection and benefit of the law
- Elimination of all forms of coercive and discriminatory practices in health care settings, such as coerced sterilization
- Implementation of strategies to reduce women’s economic dependence on men including access to resources, including skills training and access to employment without discrimination.
- Implementation of interventions to alleviate stigma and discrimination on the basis of gender
- “Know your rights” initiatives and campaigns to empower and educate women and men, including boys and girls, on human rights in general and women’s rights in particular
- It is further recommended that measures be taken to stop the practice of forced abortion and coerced sterilization of HIV-positive women and girls, as well as all other forms of violence against women and girls in health care settings.
- In addition, the capacity of health care workers must be strengthened to provide women with full information on sexual and reproductive options and ensure that women can provide informed consent in all matters relating to their health.

²⁷⁰ UNAIDS Seychelles Country Report 2012 at page 6

²⁷¹ Global AIDS Report 2012, UNAIDS at 70

PART IV. ACCESS TO JUSTICE AND LAW ENFORCEMENT IN SEYCHELLES

Strengthening access to justice and law enforcement is critical to creating strengthened legal and regulatory frameworks for effective HIV responses. The Global Commission on HIV and the Law's *Risks, Rights & Health* recognises the importance of taking steps to improve access to justice and law enforcement in relation to HIV and AIDS. Its recommendations note that need to not only enact protective and repeal punitive laws, but also to create stronger mechanisms to implement and enforce laws. The GCHL urges countries to “develop and implement humane, workable HIV-related policies and practices and to fund action on law reform, law enforcement and access to justice.”²⁷² Protective laws cannot, on their own, create an enabling environment for people living with HIV and key populations at higher risk of HIV exposure. Laws and policies need to be accessed, implemented and enforced by sensitized judiciary and law enforcement agents.

The UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights* also recommend various forms of support to improve access to justice and law enforcement in the context of HIV and AIDS, including legal support services, education and awareness and the strengthening of monitoring and enforcement mechanisms.

International Guidelines on HIV/AIDS and Human Rights, 2006

Guideline 7: Legal Support Services

Guideline 8 States should implement and support legal support services that will educate people affected by HIV about their rights, provide free legal services to enforce those rights, develop expertise on HIV-related legal issues and utilize means of protection in addition to the courts, such as offices of ministries of justice, ombudspersons, health complaint units and human rights commissions.

Guideline 9:

States should promote the wide and ongoing distribution of creative education, training and media programmes explicitly designed to change attitudes of discrimination and stigmatization associated with HIV to understanding and acceptance.

Guideline 11:

States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights, including those of people living with HIV, their families and communities.

In particular, the *International Guidelines* recommend that states take the following specific steps:

- Support for legal aid systems specializing in HIV casework, possibly involving community legal aid centres and/or legal service services based in AIDS service organisations

²⁷² GCHL (2012) *Risks, Rights & Health* at pg 10

- Support to private sector law firms to provide free pro bono services to people living with HIV and affected populations
- Support for programmes to educate and raise awareness of HIV law and human rights amongst affected populations, lawyers, legal support services and civil society organizations
- Support for HIV legal services and protection through a variety of offices, such as Ministries of Justice, procurator and other legal offices, health complaint units, ombudspersons and human rights commissions.
- Support for stigma and discrimination reduction programmes to the broader public, within educational institutions, workplaces and for key leaders and service providers, to promote dignity and respect for people living with HIV and other key populations
- Support monitoring and data collection on HIV and human rights including through the establishment of HIV focal points in relevant government branches, support to civil society organizations and through new or existing human rights commissions, national legal bodies and law reform commissions.

In this section we examine some of the key institutions available in the Seychelles to support people to access and enforce their rights in relation to HIV and AIDS. A complete assessment of the justice system is beyond the scope of this report.²⁷³ However, this report hopes to highlight some of the challenges and gaps in the justice system for people living with HIV or AIDS as well as all affected populations.

A. Awareness of HIV, law and human rights and of legal remedies available

The Republic of Seychelles (2012) *National Commitments and Policies Instrument* (NCPI)²⁷⁴ reports that there have been programmes to raise awareness and educate people on HIV, law and human rights issues in Seychelles. However, there is limited additional information available on the extent to which the general public and key populations are aware of HIV-related law and human rights issues and are able to access remedies for HIV-related human rights violations. Focus group discussions with selected populations as part of this research suggest that people are not aware of their HIV-related rights.²⁷⁵ The NCPI itself recognises the need for people to be further informed of their “rights and responsibilities”.

Specific information on awareness of gender-related rights and issues is available from recent country report to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee.²⁷⁶ According to the report, there have been strong efforts to inform and educate people on gender issues, the right to gender equality and reducing gender-based violence, through various government initiatives in the private and public sector and through the Ministry of Education. The National Council for Children, a statutory body set up to promote the well-being of the child, provides education and sensitization on domestic violence,

²⁷³ For more detailed assessments of the Seychellois justice system, see B Vel (2010) *Final Report of the National Study on Access to Justice in Seychelles*.

²⁷⁴ A report to UNAIDS on National HIV-related laws, policies and programmes covering various issues including HIV-related law and human rights issues; available at www.unaids.org

²⁷⁵ See, for instance, Focus Group Discussion: Peer Educators, 9th March 2013.

²⁷⁶ Republic of Seychelles (2011) *Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women 1993-2009*

child protection and human rights. However, the report notes that there are no civil society organizations that focus specifically on legal education and support for women. Women are not always knowledgeable of their rights and this limits their access to justice.

Despite this, existing research on access to justice more broadly shows that there is generally a limited awareness of law and rights as well as of legal support services, remedies and procedures amongst the general public in Seychelles. According to a recent report, there is “a complete lack of awareness at worst or at best, the haphazard knowledge of the law by members of the general public or people seeking redress under specific laws, leading to abuse and exploitation by counsel...”²⁷⁷ This is reportedly due to a lack of information in the national media and the limited involvement of civil society organizations in increasing awareness around law and human rights issues.²⁷⁸

Community nurses and nurses in hospital services, participating in a small focus group discussion during this research, also revealed limited awareness of HIV-related patient rights in terms of existing health guidelines such as the HIV testing and counseling guidelines and the HIV treatment guidelines; they furthermore felt unequipped to deal with the needs of key populations.²⁷⁹ A focus group discussion with people living with HIV felt that educators also needed more information and training on HIV and reducing stigma and discrimination at school, to deal with stigmatization of children from affected families.²⁸⁰

B. Legal Support Services

In the Seychelles, legal support services are provided by private lawyers and legal aid services.

