

# **HIV and AIDS Discrimination in the Workplace:**

## **Issues and Responses**

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### **Situational Analysis**

There is incontrovertible evidence that the HIV and AIDS epidemic has had a marked impact on the world of work.<sup>1</sup> According to 2014 models,<sup>2</sup> an estimated 1.8% of the adult population or approximately 30,265 Jamaicans are living with the virus. HIV and AIDS therefore present a major threat to the world of work in light of the overrepresentation among the most reproductive and productive age groups. This presents challenges not only for the health sector but also for businesses which face declining productivity, profits, loss of skills and institutional memory which is exacerbated by the attendant cost of recruiting and training new workers. There are also implications for the country at the macro-economic level, since responding to the epidemic necessarily increases the cost to government of funded social protection schemes considering that the financial and social implications of the onset of the virus has the potential to plunge persons below the poverty line. Additionally, the stigma and discrimination which is meted out to persons infected with and affected by HIV and AIDS poses a credible threat to fundamental human rights generally, and it is unsurprising that this concern is mirrored in the workplace, which is no exception in this regard.

### **HIV and AIDS and the World of Work**

There is consensus among international human rights institutions that the promotion and protection of human rights constitutes an essential component in

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<sup>1</sup> Corthésy and Harris-Roper, "Commonwealth Caribbean Employment and Labour Law" 2014 at page25

<sup>2</sup> JAMAICA: Global AIDS Response Country Progress Report, 2014.

the legal response to preventing the transmission of HIV and reducing the impact of HIV and AIDS. Further, the workplace provides a 'captive audience' which can play a vital role in efforts to stymie the spread and effects of the epidemic. The need for concerted evidence-based action, has generated reactions in both the public and private sectors in Jamaica.

The call to action from the Jamaica Business Council on HIV/AIDS (JABCHA)<sup>3</sup> for example, is as follows;

*"HIV/AIDS is affecting your business whether you get involved or not. HIV/AIDS is a generalized epidemic in Jamaica and a growing economic threat. HIV/AIDS is affecting the labour market, not only in this generation but the next - given the growing impact in the labour pool. This will have a long-term impact on economic growth and development in Jamaica if it is not dealt with effectively. Addressing HIV/AIDS in the workplace is more than just a matter of corporate social responsibility. It is a strategic investment in long-term growth and profitability. Companies that ignore the threat that HIV/AIDS poses to their bottom line will pay an economic price. HIV/AIDS will impact the investment that you have made in your workforce. Additionally, if we don't address it individually and jointly, it will erode your customer base"*<sup>4</sup>.

This paper seeks to explore the legal challenges which abound in treating with HIV and AIDS in the World of Work. We will firstly examine the existing International Legal Framework which will be complimented by case illustrations. The case for addressing HIV and AIDS related stigma and discrimination in the workplace will be examined against the background of a fundamental human rights framework. Finally, Jamaica's response to the epidemic will be situated in the context of a more pragmatic, 'rights based' approach which will countenance both 'soft' and 'hard' law methodology as typified in the National Workplace Policy on HIV and AIDS and the proposed Occupational Safety and Health legislation.

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<sup>3</sup> JABCHA is a private sector initiative established in September 2006 with support from the United States Government to assist national efforts to increase access to health care and garner financial resources to sustain the response to HIV/AIDS in partnership with the Ministry of Health through the National HIV/STI Programme.

<sup>4</sup> The Jamaica Business Council on HIV/AIDS, Best Practices 2008 for HIV/AIDS in the Workplace at page 4

## **International Legal Context**

UNAIDS, a Joint United Nations Programme on HIV and AIDS seeks to lead the charge of inspiring the world to achieve universal access to HIV related care, treatment and support. Since 2011, UNAIDS has advanced the goal of “Zero new HIV infections, Zero AIDS-related deaths and Zero Discrimination”. Sidibe, the organization’s Executive Director<sup>5</sup> notes that “Zero Discrimination appears to be the most difficult to attain [and that] stigma, discrimination and punitive approaches against people living with or at risk of HIV remain highly prevalent”<sup>6</sup>. This unhealthy state of affairs has been credited with not only hurting ‘Persons Infected with and Affected by HIV and AIDS,’ (PLHIV and AIDS), but with also undermining the otherwise effective responses to the epidemic. As such, the ‘hew and cry’ of the international community is for the addressing of HIV-related stigma and discrimination in the framework of an enabling legal environment, as would ensure the preservation of the dignity of PLHIV and AIDS.

