A CRITICAL REVIEW OF THE EXTENT TO WHICH THE *HIV/AIDS AND HUMAN RIGHTS INTERNATIONAL GUIDELINES* HAVE BEEN IMPLEMENTED IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY*

Ann Strode
BA LLB LLM
Senior Lecturer of Law
University of KwaZulu-Natal, Pietermaritzburg

Brenda Grant
BA LLB LLM PG Dip in Taxation
Associate Professor of Law
University of KwaZulu-Natal, Pietermaritzburg

SUMMARY

2006 was the tenth anniversary of the development of the *International Guidelines on HIV/AIDS and Human Rights* and to celebrate this occasion the AIDS and Rights Alliance of Southern Africa (ARASA) commissioned research into the extent to which these Guidelines have been used and implemented in the Southern African Development Community (SADC) region. This article examines the findings of this research on the three guidance points related to developing a legal and policy framework. It finds that although reforms are taking place within the SADC region and many are aimed at ensuring that responses to HIV are based on human rights, there is an uneven approach, with a number of countries failing to meet the basic requirements described in the Guidelines. There are also a number of regional human rights issues that need to be addressed as a matter of urgency. These include the continued testing and exclusion of HIV-positive recruits from the military, the criminalisation of same-sex relationships and the lack of legal protection for women.

* Ms Suhayfa Bhamjee (Lecturer, Faculty of Law, University of KwaZulu-Natal) is thanked for her insightful comments on the first draft of this article and assistance with the formatting of tables.

1 INTRODUCTION

Early governmental responses to HIV were, in many instances, a knee-jerk reaction of coerciveness and discrimination. They included mandatory HIV testing, the placing of HIV-positive persons in quarantine and forced disclosure of HIV status.[1] This coercive approach to the epidemic was premised on public health principles that required the "carriers" of disease to be isolated and contained.[2] Accordingly, initial legal responses either targeted the behaviour that was seen to be escalating the epidemic (for example, sex between men), or the individuals who were viewed as being responsible for "spreading" HIV (for example, sex workers).[3] Furthermore, the active exclusion of People Living with HIV or AIDS (PLHAs) from various spheres of life, such as the workplace and schools, was seen as a valid mechanism of keeping the community "AIDS free". In this setting of widespread discrimination against PLHAs, a small but active HIV and human rights movement emerged. This international movement argued that responses to the epidemic ought to be based on human rights[4] as both public health and human rights have the common goal of human well-being.[5]

It is against this background that, in 1996, the United Nations Joint Programme on HIV/AIDS (UNAIDS), in conjunction with the United Nations Office of the High Commissioner for Human Rights called together various experts to a consultation on HIV/AIDS and human rights. This consultation led to the development and issuing of the International Guidelines on HIV/AIDS and Human Rights (hereinafter "Guidelines").[6] The issuing of these Guidelines is regarded as a milestone in the struggle for the recognition of HIV/AIDS as a human rights issue. They describe in detail the responsibilities of governments towards creating a human rights-based response to HIV/AIDS. The twelve guidance points set out appropriate legislative and other responses that are required for an effective human rights and public health response to the epidemic.[7]

Given that 2006 marked the tenth anniversary of the development of the Guidelines, the AIDS and Rights Alliance of Southern Africa *(*ARASA) commissioned research into the extent to which these Guidelines have been used and implemented in the Southern African Development Community

---

1 Cameron "Human Rights, Racism and AIDS: The New Discrimination" 1993 *SAJHR* 22-23; and Kirby "The Never-ending Paradoxes of HIV/AIDS and Human Rights" 2004 *African Human Rights Law Journal* 163 167.

2 Buchanan "Public Health, Criminal Law and the Rights of the Individual" in *African Network on Ethics, Law and HIV, Proceedings of the Inter-Country Consultation* United Nations Development Programme, Dakar, Senegal 27 June - 1 July 1994 93-94.

3 Cameron and Swanson "Public Health and Human Rights – The AIDS Crisis in South Africa" 1992 S*AJHR* 200 202.

4 Albertyn and Heywood *Human Rights and HIV/AIDS in the Commonwealth* www.alp.org.za (accessed 2006-11-18); and Kirby 2004 *African Human Rights Law Journal*.