Section 6 of the Legal Aid Act provides for aid to be made available to all persons who require assistance if charged with a criminal offence and provides that: “[s]ubject to this Act, legal aid shall be available to any person charged with an offence and shall relate to proceedings in any court in any exercise of original or appellate jurisdiction in criminal matters in respect of that offence.” Section 4 provides that “legal aid shall be granted to any person whose disposable income does not exceed the level of subsistence declared under the Social Security Act.”

This means that all people, including people living with HIV, key populations at higher risk of HIV exposure and others affected by HIV should have access to legal aid services in the event that they are charged with a criminal offence and do not have the means to hire a private lawyer. This means that theoretically, people living with HIV should be able to access legal aid if required to defend a criminal charge (such as a charge of intentionally transmitting HIV in terms of existing criminal laws). Key populations, such as sex workers and people who use drugs should also be able to access legal aid to support charges they may face under the Penal Code. Interviews with the Bar Association suggest that legal aid is easily accessible and all people

²⁷⁷ B Vel (2010) *Final Report of the National Study on Access to Justice in Seychelles*

²⁷⁸ Ibid.

²⁷⁹ Focus group discussion, Community Nurses, Ministry of Health, 6th March 2013; Focus Group Discussion, Nurses Hospital Service, 11th March 2013.

²⁸⁰ Focus Group Discussion, People Living with HIV, 16th March 2013

charged are aware of their rights to apply for legal aid, and that disclosure of HIV status would not be required for an application.²⁸¹

However, legal aid would not be of assistance to populations in non-criminal matters, where they wished to pursue, for example, a complaint for an HIV-related violation of their rights in law. In this case, they would need to rely on a private lawyer, civil society organizations or on accessing legal support from state institutions such as the National Human Rights Commission.

Research on access to justice in Seychelles indicates that the general public feels that civil society organizations are not providing adequate legal support services to support people to access justice for legal complaints: “[p]articipants often felt alone in their efforts to seek redress and to have access to justice.”²⁸²

According to the research, “[c]ivil society organizations are conspicuously absent from the process and procedures in access to justice and legal awareness. There are no non-governmental organizations that are presently and specifically involved in clear and overt advocacy and lobbying for justice on any side of the fence, i.e. for either the accused or the presumed victim of a crime. There are no victims’ groups. There are no kinds or organizations providing support, self-help or otherwise to any kind of groups active within the legal system, be they drug-dependent persons, children or adult survivors of sexual abuse or victims of gender-based violence.”²⁸³ The research noted several organizations and institutions, such as the Alliance of Solidarity for the Family, the Association for the Promotion of Solid and Humane Families, the Human Rights Commission of the Liaison Unit of Non Governmental Organizations (LUNGOS), the Red Cross Society of Seychelles and the National Human Rights Commission which they believed could play a stronger role in the process.

In addition, the general public report that state counsel provided in certain matters (e.g. the state counsel from the Attorney-General’s office and agencies such as the Family Squad of the Police Department provided in children’s cases) are less engaged than private lawyers and have high backlogs in their cases.

i) The court and tribunal system

Article 119 of the Constitution makes provides for an independent judiciary subjected only to the Constitution and other laws of Seychelles. The judiciary consists of 3 levels of courts:

- The Seychelles Court of Appeal
- The Supreme Court of Seychelles (including the Constitutional Court as a division of the Supreme Court), and
- Subordinate courts such as the Magistrates Courts and Tribunals

²⁸¹ Personal communication with a representative of the Bar Association, 15th March 2013

²⁸² B Vel (2010) *Final Report of the National Study on Access to Justice in Seychelles*.

²⁸³ Ibid.

The Supreme Court of Appeal is the highest court. It hears final appeals from the Supreme Court and the Constitutional Court. It is made up of the President of the Court and 3 Justices of Appeal, appointed by the President from candidates proposed by the Constitutional Appointments Authority.

The Supreme Courts hears the most serious criminal cases and complex, high-value civil cases as well as admiralty matters and divorces. It is presided over by the Chief Justice and *Puisne* Judges. It is also the first court of appeal for all the lower courts and tribunals. It consists of the Chief Justice, 4 *Puisne* Judges and the Masters of the Supreme Court all of whom are appointed by the President from judges proposed by the Constitutional Appointment Authority.

The Constitutional Court, created by the Constitution, hears constitutional law matters. It is a division of the Supreme Court and a constitutional matter must be heard by at least 2 judges of the Supreme Court.

The Magistrates Court is a court of limited jurisdiction. The Magistrates Courts of Seychelles are the trial court for lower value civil claims and less serious criminal charges. They also handle the initial stages of remanding suspects into custody. The head of the magistracy is the Senior Magistrate and other officers of the Magistracy are referred to as Magistrates.

There are also a number of lower tribunals such as the Family Tribunal, the Employment Tribunal, the Rent Control Board and the Fair Trading Commission.

The Family Tribunal was created under the Amendment of the Children Act, 1998 to act as an alternative structure to the traditional court system. It provides free services and deals with issues relating to custody, maintenance, access and care and control of minors as well as all issues relating to family violence.

The Employment Tribunal hears employment-related disputes. Public service employment disputes are heard by the Public Service Appeals Board and employment disputes in the private sector are filed before the Employment Department of the Ministry of Employment where mediation is provided - where mediation is unable to resolve the dispute then the matter is forward to the Employment Tribunal. Parties dissatisfied with the decisions of the employment tribunals may appeal either to the relevant Minister or to the Supreme Court, depending on which tribunal made the decision. Dissatisfied parties may also seek judicial review from any of the tribunals by petitioning the Supreme Court.