## **International Law**

The international perspective is premised on conceptions of human rights and the ‘moral equality of persons’<sup>7</sup>. International Declarations, Conventions, Protocols and best practices are highly developed areas of international jurisprudence. This is because non-discrimination and equality are the foundation of international human rights law,<sup>8</sup> and an integral pillar in supporting the legal framework within many jurisdictions which allows for the exercise and enjoyment of human rights. In the absence of a binding international instrument specifically dedicated to addressing HIV-related discrimination, the piecemeal approach of the international jurisprudence nonetheless appears to reflect an enabling, if not purposive approach to the existing non-discrimination provisions found in key international treaties.

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<sup>5</sup> Michel Sidibe, Executive Director, UNAIDS; “Judging the Epidemic: A Judicial Handbook on HIV, Human Rights and the Law”

<sup>6</sup> Footnote 5 at page xiv

<sup>7</sup> Simeon McIntosh “Human Rights and the Caribbean Constitution” in George Alleyne and Rose-Marie Belle Antoine, “HIV and Human Rights, Legal and Policy Perspectives” at page 49

<sup>8</sup> Footnote 5 at page 27

## The United Nations (UN)

An important milestone in the history of human rights is marked by The Universal Declaration of Human Rights (UDHR)<sup>9</sup> which expresses the basic fundamental human rights which are inherent to all people. This international document which has since provided a template for several human rights instruments, has been aptly described as the ‘blue print’<sup>10</sup> of the international human rights framework. Two of the better known instruments which have been birthed out of the UDHR are the International Covenant on Civil and Political Rights (ICCPR)<sup>11</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>12</sup>. Article 2 of both treaties which have been ratified by Jamaica since 1975, posits that rights provided for are to be enjoyed “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”<sup>13</sup>. This provision has been interpreted as assuring non-discrimination on the basis of real or perceived HIV status, an amplification which is endorsed by the United Nations Commission on Human Rights.

In its commentary, the General Committee of the ICESCR has been explicit in establishing that the reference to “**other status**”<sup>14</sup> in the Covenant, in effect countenances HIV and AIDS. The Committee stated that “State parties should ensure that a person’s actual or perceived health status is not a barrier to realizing rights under the Covenant (and that)...restrictions are discriminatory for example, when HIV status is used as the basis for differential treatment with regard to access to...employment...(consequently) State parties should also adopt measures to address widespread stigmatization of persons on the basis of their health status...”<sup>15</sup> Additionally, governments have also been encouraged by the 1996

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<sup>9</sup> UN General Assembly, “Universal Declaration of Human Rights” 10 December, 1948.

<sup>10</sup> Edward Greene, “Reflections on reducing the gap between ‘Promise and Reality’” at page 23 of HIV and Human Rights: Legal and Policy Perspectives on HIV and Human Rights in the Caribbean; edited by George Alleyne and Rose-Marie Belle Antoine

<sup>11</sup> The International Covenant on Civil and Political Rights (ICCPR), 1966

<sup>12</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

<sup>13</sup> Footnote 11 and 12

<sup>14</sup> See Footnote 13. Similarly, the reference to “other status” in Article 2 of the Convention on the Rights of the Child has been interpreted to include the HIV status of the child and their parent; Committee on the Rights of the Child, General Comment No. 3: HIV/AIDS and the Rights of the Child, CRC/GC/2003/3; para. 9.

<sup>15</sup> Footnote 5 at page 27.

‘International Guidelines on HIV/AIDS and Human Rights’<sup>16</sup> to enact legislation to ensure the existence and operation of enforcement mechanisms for the protection of PLHIV and AIDS and their families.