5 Mann "Health and Human Rights: If Not Now, When?" 1997 (2) *Health and Human Rights* 118 119.

6 UNAIDS and UN High Commissioner for Human Rights *HIV/AIDS and Human Rights: International Guidelines* (1996) www.unaids.

7 *Ibid*.

(SADC) region[8]. This article examines the findings of this research on the three guidance points related to developing a legal and policy framework that protects the civil and political rights of PLHAs. It sets out the content of each guidance point, reviews the extent to which SADC countries have complied with it and makes observations on progress or lack of it. It concludes with general conclusions on the extent to which the legal and policy frameworks within SADC countries are facilitating a human rights-based response to the HIV epidemic.

2 METHODOLOGY

This review of the steps taken by SADC countries to implement the Guidelines was undertaken through key informant questionnaires which were distributed to non-governmental organisations (NGOs) working on HIV as a human rights issue in the SADC region during September-October 2006. Where possible, more detailed information was obtained during follow-up telephonic or face-to-face interviews. This information was supplemented with a desk review of all literature and other material on the state of HIV and human rights in the SADC region.

3 FINDINGS

The Guidelines place obligations on governments to develop a protective legal and policy framework based on human rights principles. This, in turn, requires a commitment to ensuring that laws and policies protect people infected and affected by HIV from discrimination, protect vulnerable people from the risk of HIV infection, create an effective framework for prevention and treatment responses to HIV, and set standards of appropriate conduct and sanctions if these standards are not met.[9]

To meet these commitments, states need to audit or review existing legislation and policies against both human rights principles and the public health objective of effectively managing the epidemic.[10]

The research found that 13 of the 14 SADC countries surveyed had either taken steps or were in the process of creating a protective legal and policy environment.[11] Although it appears that these reforms may have helped with

---

[8] Funding to produce a research report for ARASA entitled *HIV/AIDS and Human Rights in SADC: An Evaluation of the Steps Taken by Countries Within the Southern African Development Community (SADC) region to implement the International Guidelines on HIV/AIDS and Human Rights* was obtained from Swedish International Development Cooperation Agency (SIDA) and Irish Aid. Permission to produce this article based on the findings of the research was granted by ARASA in December 2006 www.arasa.info.

[9] See fn 6 above.

[10] *Handbook for Legislators on HIV/AIDS, Law and Human Rights* (1999) UNAIDS and the Inter-Parliamentary Union www.unaids.org (accessed 2007-01-27).

[11] Only the DRC has not taken any steps towards developing a protective legal framework. Obviously, the lack of progress in the DRC must be seen against the backdrop of its regional war between the Congolese government and Uganda and Rwanda-backed Congolese rebels since the late 1990s which has left 2,3-million Congolese internally displaced and caused more than 412 000 Congolese refugees to flee to other countries.

creating a more protective legal environment for those infected and affected by HIVAIDS, human rights abuses within the region remain widespread.[12]

(i) Public Health Laws

Guideline 3 requires states to ensure that public health legislation does not inappropriately deal with HIV/AIDS inappropriately and that its provisions are consistent with human rights. It provides:

> "States should review and reform public health legislation to ensure that they adequately address the public health issues raised by HIV/AIDS, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS and that they are consistent with international human rights obligations."[13]

Table 1 below shows which countries have public health legislation and those that have introduced new HIV-specific public health laws.