As is set out above, it is clear that there are various mechanisms available to support enforcement of rights in the Seychelles. HIV-related employment disputes in the public and private sector may be dealt with by the various employment tribunals, family matters such as custody disputes may come before the Family Tribunal and civil and criminal HIV-related legal disputes may be brought before the courts. The NCPI Report to UNAIDS also indicates that the judiciary has been sensitized on HIV, law and human rights issues.²⁸⁴ However, there is no specific information available on the extent to which people affected by HIV and AIDS are able

²⁸⁴ Republic of Seychelles (2012) *National Commitments and Policies Instruments* available at www.unaids.org

to access existing remedies through the tribunal and court systems and how they experience the system. Focus group discussion with migrant workers and prisoners indicated they felt unwilling or unable to report complaints due to their vulnerable positions.²⁸⁵ Information from the Seychelles Bar Association indicates that they rarely deal with HIV-related matters in practice.²⁸⁶ However, they suggested that issues of confidentiality *may* deter people living with HIV from accessing justice.

Existing research on access to justice in general indicates, however, major concerns with access to justice via existing mechanisms in Seychelles. The major issues of concern include the slow pace of litigation, with high case backlogs in the system; general mistrust and perceptions of corruption within the justice system amongst the general public; poor administration and the limited commitment of state counsel. People, and in particular vulnerable populations, report feeling alienated and intimidated by the system and court proceedings.²⁸⁷ Focus group discussions with selected populations, undertaken as part of this research, confirm this general mistrust of the system and indicate that few people bother to access justice; many turn to religious leaders and groups for support instead.²⁸⁸ A recent report to the CEDAW Committee suggests that the patriarchal mind-set and gender inequality influences women's ability to access justice for gender-based violence such as domestic violence and rape.²⁸⁹

The justice system is currently undergoing reform in order to improve access to justice in Seychelles.²⁹⁰ The introduction of the tribunals appears to have provided some assistance, with research showing, for instance, tremendous demands for the services and speeding up of decisions in family matters through the Family Tribunal.²⁹¹

ii) Other Statutory Institutions

The Protection of Human Rights Act, 2009 establishes a National Human Rights Commission (NHRC). It has the power to enquire into allegations of human rights violations, review safeguards for the protection of human rights and recommend actions to ensure the full enjoyment of human rights. Its mandate clearly provides the NHRC with wide-ranging powers to support people affected by HIV and AIDS to claim their rights, in the event of violations. However, it appears that the NHRC is not yet widely known.²⁹²

²⁸⁵ Focus Group Discussion, Migrant Workers, 25th March 2013; Focus Group Discussion, Prisoners, 3rd April 2013.

²⁸⁶ Personal communication with a representative of the Bar Association, 15th March 2013

²⁸⁷ See, for instance, B Vel (2010) *Final Report of the National Study on Access to Justice in Seychelles* and Republic of Seychelles (2011) *Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women 1993-2009*

²⁸⁸ See Focus Group Discussion: Peer Educators, 9th March 2013; Focus Group Discussion: People who use drugs, 5th March 2013.

²⁸⁹ Ibid.

²⁹⁰ See, for instance, recommendations for improving case management in the ISRIG-CNR (2011) *Development of the Case Management System for the Judiciary of the Republic of Seychelles: Towards a Road Map*

²⁹¹ Republic of Seychelles (2011) *Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women 1993-2009*

²⁹² Focus Group Discussion, Peer Educators, 9th March 2013; Focus Group Discussion: People who use drugs, 5th March 2013.

The Constitution also sets up the Ombudsman and the Public Service Appeals Board²⁹³ to assist people to deal with complaints against the public service. The Ombudsman has the power to investigate corruption in the public service and assist people whose constitutional rights have been affected as well as to take up a case to declare a law unconstitutional. The Ombudsman may potentially play an important role in supporting people living with HIV and affected populations in remedying violations of their rights as well as in challenging unconstitutional laws and policies. The Public Service Appeals Board hears complaints by persons relating to unfair actions in the course of public service employment, as is discussed above. It may also assist people affected by HIV and AIDS to challenge HIV-related discrimination they experience in their dealings with the public service.

iii) The Police Service

Seychelles has a police force made up of around 650 officers. There is limited, specific research on the experiences of people living with HIV and key populations at higher risk of HIV exposure at the hands of law enforcement. Research on access to justice more broadly indicates that delays and backlogs in bringing cases to justice in Seychelles very often start with the police, with delays in the investigation of cases.²⁹⁴ Focus group discussions with various populations during this assessment reported experiences of bribery, corruption and harassment of key populations by the police.²⁹⁵ For example, focus group participants said that law enforcement agents “beat up” people who use drugs and take possession of drugs seized for their own purposes. The National Drugs Enforcement Agency is also reported to throw away needles and syringes when effecting arrests, leading to sharing of needles amongst people who inject drugs and exacerbating the risk of HIV exposure.²⁹⁶ Focus group discussions furthermore felt that populations experience difficulties in trying to report violations by law enforcement officials.²⁹⁷ This issue has been dealt with in further detail in Part III, C, above and suggests the need for sensitization of law enforcement officials to protect the rights of key populations and to reduce the risk of HIV exposure.

iv) The Prisons Service

The Seychellois prisons service is governed by Prisons Act of 1991 (currently under revision), which outlines the various principles governing the prisons services, including the care of prisoners. The Act is further supplemented by the Prison Regulations, 1999. Prison policy regarding the care of all prisoners, including prisoners living with HIV and those at risk of HIV exposure, is dealt with in detail in Part III, C, above.

²⁹³ Articles 143-144 and 145- 148

²⁹⁴ B Vel (2010) *Report of the National Study on Access to Justice in Seychelles*.

²⁹⁵ See, for instance, Focus Group Discussion: Peer Educators, 9th March 2013; Focus Group Discussion: People who use drugs, 5th March 2013.

²⁹⁶ Focus Group Discussion: People who use drugs, 5th March 2013.