The United Nations Convention on the Rights of Persons with Disabilities<sup>17</sup> (UNCRPWD) seeks to promote respect for the inherent dignity of persons with disabilities by ensuring their full and equal enjoyment of all human rights and fundamental freedoms.<sup>18</sup> ‘Discrimination on the basis of disability’<sup>19</sup> is defined as meaning “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, cultural, civil or any other field. It includes all forms of discrimination, including denial of ‘reasonable accommodation’”. The concept of ‘reasonable accommodation’ as defined by the Convention, means the taking of “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities (PWDs) the enjoyment or exercise on an equal basis with all others the fundamental human rights and freedoms”<sup>20</sup>.

Whereas the UNCRPWD does not define or make reference to HIV or AIDS, some commentators have suggested that its ‘social model’ based definition of the concept of ‘discrimination on the basis of disability’<sup>21</sup> is broad enough to include discrimination against PLHIV and AIDS<sup>22</sup>. The premise of this model is that PLHIV and AIDS may experience disability as the disease progresses. This disability may manifest itself as mental and physical conditions that impair one’s ability. Further, whilst saving and prolonging lives, disabling effects have been attributed to antiretroviral therapy and other treatments. In such cases, according to Elliott et.

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<sup>16</sup> International Guidelines on HIV/AIDS and Human Rights, 1996, Guideline 11

<sup>17</sup> The United Nations Convention on the Rights of Persons with Disabilities, 2006

<sup>18</sup> Fn. 17 at Article 1

<sup>19</sup> Fn. 17 at Article 2

<sup>20</sup> Fn. 17 at Article 2

<sup>21</sup> See footnote 19

<sup>22</sup> See footnote 5 at page 28

al.<sup>23</sup> (who explores how conceptions of disability have developed over the years),<sup>24</sup> “once HIV or its treatment manifests in impairment of some sort, generic legal protection against discrimination ought properly to apply”<sup>25</sup>.

Having made this crucial link in the evolution of thinking, the view is advanced that for at least some legal purposes, the effects of HIV would fall under the rubric of ‘disability,’ as a form of discrimination based on disability. Elliott however goes on to underscore the fact that this social model does not countenance PLHIV and AIDS who are asymptomatic but who may experience stigma and discrimination due to the prejudice of others, rather than difficulties caused by HIV infection itself. It would therefore mean that specific anti-discrimination laws would be needed to supplement the coverage afforded by this linkage between HIV and AIDS and other forms of disability if the mischief of ensuring that the human rights of PLHIV are protected generally, as well as at work.

In a similar vein to the social model, the Inter American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities<sup>26</sup> ascribes a very broad definition to the term ‘disability’ as being “a physical, mental or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment”<sup>27</sup>. Later on in this discussion we will seek to reconcile Jamaica’s ***Disabilities Act, 2014*** and its applicability to PLHIV and AIDS within this social model conception of HIV and AIDS as a disability.

## **The International Labour Organisation (ILO)**

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<sup>23</sup> Richard Elliott, Leah Utya Sheva and Elisse Zack, ‘HIV, disability and discrimination: Making the links in international and domestic human rights law,’ *Journal of the International AIDS Society* 2009, 12:29.

<sup>24</sup>Ibid at page 1 for discussion on impairment, functional limitations and ecological perspectives

<sup>25</sup> Ibid at page 3

<sup>26</sup> The Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities, 1999.

<sup>27</sup> Ibid, Article 2

The ILO, a specialized agency of the UN, is organized around the primary goal of “promot[ing] opportunities for women and men to obtain decent and productive work, in conditions of freedom, equality, security and human dignity”<sup>28</sup>. The two main pillars of the ILO’s framework for addressing HIV and AIDS are the *Recommendation concerning HIV and AIDS and the World of Work*,<sup>29</sup> and the *Code of Practice on HIV and AIDS and the World of Work*<sup>30</sup>. Both elucidate comprehensive guidelines for addressing HIV and AIDS in workplaces in a context of evidence-based, human rights considerations as well as a decent work<sup>31</sup> framework.

Recommendation 200 which is the first labour standard setting instrument on the subject, expressly situates the response to HIV and AIDS in the world of work in the context of occupational structures in both the public and private sectors. The relevance of this will be seen as this discussion progresses. The Recommendation and the Code of Practice which recognizes the major threat posed by HIV and AIDS to fundamental rights and freedoms at work, have together informed the substantive content of Jamaica’s *National Workplace Policy on HIV and AIDS* which will also be discussed later in this paper.