Table 1: Use of public health legislation to deal with HIV in SADC countries

No information	**Public health legislation dealing directly with HIV**	**Non-HIV-specific public health legislation**	**No public health legislation**
Lesotho	Angola	Botswana	DRC
Mozambique	Madagascar	Malawi (proposed law reform)	
Namibia	Mauritius (draft legislation)	Swaziland	
Tanzania	South Africa	Zimbabwe	
Zambia			

The research found that of the nine countries surveyed,[14] 55.5 % (n = 5) had not reformed public health laws. However 44.4 % (n = 4) had introduced or were in the process of introducing HIV-specific public health laws. Based on this information, the following conclusions could be drawn:

(a) Most countries have not reviewed existing public health legislation or introduced new legislation to adequately address the public health issues raised by HIV/AIDS, as required by the Guidelines. Furthermore, given that many countries had existing public health legislation that pre-dated the HIV epidemic, it is possible that this legislation could still be inappropriately applied to PLHAs. Again this is contrary to the guidance provided in the Guidelines. For example, in South Africa, the Regulations Relating to Communicable Diseases and the Notification of Notifiable

Although peace was officially declared two years ago, there have been several waves of violence in the Katanga Province. *CIA World Factbook* https//cia.gov/cia/publications/factbook/geos/cg.html (accessed 2006-09-18).

12 Gumedze "HIV/AIDS and Human Rights: The Role of the African Commission on Human and People's Rights" 2004 *African Human Rights Law Journal* 181.

13 See fn 6 above.

14 Angola, Botswana, DRC, Madagascar, Mauritius, Malawi, South Africa, Swaziland and Zimbabwe.

Medical Conditions[15] inappropriately simply added "AIDS" to the list of communicable diseases, thus enabling the authorities to isolate or detain PLHAs.[16]

(b) Recent legislative developments in Angola, Madagascar and Mauritius seem to indicate a new trend towards introducing public health legislation that is HIV-specific and based firmly on human rights principles.[17] This is a clear break from the past, where in certain instances public health legislation was inappropriately applied to HIV.[18] The Angolan Law on HIV and AIDS, for example, states that this law aims at:

> "(a) Guaranteeing the protection and integral promotion of the health of all people …
> (b) Establishing the rights and duties of people infected by HIV or sick with AIDS"[19]

(ii) Reform of Criminal laws

Guideline 4 requires states to review and reform their criminal law so as to ensure that they are not inappropriately used in the context of HIV/AIDS and they do not target vulnerable groups. The Guideline states:

> "States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted at vulnerable groups."[20]

Table 2 below shows the wide range of criminal law reforms that have been introduced within SADC countries.

Table 2: Use of criminal law in responding to HIV in SADC countries

Country	No special HIV crime	Special crime for deliberate infection with HIV	Public health measures for harmful HIV-related behaviour	Harsher sen-tences for HIV+ rapists	Compul-sory testing of rapists	PEP pro-gramme
Angola			🎗			
Botswana	🎗		🎗	🎗	🎗	

---

[15] GN R2438 in *GG* 11014 of 1987-10-30.

[16] *Interim Report, Aspects of the Law Relating to AIDS* February 1997 South African Law Reform Commission www.doj.gov.za/salrc/ (accessed 2007-01-15).

[17] Law on Human Immunodeficiency Virus and the Acquired Immune Deficiency Syndrome, Law n.8/04, Law no. 2005-040, For the Protection of the Rights of Persons Living with HIV/AIDS and the HIV and AIDS Preventative Measures Bill, 2006.

[18] Mann "Human Rights and AIDS: The Future of the Pandemic" in Mann, Gruskin, Grodin and Annas (eds) *Health and Human Rights* (1999) 216 217.

[19] Article 1, Law on Human Immunodeficiency Virus and the Acquired Immune Deficiency Syndrome, Law fn 8/04.

[20] See fn 6 above.

Country	**No special HIV crime**	**Special crime for deliberate infection with HIV**	**Public health measures for harmful HIV-related behaviour**	**Harsher sen-tences for HIV+ rapists**	**Compul-sory testing of rapists**	**PEP pro-gramme**
DRC	No information					
Lesotho		🎗		🎗	🎗	🎗
Mada-gascar		🎗	🎗			˜ 🎗
Malawi	Proposed law reform of Penal Code but not HIV specific					
Mauritius			🎗			
Mozam-bique	🎗					
Namibia	🎗	Calls for new legis-lation		🎗		🎗
South Africa	🎗			🎗	🎗 (draft bill)	🎗
Swaziland		˜ 🎗 (draft bill)		˜ 🎗		˜ 🎗
Tanzania	No information					
Zambia	˜ 🎗	Calls for new legis-lation			˜ 🎗	
Zimbabwe		˜ 🎗		˜ 🎗	˜ 🎗	