²⁹⁷ Focus Group Discussion: Peer Educators, 9th March 2013; Focus Group Discussion: People who use drugs, 5th March 2013.

Recommendations

- Develop general as well as targeted programmes and campaigns to reduce stigma and discrimination against people living with HIV and key populations at higher risk of HIV exposure.
- Provide information and education on HIV, law and human rights issues to increase awareness and understanding of HIV-related law and rights and how to claim and enforce rights through existing legal support services and enforcement mechanisms such as the police, tribunals and the courts.
- Sensitize key service providers, including health workers, educators and welfare workers, on the rights of people living with HIV and affected populations
- Strengthen access to legal support services for people living with HIV and key populations at higher risk of HIV exposure through various possible measures including
 - Encouraging pro bono services through private lawyers
 - Supporting civil society organizations to provide legal support for HIV-related complaints
 - Increasing the capacity of the National Human Rights Commission, Ombudsman and key government offices, institutions and legal support services to provide support services for HIV-related human rights violations
- Conduct research into access to justice through existing court mechanisms, tribunals and institutions for people affected by HIV and AIDS.
- Ensure that ongoing justice system reforms consider and integrate the specific vulnerabilities, difficulties and concerns of people living with HIV and other key populations.
- Sensitize judiciary on law and human rights issues affecting people living with HIV and other vulnerable and key populations.

PART V RECOMMENDATIONS

Based on the analysis of the current and proposed legal and regulatory framework, in terms of human rights principles to which the Seychelles has committed itself, public health as well as human rights evidence, we recommend the following:

A. Law review and reform

i) Equality / non-discrimination (High priority)

The law must protect and promote human rights in the context of HIV and AIDS and prohibit all forms of discrimination on the basis of actual or perceived HIV status. Protection from HIV-related discrimination should be included within any proposed HIV law; alternatively consideration should be given to the enactment of general anti-discrimination legislation which includes HIV as a prohibited ground of discrimination. Existing human rights and constitutional guarantees should be enforced. The State may also wish to consider an amendment to the Constitution to include HIV as a prohibited ground of non-discrimination.

Migrant workers and foreigners

To ensure an effective, sustainable response to HIV that is consistent with human rights obligations:

- Repeal those provisions of immigration legislation and regulations that exclude migrant workers from employment or foreigners from residing in the Seychelles solely on the basis of their HIV status (i.e. ensure that HIV and AIDS is not viewed as a “prescribed disease” in terms of the Immigration Decree and that HIV and AIDS is not viewed as a justifiable public health concern for excluding persons from Seychelles).
- Implement regulatory reform to ensure that migrant workers and foreigners can access the same quality of HIV prevention, treatment and care services and commodities that are available to citizens. All HIV testing and STI screening for migrant workers and foreigners must be confidential, voluntary and with informed consent²⁹⁸.
- Ensure that employers’ contracts with migrant workers and foreigners make provision for the employer to assume responsibility for all health care costs of the employee during the period of the employee’s employment with the employer.
- Enact legislation to give legal effect to the provisions of the Policy on HIV and AIDS in the Workplaces, including on the prohibition of HIV-related discrimination in the workplace.

Access to loans / insurance (Identified as an area of priority)

Legal provisions should be enacted to prohibit exclusion from life, health and other insurance solely on the basis of HIV status and to ensure that in the context of insurance HIV should not

²⁹⁸ In terms of Public Service Order 2011 para 36 Government is responsible for meeting the primary health care costs of expatriates in Government employment and that of their dependants. This applies however only to Government employees. It is also not clear whether primary health care covers the provision of ARVs.

be treated differently from analogous chronic medical conditions.

ii) Health laws, policies and plans

Currently, health rights in the context of HIV and AIDS are not clearly set out in law. They are protected in various broad constitutional rights and further developed in various HIV-related policies, strategies and plans. This means that there is at times legal uncertainty, as well as limited legally binding provision for specific matters relating to HIV and AIDS. In addition, current health legislation contains some punitive public health responses for dealing with infectious diseases. It is unclear to what extent coercive provisions regarding the isolation and detention of patients are applied to HIV and AIDS; however the provisions are also applied to populations affected by HIV and AIDS such as people who inject drugs and people with TB.

The following law review and reform measures are recommended to strengthen health rights in law and current policy for all affected populations in the context of HIV and AIDS:

- Legal and policy provision (in terms of the finalization of the Ministry of Health (2011) *Seychelles HIV Testing and Counseling Guidelines*) for HIV testing to take place only on the basis of voluntary and informed consent (save for exceptional circumstances such as unlinked surveillance testing), as is currently provided for in the *National HIV Policy*.
- Law and policy review and reform to create legal certainty on the age of consent for medical testing and treatment, and to align the age of consent to sexual and reproductive health services to that of consent to sexual intercourse, in accordance with the provisions of *the National HIV Policy* and draft *National Sexual and Reproductive Health Policy*.²⁹⁹
- Make clear provision in law, and in policy (in terms of the finalization of the Ministry of Health (2011) *Seychelles HIV Testing and Counseling Guidelines*) for
 - the right of all people to medical confidentiality, including in the case of HIV and AIDS (**High priority**)
 - the rights of children to medical confidentiality with regard to their HIV status, and for children who are able to consent independently in law to HIV testing to receive the results of their HIV tests
 - the right to be protected from disclosure of confidential medical information and for disclosure of confidential medical information, including HIV status, only on the basis of the informed consent of the person him or herself / person with the capacity to provide consent or by a qualified health care professional to an identified, third party where a real risk of HIV transmission exists after following step-by-step procedures, and after ensuring that there is no risk of harm to the patient, as

²⁹⁹ Note that these policies recommend that children aged 15 years and older be given the authority to provide independent consent to medical treatment. The Republic of Seychelles (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016* in fact recommends that children aged 14 to 18 years be provided with authority to consent without parental involvement. Note in addition that the National Committee on Child protection has agreed on the following: harmonisation of laws to align age of consent to sex and age of consent for reproductive health services at 16 years; 18 years for consent to marriage for both girls and boys.

recommended in the International Guidelines on HIV/AIDS and Human Rights³⁰⁰
(High priority)