Outside of Recommendation 200, there are no other ILO Instruments which exclusively treat with the subject of HIV and AIDS in the workplace. However, there are several Conventions addressing specific aspects of the employment relationship, which are of general application and can therefore impact positively on attempts at seeking redress for PLHIV and AIDS

The ILO *Declaration on Fundamental Principles and Rights at Work, 1998*<sup>32</sup> for instance, affirms the constitutional values of the ILO by way of a political statement aimed at ensuring adherence to labour standards. Significantly, the Declaration represents a move to “reorient the debate on labour standards in the global

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<sup>28</sup> Report of the Director-General to the International Labour Conference’s (ILC’s) 87<sup>th</sup> session; ILO, 1999a, at page 3

<sup>29</sup> R200- HIV and AIDS Recommendation, 2010 (No. 200)

<sup>30</sup> An ILO Code of Practice on HIV/AIDS and the world of work; ILO, Geneva 2001

<sup>31</sup> Decent work sums up the aspirations of people in their working lives. The ILO has developed an agenda for the community of work, to be achieved through implementing the ILO’s four strategic objectives, with gender equality as a cross-cutting objective viz. promoting jobs, guaranteeing rights at work, extending social protections, promoting social dialogues: [www.ilo.org/global/about-the-ilo/decent-work-agenda](http://www.ilo.org/global/about-the-ilo/decent-work-agenda).

<sup>32</sup> International Labour Conference, 86<sup>th</sup> Session, Geneva, June 1998.

era...towards the recognition of labour rights as human rights, and the need for all in the global community to respect some common norms and values”.<sup>33</sup> Among the fundamental principles and rights at work expressed under Article 2<sup>34</sup> of the Declaration is the elimination of discrimination in respect of employment and occupation.

Whereas the 1998 Declaration seeks to treat with discrimination in employment and occupation in a human rights framework, with rights at work being accorded the elevated status of human rights, also relevant to this discussion is the *Discrimination (Employment and Occupation) Convention No.111*, which has since 1960 taken a rights-based approach to addressing this issue. Convention 111 categorically enshrines a right to equality of opportunity and treatment at work<sup>35</sup>. ‘Discrimination’ is defined as including “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing<sup>36</sup> equality of opportunity or treatment in employment or occupation”<sup>37</sup>. It is however the wider enumeration at Clause (b) of Article 2 which countenances other kinds of unspecified attributes which have “the effect of nullifying or impairing equality of opportunity in employment or occupation”<sup>38</sup>.

It is suggested that the use of the expression ‘has the effect of nullifying or impairing’ is a drafting technique that countenances both direct and indirect discrimination. Direct discrimination exists when unequal treatment stems directly from laws, rules or practices making an explicit difference on one particular ground. Indirect Discrimination on the other hand refers to situations, rules and practices

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<sup>33</sup> Rosemary Owens et ors., “The Law of Work,” 2<sup>nd</sup> edition, Chapter 2 at page 64.

<sup>34</sup> The Elimination of Discrimination in respect of Employment and Occupation Convention (ILO C 100 and ILO C 111) ratified by Jamaica in 1975

<sup>35</sup> Article 2 of C 111.

<sup>36</sup> Jane Hodges InFocus Programme on Social Dialogue, Labour Law and Labour Administration-Guidelines on addressing HIV/AIDS in the workplace through employment and labour law- International Labour Office-Geneva 2004 .

<sup>37</sup> Article 2 (1) (a) of C 111.

<sup>38</sup> Article 2 (1)(b) of C 111.



which may appear neutral on the surface but in practice actually creates disadvantage which is primarily suffered by a specific category of persons.

It is this provision which applies by implication to HIV and AIDS related stigma and discrimination in the workplace. Interestingly, subsection (2) of Article 1 allows discrimination “in respect of a particular job based on the inherent requirements thereof”<sup>39</sup>. The suggestion therefore is, that the fact that a person is HIV positive or has AIDS can, for example, lawfully form the basis for their exclusion from employment if it can be shown that the nature of the job requires a person without that attribute as a genuine occupational requirement<sup>40</sup>.