In a review of the legislation in 12 SADC countries[21] it was found that considerable law reform had occurred. 33.3 % (n = 4) of the countries had introduced or were in the process of introducing laws criminalising the wilful transmission of HIV. A further 25 % (n = 3) had reformed public health laws to deal with harmful HIV-related behaviour. 50 % (n= 6) had introduced harsher sentences for rapists who were found to have known their HIV status. 41.6 % (n = 5) required rapists to be tested for HIV. However only 33.3 % (n = 5) had introduced a programme of providing post-exposure prophylaxis (PEP) to rape survivors. Based on this information, the following conclusions could be drawn:

(a) Whilst a number of countries have reformed their criminal law, not all of these reforms are in accordance with the guidance provided in the Guidelines or other policy documents issued by international bodies such as UNAIDS. The Guidelines require that the criminal law is not misused

[21] Angola, Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

within the context of HIV/AIDS, and UNAIDS has recommended that countries do not introduce new offences criminalising the wilful transmission of HIV.[22] The UNAIDS *Handbook for Legislators on HIV/AIDS, Law and Human Rights* argues that using the criminal law in this manner is ineffective:

> "Many countries have specific criminal offences for the intentional exposure or transmission of HIV. The existence of these offences has little impact on the spread of the virus, given that in the vast majority of cases transmission occurs at a time when the infected person is unaware of his or her own infection. Such laws divert attention and resources from measures which do make a difference in curbing the epidemic … Coercion is a crude tool in educating behaviour change, particularly in areas of intimate private sexual activity like sex."[23]

Contrary to this approach, new legislation has been introduced in Lesotho, Swaziland and Zimbabwe criminalising the wilful transmission of HIV. There have also been calls for the criminalisation of HIV in Namibia, Zambia and South Africa, where the AIDS Law Project noted:

> "The latest version of the Sexual Offences Bill does not make it a criminal offence for an HIV positive person to have unprotected sex. This is unlike earlier versions of the Bill which required that HIV positive persons either disclose their status or protect their sexual partners … although it is commendable that these sections have been taken out of the current Bill, civil society must remain vigilant to ensure they are not re-inserted."[24]

The research was not able to establish why legislatures have elected to create new crimes to deal with harmful HIV-related behaviour, given that all SADC countries have common law or penal code crimes which could be used to prosecute persons who deliberately infect others with HIV. It may be that they wished either to confirm or clarify the existing legal position or they may have been under political pressure to create a "new" offence. For example, in Lesotho, a new crime of wilful transmission of HIV has been created in the Sexual Offences Act (2003). It is very broadly worded and extends liability to persons who fail to disclose their HIV status to their sexual partners. It is unclear if the use of safer sex techniques would be a defence in this instance.[25]

Furthermore, despite the existence of these new crimes, it is unclear whether they are being used to deal with harmful HIV-related behavior as none of the NGOs surveyed reported any prosecutions of PLHAs for the willful transmission of HIV.

---

[22] UNAIDS "Criminal Law, Public Health and HIV Transmission: A Policy Options Paper" prepared for UNAIDS by Elliott, Canadian HIV/AIDS Legal Network, Montreal, Canada, 2002, UUNAIDS/02.12E http://data.unaids.org/Publications (accessed 2006-11-21).

[23] See fn 9 above.

[24] Heywood "Human Rights and HIV/AIDS in South Africa – An Assessment" paper presented at ARASA Civil Society Conference, October 2006, Johannesburg, South Africa.

[25] "New laws to strengthen HIV/AIDS action" http://www.africafiles.org/printableversion .asp?id4577 (accessed 2006-09-14).

(b) Recent public health legislation in Angola, Madagascar and Mauritius deals directly with harmful HIV-related behaviour.[26] In these countries provision is made in public health legislation, as opposed to the criminal law, to deal with harmful HIV-related behaviour. This approach appears to be more in line with the recommendations made in the Guidelines. For example, in Madagascar, Art 12 of Law 2005-040 requires that PLHAs must be treated the same as other patients, and Art 28 prohibits all stigmatisation and discrimination against PLHAs, their partners or members of their families.