- A clear prohibition on the use of coercive public health measures such as isolation, detention or quarantine in the response to HIV or AIDS.
- The review of the Public Health TB Regulations to ensure that patients subjected to involuntary detention for TB are accorded due process and that detention does not take place without appropriate justification.
- Legal provision for measures to ensure that the blood/tissue/organ supply is free of HIV and other blood-borne diseases.
- Legal provision for the right of all people to available, accessible, appropriate, affordable and quality medicines, diagnostics and related technologies for HIV and AIDS, without discrimination, for prevention, treatment, care and support of HIV and AIDS, as is currently set out in the National Strategic Framework for HIV & AIDS and STIs 2012-2016. **(High priority)**
- Legal provision for employers to be responsible for the cost of treatment of migrant worker employees.
- Legal provision for the prioritization of the needs of particularly vulnerable populations in access to health care services, as is currently set out in the National Strategic Framework for HIV & AIDS and STIs 2012-2016. **(High priority)**
- Legal provision to give effect to the commitment to providing harm reduction programmes for people who use drugs, as set out in the National Strategic Framework for HIV & AIDS and STIs 2012-2016, including the repeal of laws that restrict the availability of preventive measures such as clean needles and syringes.³⁰¹

In addition, further research into the following issues is recommended in order to make appropriate recommendations for law and policy review and reform:

- Research into the use and impact of coercive public health measures, such as those contained in the TB Regulations and Mental Health Act, on people living with and at risk of exposure to HIV.
- Research into the use of regulatory bodies, such as the Nurses and Midwives Council, the Dentists and Medical Practitioners Council and other professional bodies, to challenge misconduct or negligence by health care professionals.

Access to Treatment

- The Patents Act should be amended in order to comply with the TRIPs Agreement and include specific directives on utilising TRIPs flexibilities in relation to public health for increased access to good quality and affordable generic medicines.
- In developing its new patent law, Seychelles should be guided by its National Medicines Policy to ensure provision for parallel importation and compulsory licensing in accordance with TRIPs and should ensure avoidance of TRIPs-plus provisions in the TWO accession process.

³⁰⁰ Guideline 3 UNAIDS and OHCHR (2006) *International Guidelines on HIV/AIDS and Human Rights*

³⁰¹ See section on criminal law for further detail of laws that create barriers to the provision of harm reduction programmes for people who use drugs.

- The law must define and include specific protection for and the tailoring of accessible prevention and treatment services for vulnerable populations and key populations at higher risk of HIV exposure and in particular those commonly identified by the LEA such as women, children, people with disabilities, migrants, travellers, prisoners, people who inject drugs, sex workers, men who have sex with men and the homeless. This should be addressed by the Public Health Act where applicable as well as by other relevant legislation.
- Separate clauses within an HIV-specific law or in relevant sectoral laws may assist in setting out the specific measures required to respond to the needs of vulnerable populations and key populations at higher risk of HIV exposure.
- For example, in the case of women, it is important that the law contains the following explicit provisions:
 - Recognition of women as a vulnerable population
 - Specific protection of the rights of women to equality and non-discrimination on the basis of gender as well as on the basis of HIV and AIDS, and equality in inheritance and in rights to custody of children
 - Protection from gender-based violence, including sexual violence and all forms of rape, and access to appropriate and timely health care services (including post-exposure prophylaxis) in the event of sexual assault
 - Specific protection of the rights of women to sexual and reproductive health care without discrimination
- In the case of children, it is important that the law provides for, amongst other things:
 - The recognition of children as a vulnerable population in need of specific protection and targeted services, including the rights of the unborn child to be born HIV negative through ensuring women's access to prevention of mother to child transmission services
 - Protection of children's rights to equality and non-discrimination on the basis of HIV and AIDS, and equality in terms of access to health services, social services, inheritance and property rights
 - Children's rights to access to age appropriate HIV information, education and prevention services without discrimination
 - Children's rights to access to treatment, care and support for HIV without discrimination, including care and support for children orphaned by AIDS
 - The right to access independent and voluntary consent to HIV testing and to obtain related health care services when a child has the capacity to understand and appreciate so doing and the harmonization of the age of consent to sexual intercourse (15 years) with the age of consent to testing and treatment³⁰²
 - The provision of age appropriate targeted services for young sex workers and young people who inject drugs
- People with disabilities should be specifically provided for in law to ensure, amongst other things:

³⁰² Note: The National Committee on Child Protection has agreed on the following: harmonisation of laws to align age of consent to sex and age of consent for reproductive health services at 16 years; 18 years for consent to marriage for both girls and boys. There is a need to carefully consider and cater for the implications of providing HIV results to minors in the absence of parental consent or support.

- Their recognition as a vulnerable population in need of special protection and targeted health care services
- The protection of their right to equality and non-discrimination on the basis of their disability as well as on the basis of their actual or perceived HIV status as well as in terms of access to health care services, social services, employment and economic opportunity and other rights
- The protection of people with disabilities from violence, including sexual violence, and access to appropriate and timely health care services (including post-exposure prophylaxis) in the event of sexual assault
- Specific provision for the rights of people with disabilities to accessible and appropriate information and health care services, including HIV-related prevention, treatment, care and support and access to sexual and reproductive health care without discrimination including information appropriate for people with disabilities (braille and audio)
- Other key populations at higher risk of HIV exposure, such as prisoners, men who have sex with men and sex workers, should be specifically provided for in law to ensure, amongst other things:
 - Their recognition as a key population at higher risk of HIV exposure, in need of special protection and targeted health care services
 - Protection from all forms of violence, including sexual violence, targeted at key populations
 - The protection of their rights to equality and the prohibition of discrimination on any grounds, including protection for their rights to access to health care and social services
 - Provision for their access to appropriate and accessible HIV-related health care, including prevention, treatment, care and support services, without discrimination, to meet their particular needs.
- In addition, other provisions within law, such as provisions regarding HIV-related information, education, prevention, treatment, care and support, should make specific mention of the need to identify and target the needs of key populations. Likewise, provisions regarding information and education campaigns to reduce stigma and discrimination and to increase awareness of rights should include a focus on the rights of all vulnerable and key populations as well as targeting these populations for education.
- Ensure health care workers have training, including rights-based and sensitization training, to adequately implement and provide non-discriminatory services to key populations at higher risk of HIV exposure.