In a similar vein, the *Termination of Employment Convention*<sup>41</sup>, states that a dismissal is only validated by a reason “connected with the capacity or conduct of the worker or based on operational requirements”. Further, temporary absences from work due to illness whether occupationally related or not, does not constitute a valid reason for dismissal.<sup>42</sup> It does appear that the concept of ‘reasonable accommodation’<sup>43</sup> is somewhat built into the preferred approach of this Convention, however implicitly, with respect to dealing with the temporary incapacity of a worker.

Another noteworthy development is in relation to the 1995 General Survey of the Committee of Experts on Convention 158<sup>44</sup> which not only gives guidance as to how law and practice are to treat with temporary absences due to illness,<sup>45</sup> but also extends the ‘unjustified dismissal’ protection of the Convention to HIV and AIDS”.<sup>46</sup>

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<sup>39</sup> Article 2(2) of C111

<sup>40</sup> The suggestion is made that in carving out such an exclusion, legislators must be especially mindful of ensuring that only “genuine and bona fide needs in relation to the specific job, post or position are captured,” see footnote 36 above at page 11.

<sup>41</sup> C158 - Termination of Employment Convention, 1982 (No. 158) Jamaica has not yet ratified this Convention

<sup>42</sup> C 158, Article 6.

<sup>43</sup> See footnote 17 above for this discussion relative to the UNCRPWD.

<sup>44</sup> International Labour Conference, “Protection against Unjustified Dismissal,” 82<sup>nd</sup> session, Geneva, 1995, paras 137-142. See also Corthésy and Harris-Roper, footnote 1 at pages 34-37

<sup>45</sup> C 158 provides at Article 6 that “temporary absence from work because of injury or illness shall not constitute a valid reason for termination”.

<sup>46</sup> Jane Hodges, “Guidelines on Addressing HIV/AIDS in the Workplace through Employment and Labour law”, ILO, Geneva, January 2004 at page 6.

Therefore, if Jamaica is to ratify this Convention, its implementation in the current dispensation would require that termination on the basis of a positive HIV status is included in the definition of an industrial dispute under section 2 of the ***Labour Relations and Industrial Disputes Act (LRIDA), 1975***. In fact, this approach to enforcement has been contemplated in principle as part of efforts to support the National Workplace Policy on HIV and AIDS within the existing legal framework.

Conventions 87<sup>47</sup> and 98<sup>48</sup> on the *Freedom of Association and Protection of the Right to Organise Convention* and the *Right to Organise and Collectively Bargain* respectively, are also instructive to the extent that they encourage the negotiation of terms and conditions of employment, which conceivably could touch and concern HIV and AIDS related issues in the context of labour and industrial relations. Therefore, matters such as the provision of ‘administrative controls’<sup>49</sup> as are reasonable for accommodating PLHIV and AIDS, could feasibly be provided for in collective labour agreements. This kind of discourse could also encourage the introduction of internal HIV/AIDS workplace policy within organisations which would impact the treatment of the subject at work.<sup>50</sup>

Conventions dealing with the subject matter of safety and health also have implications for the treatment of PLHIV and AIDS during employment. The *Occupational Safety and Health Convention*<sup>51</sup> and *Protocol*<sup>52</sup> for example, address appropriate administrative controls for ensuring the safety and health of workers. These include the provision of personal protective equipment without levying the worker, the adjustment of work processes to meet the safety and health requirements of workers, as well as the canvassing of an employee’s right to refuse

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<sup>47</sup> C087- Freedom of Association and Protection of the Right to Organise Convention, 1949 (No.98); ratified by Jamaica since 1962.

<sup>48</sup> C 098- Right to Organise and Collective Bargaining Convention, 1949 (No.98); ratified by Jamaica since 1962.

<sup>49</sup> Administrative controls refers to controls that alter the way that work is done including the timing of work such as rest breaks, flexible work arrangements, policies, rules and work practices such as standards and operating procedures.

<sup>50</sup> Since 2006, eight government ministries and 217 private-sector companies have received technical assistance from workplace technical officers to develop and establish their HIV workplace policies - Source Sunday Gleaner June 3, 2012 “*Corporate AIDS donors shy away from gay stigma*” by Byron Buckley - <http://jamaica-gleaner.com/gleaner/20120603/cleisure/cleisure5.html>.