(c) Half the countries surveyed had developed new laws providing for harsher sentences for persons who commit the crime of rape whilst knowing they are living with HIV. Whilst this is an important reform that protects the rights of victims, it appears that in practice, with the low levels of HIV testing in communities, it is difficult to prove that the accused was aware of their HIV status at the time of committing the offence. A case in point is *Qam Nqubi v The State,* where the Botswana Court of Appeal found that the offender's HIV status could not be regarded as an aggravating factor given the absence of any proof that he was HIV-positive at the time the rape was committed.[27]

(d) A significant number of countries had introduced law reform requiring the compulsory HIV testing of sexual offenders. It appears that the purpose of HIV testing at this point (that is, after a person has been convicted of the crime) is to assist the court with determining an appropriate sentence. If this assumption is correct, this reform is of little value, as was demonstrated in the *Qam Nqubi* case.[28] Furthermore, although superficially this may appear to be a reform that is aimed at assisting the survivors of sexual violence, knowledge of the offender's HIV status some months or years after the rape is generally of little health value to the survivor.[29] Law or policy reform towards developing a package of services for the survivors of rape, such as immediate access to post-exposure prophylaxis (PEP),[30] would be far more beneficial.[31] It is only in South Africa that the compulsory testing of sexual offenders is linked to providing the survivor of sexual violence with information to protect their health. In this instance, the HIV testing may only be done by order of a magistrate, under certain conditions, to protect people accused of a sexual offence from arbitrary, forced HIV testing.[32]

(e) Only a third of countries surveyed had introduced PEP programmes for the survivors of rape. Of these countries, only Lesotho and South Africa

---

[26] See fn 14 above.

[27] Criminal Appeal 49/2000.

[28] *Ibid*.

[29] http//:www.thebody.com/ (accessed 2007-01-28).

[30] PEP is an antiretroviral therapy designed to reduce the possibility of an individual becoming infected with HIV.

[31] *Submission to the Commission on Gender Equality on the Criminal Law (Sexual Offences and Related Matters Amendment Bill [B-2006)* 17 August 2006 Tshwaranang Legal Advocacy Centre www.tlac.org.za (accessed 2007-01-28).

[32] S 33-37 of Criminal Law (Sexual Offences and Related Matters) Amendment Bill, B – 2006.

have created, or are in the process of ensuring, a legal right to PEP for rape survivors. Given the high levels of sexual violence in the region, the high prevalence of HIV and the risks of exposure to HIV during a sexual assault, this is a matter of grave concern.

(f) Despite the Guidelines stating that the criminal law should not be used to target vulnerable groups, gay men (a group that is highly vulnerable to HIV), remain the victims of harsh criminal law penalties. In reviewing the legislation in 11 countries[33] it was found that 72.7% (n = 8) had criminalised sex between men. In only 27.2 % (n = 3) of the countries surveyed were men who had sex with men protected from unfair discrimination. Table 3 below sets out which countries have criminalised same-sex relationships.

Table 3: Criminalisation of sex between men in SADC Countries

Country	No information	No crime	Common law offence	Crime under the Penal Code
Angola		🎗		
Botswana				🎗
DRC	🎗			
Lesotho	🎗			
Madagascar		🎗		
Malawi				🎗
Mauritius			🎗	
Mozambique				🎗
Namibia				🎗
South Africa		🎗		
Swaziland			🎗	
Zambia				🎗
Tanzania	🎗			
Zimbabwe			🎗	

This has significant implications for HIV prevention programmes because where sex between men is criminalised, it is extremely difficult to openly provide services to this group. It also means that all state media messages on HIV/AIDS ignore gay men, thus heightening their vulnerability to HIV. Furthermore, the criminalisation of sex between men continues to act as a barrier to providing HIV prevention programmes in prisons, with authorities refusing to provide condoms to inmates where homosexuality is illegal. For example, in Namibia a spokesperson for the Ministry of Safety and Security stated that allowing male prisoners access to condoms would be tantamount to condoning sex between men which was prohibited by law.[34]

---

[33] Angola, Botswana, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

[34] *Masihlangane* The AIDS Consortium, January 2006.