B. Criminal Law and Law Enforcement

i) Men who have sex with men (High priority)

- The provisions of the Penal Code be amended to decriminalize consensual sex between adults in accordance with the provisions of its own National Strategic Framework and

National HIV Policy and in accordance with international human rights law and good practice³⁰³.

- Given the high percentage of MSM who inject drugs, services for MSM should include linkages to injecting drug use services, including evidence-based risk reduction programs such as syringe exchange and opiate substitution therapy.

ii) Sex workers (High priority)

- Law should be enacted to protect against discrimination³⁰⁴ and violence, and other violations of rights faced by sex workers in order to realize their human rights and reduce their vulnerability to HIV infection and the impact of AIDS. Antidiscrimination laws and regulations should guarantee sex workers' right to social, health and financial services.
- Consideration should be given to decriminalising consensual sex work and the elimination of unjust application of non-criminal laws and regulations against sex workers.^{305 306 307}
- Consideration of discontinuing the use of public order statutes and the "Idle and Disorderly" provisions of the Penal Code currently used as the basis to arrest sex workers in public places.
- Programmes should be put in place to provide legal literacy and legal services to sex workers so that they know their rights and applicable laws, and can be supported to access the justice system when aggrieved.
- Health services should be made available, accessible and acceptable to sex workers based on the principles of avoidance of stigma, non-discrimination and the right to health.
- Programmes should be put in place to sensitize and educate health-care providers on non-discrimination and sex workers' right to high-quality and non-coercive care, confidentiality and informed consent.

³⁰³ The Republic of Seychelles (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016* at page 59 recommends the elimination of punitive laws that criminalise certain behaviours and groups of people, namely migrant populations, IDUs, SWs and MSM and which restrict access to education, insurance and other services and freedom of movement.

³⁰⁴ *International Guidelines on HIV/AIDS and Human Rights*, Guideline 5, para.22: "States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV and people with disabilities from discrimination in both the public and private sectors, that will ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation and provide for speedy and effective administrative and civil remedies."

³⁰⁵ See the Report of the Global Commission on HIV and the Law (2012) *Risks, Rights & Health*; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/14/20, 2010; UNAIDS Guidance Note on HIV and Sex Work, 2012.

³⁰⁶ The Republic of Seychelles (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016* at page 59 recommends the elimination of punitive laws that criminalise certain behaviours and groups of people, namely migrant populations, IDUs, SWs and MSM and which restrict access to education, insurance and other services and freedom of movement.

³⁰⁷ It was suggested at the stakeholder's consultation that clients soliciting sex workers should be criminalised. This runs contrary however to international recommendations. See the Report of the Global Commission on HIV and the Law (2012) *Risks, Rights & Health*; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/14/20, 2010; UNAIDS Guidance Note on HIV and Sex Work, 2012.

- Sex workers' groups and organizations should be made essential partners and leaders in designing, planning, implementing and evaluating health services.
- Essential health services for sex workers must include universal access to male and female condoms and lubricants, as well as access to comprehensive sexual and reproductive health services, and equitable access to all available health-care services including primary health care.
- Violence against sex workers is a risk factor for HIV and must be prevented and addressed in partnership with sex workers and sex worker led organizations.
- Violence against sex workers needs to be monitored and reported, and redress mechanisms established to provide justice to sex workers.
- Law enforcement officials, and health and social care providers need to be trained to recognize and uphold the human rights of sex workers, and held accountable if they violate the rights of sex workers, including the perpetration of violence.
- Support services need to be provided to sex workers who experience violence.

iii) People who use drugs

- Replace ineffective measures focused on the criminalization and punishment of people who use drugs with evidence-based and rights affirming interventions proven to meaningfully reduce the negative individual and community consequences of drug use, including the promotion of referrals to rehabilitation programmes rather than the imposition of custodial services for persons convicted of possession for own use.
- Amend the Misuse of Drugs Act to provide for needle exchange and substitution therapy programmes.
- Consider the decriminalisation of possession of drugs for own use and halt the practice of arresting and imprisoning people who use drugs but do no harm to others³⁰⁸.
- Scale up evidence based strategies to reduce HIV infection and protect the health of persons who use drugs, including sterile syringe distribution and other safer injecting programmes.
- Invest in an easily accessible range of evidence-based options for the treatment and care for drug dependence, including substitution and heroin-assisted treatment.
- Build the capacity of law enforcement officials, judicial officers and health care service providers on the importance of evidence-based and rights affirming interventions proven to meaningfully reduce the negative individual and community consequences of drug use.

iv) Criminalization

- It is recommended that HIV-specific laws that criminalise HIV transmission and exposure are not enacted and that in the rare instances where individuals maliciously and intentionally transmit or expose others with the express purpose of causing harm existing

³⁰⁸ The Republic of Seychelles (2011) *Evaluation Report of the HIV and AIDS National Strategic Plan 2005-2009 and Roadmap for the National Strategic Plan 2012-2016* at page 59 recommends the elimination of punitive laws that criminalise certain behaviours and groups of people, namely migrant populations, IDUs, SWs and MSM and which restrict access to education, insurance and other services and freedom of movement.

laws— against assault, homicide and causing bodily harm, or allowing intervention where a person is spreading communicable diseases—suffice to prosecute people in those exceptional cases.