<sup>51</sup> C 155- Occupational Safety and Health Convention, 1981 (No.155)

<sup>52</sup> The Protocol of 2002 to the Occupational Safety and Health Convention, 1981

to carry out work which poses imminent danger. The complementary *Occupational Health Services Convention*<sup>53</sup>, as well as *Recommendation 164*<sup>54</sup>, requires State parties to co-ordinate a safety and health country profile and implement policies which would ensure that the results of health surveillances and other medical examination data are kept confidential and not used for discriminatory purposes. None of these instruments dealing with safety and health have yet been ratified by Jamaica, but that is expected to change very soon for reasons which will become obvious as this discourse progresses.

The promotion of equality of opportunity and treatment for persons with disabilities is advanced by the *Disabled Persons Convention*<sup>55</sup>. Consistent with the ‘social model’ conception of disability, Article 1 defines a ‘disabled person’ as meaning “an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment”. The Convention also seeks to encourage State parties to establish national policies to support the vocational rehabilitation of persons. In this regard, Article 3 speaks to “ensuring that appropriate vocational rehabilitation measures are made available to all categories of disabled persons and at promoting employment opportunities for disabled persons”. Further, the implementation of special protective measures such as workplace accommodation and job transfers<sup>56</sup> to ensure the continued employment of persons with disabilities is advanced by Article 4. This Convention effectively situates the mischief of not discriminating against persons with disabilities within the built-in agenda of a discourse of rights directly relevant to the world of work.

### **International Case Law Illustrations**

We will now explore perhaps more familiar territory by examining some of the case law emerging in this developing area of employment law jurisprudence. These

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<sup>53</sup> C 161- Occupational Health Services Convention, 1985 (No.161)

<sup>54</sup> R 164- The Occupational Safety and Health Recommendation, 1981

<sup>55</sup> C159- The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No.159)

<sup>56</sup> See footnote 17 for a discussion on the separate but related concept of ‘reasonable accommodation’ under the UNCRPWD.

decisions illustrate how enabling versus narrow and restricting perceptions of rights, impact the viability of approaches to addressing HIV and AIDS which are prefaced by conceptions of human rights as well as the important role of National Policy statements in affording leverage to a rights-based approach to discrimination against PLHIV.

### **Constitutional guarantees of right to dignity, equality and protection from inhumane and degrading treatment**

“Condemnation to economic death” is how the constitutional court of South Africa contextualized the denial of employment opportunities to PLHIV and AIDS in **Hoffman v South African Airway**<sup>57</sup> The appellant was found to be a suitable candidate for employment as a cabin attendant. He submitted to a pre-employment medical examination which included mandatory HIV screening which returned a positive result. Consequently, his medical report was altered to reflect an opinion of his unsuitability for employment. The airline sought to justify its blanket policy of not employing PLHIV and AIDS as cabin attendants on the basis of medical, safety and operational considerations.

In concluding that South African Airlines acted in a discriminatory manner, the court opined that individual job applicants should be assessed based on their subjective abilities to perform the essential duties of the job, rather than being ‘broad brushed’ by the fact of their HIV positive status. It was therefore affirmed that the blanket exclusion of PLHIV’s infringes upon the constitutional guarantee of equality.

A similar sentiment was expressed by the Industrial Court of Botswana in **Diau v Botswana Building Society**<sup>58</sup> where the court referred to the dismissal of an employee for failing to take an HIV test as a form of ‘economic death’. Diau was employed to the building society on condition that her employment was subject to

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<sup>57</sup> **Hoffman v South African Airways**, Constitutional Court of South Africa, Case CCT 17/00 (2000); 2001 (1) SA 1 (CC)

<sup>58</sup> **Diau v Botswana Building Society**, Industrial Court, Gasorne, Industrial Court No. 50 of 2003; Dingake J

her passing a full medical examination conducted by a physician selected and paid by the employer. In response to a request that she submit a medical certificate regarding her HIV status, she responded by way of a letter refusing to submit to the medical examination. She was subsequently advised in writing that she would not be offered permanent employment. The Industrial Court was petitioned to determine whether the dismissal was unconstitutional and/or unlawful under the Employment Act.