(iii) Reform of Anti-Discrimination Measures

Guideline 5 requires states to enact or strengthen anti-discrimination laws to protect people infected and affected by HIV. In the discussion under Guideline 5, it is recommended that governments do this by developing or revising general anti-discrimination laws to ensure they protect PLHAs.[35] The Guideline states:

> "States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS 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, emphasise education and conciliation and provide for speedy and effective administrative and civil remedies."[36]

Table 4: Equality legislation prohibiting unfair discrimination on the basis of HIV status

No information obtained	No policy or law	HIV specific law	General equality law	Policy only
Lesotho	DRC	Angola	South Africa	Botswana
	Mozambique	Madagascar		Malawi
		Mauritius		Namibia
				Swaziland
				Tanzania
				Zambia
				Zimbabwe

A review of the legislation and policy in 13 SADC countries[37] shows that whilst 91.6 % (n = 11) had either a law or national policy prohibiting unfair discrimination against PLHAs, most of these countries, 58.3 % (n = 7), had situated this principle within national policies and not legislation. Only 30.7 % (n = 4) countries had legal protection against unfair discrimination. Based on this information, the following conclusions could be drawn:

(a) HIV-specific legal protection against unfair discrimination is limited within the region. Most countries simply provide that unfair discrimination against PLHAs is prohibited in HIV-related policies. Only Angola, Madagascar and Mauritius (in the form of its draft legislation) have HIV-specific legislation that outlaws discrimination. South Africa has specific equality legislation, but this does not list "HIV status" as a prohibited ground on which no person may discriminate.[38] In some instances, even where legislation exists it provides limited protection, for example, the

[35] See fn 6 above.

[36] See fn 5 above.

[37] Angola, Botswana, DRC, Malawi, Madagascar, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

[38] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Despite "HIV status" not being specifically listed as a prohibited ground on which no person may discriminate, it is highly likely that the provisions in the Act are broad enough to prohibit such discrimination.

draft Mauritian legislation limits HIV testing to testing with a legitimate purpose but doesn't expressly prohibit unfair discrimination as such.[39]

Furthermore, no SADC countries have used disability legislation to protect PLHAs against unfair discrimination. Even in South Africa where the Constitution protects disabled persons against unfair discrimination,[40] the Constitutional Court avoided making a finding that HIV was a disability in *Hoffmann v SAA*.[41] In the draft Mauritian legislation, the HIV and AIDS Preventative Measures Bill, HIV is expressly excluded from the definition of disability:

> "Any person who is HIV positive or has AIDS shall not be considered as having a disability of incapacity by virtue of any enactment"[42]

Thus it appears that SADC countries are approaching the protection of PLHAs against unfair discrimination in a different way to many developed countries such as the USA and Canada where courts have accepted that HIV may be viewed as a disability.[43]

(b) The most significant area of law reform has been within employment legislation. Table 5 below shows that of the 14 SADC countries reviewed,[44] 71.4 % (n = 10) had laws (even if they were not HIV-specific) which could be used to protect PLHAs from unfair discrimination in the workplace. 42.8 % (n = 6) of the countries had adopted HIV-specific codes of good practice for the workplace. This has had a significant impact on reducing unfair discrimination in the workplace. In countries where no legal protection exists, discrimination continues unabated. For example, it was reported in Mauritius:

> "Many people have lost their jobs – the discrimination is not openly on the basis of HIV status, the employer just says that they are not doing well or fires them for another reason. People also don't come forward to raise such abuses because of stigma."[45]

Table 5: Best practices in employment laws and codes

Country	Law or code regulating HIV/AIDS and Employment
Angola	The Law on HIV and AIDS (2004) prohibits unfair discrimination in the workplace; employers are under a duty to educate and train workers on HIV/AIDS. A violation of these provisions makes the employer liable for a fine of which 50 % is paid to the National Programme to fight AIDS. Further details are contained within *Order No. 43/03* (July 2003), the *Regulations of HIV/AIDS in Employment and Professional Training.*

39 S 6 of the HIV and AIDS Preventative Measures Bill, 2006

40 S 9 of the Constitution of the Republic of South Africa, 1996.

41 2001 1 SA 1 (CC).