- In the event of sexual violence such as rape, sexual assault or defilement that results in the transmission of HIV or creates a significant risk of HIV transmission, the HIV-positive status of the offender may be considered an aggravating factor in sentencing if the person knew he or she was HIV-positive at the time of committing the offence. Provision in law for compulsory HIV testing of an accused or an offender should not be considered to constitute evidence of knowledge of HIV status.
- Guidelines should be developed to support law enforcement agents and the judiciary to ensure that criminal sanctions are applied reasonably, where elements of foreseeability, intent, causality and consent are clearly and legally established and where considerations and circumstances that mitigate against criminal prosecutions (such as the age, gender or disability) or aggravation of sentence are considered.

v) Prisoners

It is recommended that all prisoners convicted and on remand, are afforded access to acceptable, affordable and accessible quality HIV voluntary testing and counseling and prevention, treatment and care services including³⁰⁹:

- Information, education and communication
- HIV testing and counselling
- Treatment, care and support
- Prevention, diagnosis and treatment of tuberculosis
- Prevention of mother-to-child transmission of HIV
- Condom programmes
- Prevention and treatment of sexually transmitted infections
- Prevention of sexual violence
- Drug dependence treatment
- Needle and syringe programmes
- Vaccination, diagnosis and treatment of viral hepatitis
- Post-exposure prophylaxis
- Prevention of transmission through medical or dental services
- Prevention of transmission through tattooing, piercing and other forms of skin penetration
- Protecting staff from occupational hazards

C. Employment

- Review the Policy on HIV and AIDS in the Workplaces 2007 in line with ILO Recommendation 200.

³⁰⁹ See UNODC, ILO, UNDP Policy brief HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/publication/wcms_187290.pdf

- Establish the mechanisms for implementing the Policy on HIV and AIDS in the Workplaces as well as for monitoring this implementation.
- Ensure the Tripartite Committee fulfills its obligations.
- Ratify the relevant outstanding international obligations.
- Legislate the necessary provisions of the Policy on HIV and AIDS in the Workplaces.

i) Mandatory workplace testing

Ensure that the provisions of the Policy of HIV and AIDS in the Workplaces, 2007 are implemented and enforced to ensure that mandatory testing for access to or continued employment or promotion is not permitted.

ii) Occupational health and safety in health care and law enforcement

- Ensure that all health care workers and law enforcement officials receive comprehensive training on universal precautions and that the necessary procedures are in place and equipment is accessible and available to enable health care workers and law enforcement officials to implement universal precautions at all times.
- Effectively implement paragraph 5.8³¹⁰ of the Policy on HIV and AIDS in Workplaces 2007.
- Ensure that post exposure prophylaxis is available for all health care workers and other service providers, including law enforcement officials, who need it and ensure that procedures are in place for access to support and counseling and assistance outside working hours.
- Provide appropriate allowances for all HCW and other service providers at risk of infection.
- Amend the Occupational Health and Safety Decree and regulations to make provision for the classification of HIV as an occupational disease for health care workers and other service providers at risk of infection in the course and scope of their employment.

D. Education and information (High priority)

- HIV Education and awareness for vulnerable groups, in particular prisoners and migrant workers.
- The PSE programme curriculum should be revised to ensure that it includes age appropriate information about HIV, stigma and discrimination and human rights and this should include safe sex education at an early age.
- Stigma and discrimination reduction campaigns should be strengthened amongst communities as well as amongst service providers (e.g. health care workers) and law enforcement officials, to reduce HIV-related discrimination as well as discrimination against vulnerable and key populations at higher risk of HIV exposure.

³¹⁰ Employers as well as workers shall share a responsibility to ensure that the work environment is healthy. This should include maximizing the safety of workers from contamination with the HIV virus (e.g. needle sticks, blood transmission). Government will endeavour to ensure that workers and owners of business achieve and maintain a healthy work environment and observe the provision of the Occupational Health and Safety Decree and Regulations.

- Community awareness and education campaigns on HIV, law and human rights (“Know Your Rights” campaigns) should be intensified, including the development of media in local languages on HIV and human rights issues. Programmes should ensure that they also specifically target and include information on issues and laws relevant to all vulnerable and key populations and on new, protective laws and policies (e.g. the proposed Disability Act).
- Human rights education and training should be strengthened in various sectors including in the school curricula, in the health system, within the working environment and amongst law enforcement officials.
- Information and sensitization campaigns should be introduced for judicial officers, to ensure on-going and updated information for all judicial officers on HIV and human rights issues.
- Information and sensitization campaigns should be introduced for law and policy-makers, to support the efforts of all decision-makers to develop supportive and effective legal and regulatory frameworks for HIV and AIDS.
- Awareness and education on HIV and AIDS as well as training on reporting on HIV specific issues for the media personnel.

E. Social welfare

Ensure that there is no discrimination in access to social welfare benefits on the basis of HIV status.

F. Access to justice and law enforcement

- Develop general as well as targeted programmes and campaigns to reduce stigma and discrimination against PLHIV and key populations at higher risk of HIV exposure.
- Provide information and education on HIV, law and human rights issues to increase awareness and understanding of HIV-related law and rights and how to claim and enforce rights through existing legal support services and enforcement mechanisms such as the police, tribunals and the courts.
- Strengthen access to legal support services for people living with HIV and key populations at higher risk of HIV exposure through various possible measures including:
 - Encouraging pro bono services through private lawyers
 - Supporting civil society organizations to provide legal support for HIV-related complaints
 - Increasing the capacity of the National Human Rights Commission, Ombudsman and Public Service Appeals Board to provide support services for HIV-related human rights violations
- Conduct research into access to justice through existing court mechanisms, tribunals and institutions for people affected by HIV and AIDS.
- Ensure that ongoing justice system reforms consider and integrate the specific vulnerabilities, difficulties and concerns of people living with HIV and other key populations.
- Sensitize judiciary on law and human rights issues affecting people living with HIV and other vulnerable and key populations.

- Support for legal aid systems specializing in HIV casework, possibly involving community legal aid centres and/or legal service services based in AIDS service organizations
- Support for programmes to educate and raise awareness of HIV law and human rights amongst affected populations, lawyers, legal support services and civil society organizations

G. Women and gender based violence

- Elimination of all forms of violence and discrimination on the basis of HIV status, gender, and sexual orientation
- Women's enjoyment of equal rights in marriage and co-habitation, and protection of rights with respect to separation, divorce, and child custody
- Women's property and inheritance rights
- Women's access to justice and equal protection and benefit of the law
- Elimination of all forms of coercive and discriminatory practices in health care settings, such as coerced sterilization
- Implementation of strategies to reduce women's economic dependence on men including access to resources, including skills training and access to employment without discrimination.
- Implementation of interventions to alleviate stigma and discrimination on the basis of gender
- "Know your rights" initiatives and campaigns to empower and educate women and men, including boys and girls, on human rights in general and women's rights in particular

It is further recommended that measures be taken to stop the practice of forced abortion and coerced sterilization of HIV-positive women and girls, as well as all other forms of violence against women and girls in health care settings.