Dingake J in expounding on the principle of dignity as an inherent human right, noted that “human dignity is considered to be what gives a person their intrinsic worth as human beings, consequently every human being must be treated worthy of respect [and that] it is the right to dignity that lays the foundation for the right to equality and all other rights that human beings possess”<sup>59</sup> The court decided that Diau’s constitutional right to not to be subjected to inhumane and degrading treatment had been violated, and that “to punish an individual for refusing to agree to a violation of her privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human”<sup>60</sup>. This sentiment was felt to be warranted in the context of HIV where even the remotest suspicion of being HIV positive “can breed intense prejudice, ostracization and stigmatization”<sup>61</sup>.

The court held that Diau was entitled to refuse the post-employment test which it considered to be irrational and unreasonable to the extent that it was not relatable to the inherent requirements of the job. In essence, the court in its reasoning signaled that it would be lawful to hold otherwise where it can be shown that an HIV negative status is inherently required on account of the nature of the job, an approach which appears to be consistent with the parlance of the ILO’s Discrimination Convention<sup>62</sup>.

Another useful example is the decision of the Labour Court of Johannesburg in **Alpass v Mooukloof Estates**<sup>63</sup>, where the complainant was awarded compensatory

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<sup>59</sup> Footnote 57 at page 38.

<sup>60</sup> Footnote 57 at page 38.

<sup>61</sup>Footnote 57 at page 39.

<sup>62</sup> See discussion at footnote 34 above.

<sup>63</sup> **Gary Shane Alpass v. Mooikloof Estates (Pty) Ltd**, (Case No. JS178/09) decided 16 February 2011.

damages for unfair dismissal and discrimination on the basis of his HIV positive status.

The complainant was employed as a horse riding instructor and stable manager indicated at the time of his employment that he was 'in good health'. He had at that time been living as a PLHIV for twenty (20) years. After being hired, all employees were required to complete a form which required disclosure of whether they were taking any "chronic medication". The complainant disclosed that he was taking medication daily to manage his HIV condition. His employment was terminated immediately and he was forcibly evicted from premises he occupied on account of his employment. The Labour Court found in favour of the complainant that his dismissal was in violation of his constitutional right to equality, as well as awarded outstanding remuneration in compensatory damages and costs against the employer. In arriving at its decision, the court was guided by the various international instruments on the subject which were specifically referred to.

### **Judicial Note of National Policy statements on HIV and AIDS**

In keeping with international treaty obligations and other guidelines for addressing HIV and AIDS in the workplace, several States have created national policy statements on the subject. Whilst there is general consensus that these policies are not law, there has been some debate as to how they can contribute in a real sense to ensuring that the rights of PLHIV and AIDS are protected. The question was raised in **Diau** and addressed in the following terms by Dingake J

*"the National HIV/AIDS Policy **augments rather than detracts from the Constitution**, to the extent that the Constitution entrenches the right to equality, human dignity, liberty and the right to privacy. It is not law. It therefore does not impose any direct legal obligations. However, to the extent that its provisions are consistent with the values espoused by the constitution, breach of its provisions may, in an appropriate case, constitute evidence of breach of constitutional provisions. In essence, the National HIV/AIDS Policy is a very progressive document, in that it seeks to eliminate HIV/AIDS*

*related unfair discrimination, promote equality and fairness especially at the workplace and more fundamentally, gives effect to Botswana's international obligations*"<sup>64</sup>.

The tone of the international common law jurisprudence in *toto*, gives a clear indication that national policy statements which provide guidelines reflective of best practices for the treatment of HIV and AIDS in the workplace, are in fact worth more than the paper on which they have been written to speak euphemistically, and can provide well needed insight to enhance the paucity of jurisprudence in the area.

## **HIV and AIDS and human rights in the Jamaican workplace**

### **The Constitution of Jamaica**

In Jamaica, the Constitution is accorded the status of supreme law of the land. Therefore, all other laws must be in conformity. As at the time of writing there were no reports of any constitutional challenge on account of HIV related discrimination. As such, relevant principles will be extrapolated from case law from other Commonwealth jurisdictions, where applicable, to give content to the discussions on the relevant constitutional provisions.