42 S 3 of the HIV and AIDS Preventative Measures Bill, 2006.

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

44 Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

45 Key informant interview with Dhiren Mohar, PILS, Mauritius, 26 October 2006.

Country	Law or code regulating HIV/AIDS and Employment
Botswana	The Directorate of Public Service Management published the *Public Service Code of Conduct on HIV/AIDS and the Workplace* (2001). This Code: • sets out the rights and responsibilities of employers and employees; and • places an obligation on management to create a non-discriminatory environment. The *Botswana National Code of Practice on HIV/AIDS and Employment* is not legally enforceable but sets out standards for an appropriate response to HIV within the workplace. It discourages pre-employment HIV testing.
DRC	No legislation or policy was accessed.
Lesotho	The Public Service has a *Public Service HIV and AIDS in the Workplace Policy* which prohibits unfair discrimination and mandatory HIV testing. A draft bill has been put before parliament (the *Legal Instrument on HIV/AIDS and Employment)* which requires employers to respond to HIV by, for example, developing an HIV policy. It also prohibits unfair discrimination.
Madagascar	Articles 44-45, Law 2005-040, Title III, Chapter IV, outlaw unfair discrimination in the workplace.
Malawi	The *Code of Conduct on HIV/AIDS and the Workplace* acts as a guide to employers, trade unions and employees.
Mauritius	The draft *HIV Preventative Measures Bill* (2006) prohibits pre-employment HIV testing as a condition of employment. Testing may also not be done as a pre-condition for workplace training or promotion.
Mozambique	Law No.5/2002 protects employees against discrimination in the workplace. It does not specifically mention HIV, but is broad enough to cover HIV.
Namibia	The *National Code on HIV/AIDS and Employment* (2000) was promulgated in terms of s 112 of the Labour Act. The Code prohibits pre-employment HIV testing and unfair discrimination.
South Africa	Unfair discrimination due to an employee or job applicant's "HIV status" is prohibited by s 6 of the Employment Equity Act 1998. HIV testing without Labour Court authorisation is prohibited by s 7 of the Act. A *Code of Good Practice on Key Aspects of HIV/AIDS and Employment* is attached to the Act. It aims to give guidance on creating a non-discriminatory environment and managing the impact of HIV/AIDS on the workplace.
Swaziland	S 29 of the Employment Act of 1980 states that employers may not discriminate in any employment contract. HIV is not referred to but it could fall under "social status".
Tanzania	S 7 of the Employment and Labour Relations Act 6 of 2004 prohibits discrimination on many grounds, including HIV/AIDS, and provides that a contravention of s 7 is a criminal offence.
Zambia	The Employment Act Cap 268 and Industrial Relations Act Cap 269 protect workers against discriminatory practices. It is not HIV-specific.
Zimbabwe	The Labour Relations Act, Part II protects employees against discrimination. Although this does not mention HIV, regulations issued under the Act (*Statutory Instrument* 202 of 1998) prohibit discrimination based on HIV/AIDS in the workplace.

(c) Where human rights protections are not enshrined in law, they provide limited, if any, protection to PLHAs. In Malawi and Mozambique human rights principles are established in national policies rather than laws. This appears to be an inadequate approach, as policies do not necessarily create enforceable, legal obligations. For example, in Zambia, the Guidelines on HIV/AIDS Counselling (2000) state that compulsory and mandatory HIV testing is a violation of human rights and shall only be allowed in exceptional circumstances.[46] The Guidelines also prohibit HIV testing and HIV-related discrimination or dismissals. Despite these Guidelines, during March 2002 the government introduced HIV testing

[46] *HIV/AIDS and Human Rights in Zambia* Centre for the Study of AIDS and the Centre for Human Rights, University of Pretoria 2004 www.csa.org.za.