In addition, the capacity of health care workers must be strengthened to provide women with full information on sexual and reproductive options and ensure that women can provide informed consent in all matters relating to their health.

H. General

Current laws in place do not give legal effect to, and are in some instances at odds with, the provisions of the National HIV and AIDS Policy. It is thus recommended that:

- Law reform should be considered a priority including the urgent finalization of new bills, regulations and policies or the amendment of existing laws, regulations and policies that are currently underway.
- An inter-sectoral law review committee on HIV and health related laws should be established to guide this process and consideration should be given to the appointment of or the secondment to the Ministry of Health of dedicated legal professionals with the necessary expertise to assist with this process.
- Partnership between the Ministry of Health and civil society organizations should be strengthened through the implementation of the new LUNGOS Operational Plan.

Annexure 1 - References

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Annexure 2 - List of key informants interviewed

NAME	ORGANISATIONS
Hon. M. A. Rose ; Hon. Murielle Marie ; Hon. Meggy Marie ; Hon. Nichole Barbe ; Hon. Roma Aglae ; Hon. Alderic Bristol; . Hon. Sebastien Pillay; Hon. Galen Bresson ; Hon. Maria Payet-Marie ; Hon. Sheryl Vandagasamy	Members of the National Assembly
Miss Sheryn Raoul – Nurse	Alliance for Solidarity for the Family
Dr Daniella Malulu – CIC Mr. George Gerry- FBOs Mrs. Doris Jean Louis – Nurse Mr. Hugh Lafleur – Mental Health Counselor	Drug Rehabilitation Centre/ Mental Health Dept MOH
Mr. Justin Freminot – Chairperson Mr. Marcel Rosalie - Member	HIV/AIDS Support Organisation (HASO)
Mr. Ronny Govinden – Attorney General	Office of the Attorney General
Mrs. Odile Octave – Director General School Division Mr. Jacques Kouï - Curriculum Development Officer Mrs. Elva Gedeon - CCAPS Mrs. Desiree Hermitte – Student Welfare Officer	Ministry of Education (Schools Division; Health Promotion Office; Curriculum Development; PSE)
Mrs. Mitsy Larue – Minister for Health Dr. Jude Gedeon- Public Health Commissioner Dr. Anne Gabriel Chairperson for HIV Technical Advisory Council Dr. Meggie Louange – Occupational Health	Ministry of Health
Dr. Louine Morel/Mrs. Georgette Furneau - Communicable Diseases Control Unit Mrs. Sabrina Mousbe – Manager HIV AIDS Control Program Dr. Meggie Louange Occupational Health	Ministry of Health
Mr. Roland Alcindor/Mrs. Preethi Sushil	United Nations Development Programme (UNDP)
Mr. Vincent Okullo & Dr Anne Gabriel	United Nations Population Fund (UNFPA)
Dr Cornelia Atsyor	World Health Organisation (WHO)
Mr. Ronald Fock-Tave	Immigration Department

Mr. Vivian Labiche	Civil Status Department
Mr. Keven Aglae - Chairperson	National Tripartite Committee for HIV and AIDS
Mr. Jimmy Finesse Director General Labour Relations	Ministry of Labour and Human Resource Development
Mrs. Dora Zatte / Mr. Nichol Gabriel	Ombudsman/Human Rights Commission
Mrs. Colette Servina	Red Cross Society of Seychelles
Judge D. Karunakaran /Mrs. Jeanine Lepathy - Assistant Registrar	Judiciary- Supreme Court
Mrs. Josette Thelemont - Director	Family Tribunal
Mrs. Margaret Pillay - CEO	National Human Rights Development Council
Mrs. Patricia Rene - Chairperson	National Council for the Disabled Association
Mr. Wallace Cosgrow - CEO	Agency for Social Protection
Miss Tessa Sui / Mr. Terrence Brutus - Gender Secretariat	Department of Social Affairs
Dr. Bernard Valentin	National AIDS Council
Members of the Police Force	
Seychelles Interfaith Committee	
Mr. Antoine Onezime - CEO	Seychelles Broadcasting Corporation

Annexure 3 - List of FGDs conducted

- People who live with HIV
- People who use drugs
- Prisoners
- Unemployed youth
- Peer educators
- Parent Teacher Association – Ministry of Education
- Community nurses/ hospital services nurses - Ministry of Health
- Migrant workers

Annexure 4 - List of members of the TWG and Coordination Team

Technical working group members
NAMES
Dr. Jude Gedeon - Public Health Commissioner Ministry of Health
Miss Chantal Melanie - Nurse Youth Health Centre
Mrs. Desiree Hermitte - Student Welfare Officer Ministry of Education
Mrs. Marie-Josée Bonne - Advisor to the Principal Secretary Ministry of Community Development Youth and Sport Social Department
Mr. Justin Freminot - Chairperson HIV AIDS Support Organisation
Mr. Reginald Hoareau - People Living With HIV
Mrs. Germaine Michaud - Secretary Seychelles Chamber and Commerce and Industry
Mrs. Sheryn Raoul - Nurse Alliance of Solidarity For Family
Mrs. Kate Benoiton National Council for Children
Mr. Sam Dodin - Research Officer Prison Department Ministry of Home Affairs
Mrs. Rosie Bistoquet - Director Family Health and Nutrition Programmes Public Health department Ministry of Health
Mrs. Sabrina Mousbe - Manager HIV AIDS Control Program Ministry of Health
Mr. Khalyaan Karunakaran - State Counsel Department of Legal Affairs
Mr. Vincent Okullo – UNV Technical Advisor – HIV Prevention and Control