for all its military recruits.[47] NGOs report that the parliamentary committee summoned the military to explain this, where it insisted that it no longer tests recruits for HIV or excludes people on the basis of their HIV status.[48] However, NGOs argue that the military are still continuing with this practice in contravention of the Guidelines.[49]

(d) Although most countries have national policies prohibiting unfair discrimination, this does not appear to have had a significant impact on the levels of stigma and discrimination in the region. In this context, stigma and discrimination continue to perpetuate a climate of fear, silence and denial. Other than the DRC, all other countries reported varying levels of stigma and discrimination as human rights abuses. A Mauritian NGO, for example, reported the following forms of unfair discrimination:

> "We have numerous reports of patients being refused treatment and admission at the public hospitals because they have HIV. For example, one case concerned a person in a private clinic that was tested without his knowledge or consent and upon found HIV positive was made to pay a huge fee for the linen and other material that had to be burned. A HIV positive female drug addict attending a rehabilitation centre that was not allowed to have a tooth removed because of her serological status. A woman was dismissed from her new job because the co-workers had heard of her HIV status and refused to work with her. A PLWA was refused heart by-pass surgery due to his HIV status."[50]

4 CONCLUSIONS

It appears that almost all SADC countries are committed, in principle, to responding to HIV and AIDS. However it is unclear if governments are committed to implementing a holistic, rights-based response to HIV and AIDS as set out in the Guidelines, as Table 5 below shows.

Table 5: Review of the extent to which SADC countries have introduced legal and policy reforms

No legal or policy reforms	HIV specific reform of public health or other legislation	Reform of policy framework	Reforms undermining the human rights framework
DRC	Angola	Botswana	Lesotho
	Madagascar	Lesotho	Swaziland
	Mauritius	Malawi	Zimbabwe
	Namibia	Mozambique	
	South Africa	Swaziland	
	Tanzania	Zambia	
		Zimbabwe	

47 Noble *HIV&AIDS in Zambia, Prevention and Care* AVERT http://www.avert.org/zambia-aids-prevention-care.htm (accessed 2006-09-05).

48 See fn 41 above.

49 *Ibid.*

50 Key informant interview with Mohar, PILS, Mauritius, 26 October 2006.

Of the fourteen countries surveyed,[51] 7.1 % (n = 1) had not taken any steps to reform their legal and policy environment. 42.8 % (n = 6) had introduced HIV-specific legal reforms and 50 % (n = 7) had introduced policy reforms. In 21.4 % (n = 3) of the countries, policy reforms had been undermined by the introduction of coercive criminal laws.

Given that this research was conducted primarily by interviewing NGOs working within the SADC region, it was unable to establish whether governments were aware of and were using the Guidelines. It was only in South Africa that direct reference was found to the Guidelines in the reports of the South African Law Reform Commission's Project 85 on *Aspects of the Law Relating to AIDS*.[52] The recommendations made by this Commission have been used by Parliament to guide law reform around HIV and AIDS. However, no similar reference was found in any of the literature relating to other SADC governments.

Finally, it appears that the two areas where the most reform has taken place are employment and criminal law. The employment law reforms appear to have had a significant impact in protecting the rights of PLHAs and in ending widespread discriminatory practices such as pre-employment HIV testing. However, in many of the reforms of the criminal law, coercive responses based on "punishing" PLHAs for being infected with HIV seem to be creeping into the legislative reform agenda. This includes, for example, mandatory HIV testing of offenders convicted of sexual offences in circumstances where the public health or legal purpose of such testing is questionable.

In conclusion, although reforms are taking place within the SADC region and many are aimed at ensuring that responses to HIV are based on human rights, there is an uneven approach, with a number of countries failing to meet the basic requirements in the Guidelines. There are also a number of regional human rights issues that need to be addressed as a matter of urgency. These include the continued testing and exclusion of HIV-positive recruits from the military, the criminalisation of same-sex relationships and the lack of legal protection for women.

---

[51] Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

[52] The five reports of this Commission can be viewed at www.doj.gov.za/salrc (accessed 2006-11-19.