Effective 8, April 2011, the Constitution of Jamaica was amended<sup>65</sup> to provide more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica. Chapter III is relevant to the discussion at hand and specifically sections 13 (3)(a),(g) and (h) which preserve a right to 'life, liberty and security of the person', 'equality before the law' and 'equitable and humane treatment by any public authority in the exercise of any public function'.

Similar provisions under the Constitution of India have been interpreted as being supportive of the rights of PLHIV and AIDS. In **MX of Bombay v M/S ZY and**

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<sup>64</sup> **Diau** at footnote 57 above, page 19. Similarly in the Botswanian High Court decision dated 22 August 2014 in **Tapela v Attorney General and Others**, it was argued on behalf of the applicant Zimbabwean prisoners that their exclusion from being administered antiretroviral therapy was *inter alia*, contrary to the letter and spirit of the national policy on HIV and AIDS.

<sup>65</sup> The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

**another**<sup>66</sup> a casual labourer in the public service was denied permanent employment after testing HIV positive. The High Court of Bombay was of the view that the impugned rule which denied employment to the HIV-infected person on account of his HIV status and irrespective of his ability to perform the job requirements, and that he does not pose any threat to others at the workplace, is clearly arbitrary and unreasonable. Tipnis J went on to state categorically that the employer's conduct infringed the wholesome requirement of the Constitution of India in respect of Article 14 which required equality before the law as well as Article 21 protection of life and personal liberty. As such the dismissal was determined to be 'unconstitutional, illegal and invalid' and therefore quashed.

The above case analysis demonstrates that discrimination meted out to PLHIV and AIDS can properly be the subject of constitutional challenge. However, this potential avenue for redress might remain unexplored in Jamaica due to the stigma associated with the diseased which is compounded by the fear of being ostracized. Further, according to Antoine, "the freedom from discrimination is not adequately protected under our Constitutions because of myopic interpretations of the anti-discriminatory clause".<sup>67</sup> Whilst agreeing that a human rights based approach might be necessary, Antoine noted that the shortcomings of this approach in countenancing HIV and AIDS as well as other intersectional issues, is due to the constitutional tool being ill-equipped to fully counteract the value laden norms in our social environments, and in the final analysis, does not provide a 'panacea for all ills'.<sup>68</sup>

With respect to the jurisprudential obstacle to framing HIV and AIDS in a human rights context, this is said to be attributable to the differing perceptions taken of

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<sup>66</sup> **MX of Bombay Indian Inhabitant v M/S. ZY and another**, High Court of Bombay, India; AIR 1997 Bom 406 Tipnis J. see also **Mr. Badan Singh v Union of India et anor**, Delhi High Court, 2002; **X v State Bank of India**, Bombay High Court 2002; **CSS v State of Gujarat** (2001) unreported Special Civil Appeal Application No. 11766 of 2000, Gujarat High Court decided 17 February 2001.

<sup>67</sup> Rose-Marie Belle Antoine, "Pragmatic approaches to HIV and Human Rights" in HIV and Human Rights, Legal and Policy Perspectives on HIV and Human Rights in the Caribbean at page 72.

<sup>68</sup> Ibid at page 73



constitutional rights. Dingake J<sup>69</sup> gave some insight on the two diametrically opposed perceptions as follows:

*“Traditionally, a Bill of Rights regulates the relationship between the individual and the State (vertical application). It confers rights on individuals and imposes duties on the State. This was premised on the realization that the State is far more powerful than individuals. For example, it is the State that has a monopoly on the legitimate use of force within its boundaries. Individuals are therefore considered vulnerable and worthy of protection from the State that may violate their rights. Over time, it was recognized that private entities or individuals may abuse human rights of others, especially the weak and the marginalized. This is what is often called the horizontal application of the bill of rights which essentially means that individuals are conferred rights by the Bill of rights, but also in certain circumstances, have duties imposed on them by the Bill of rights to respect the rights of other individuals”.*

In **Hoffman**<sup>70</sup> for instance, the court assumed a ‘vertical perception’ of constitutional rights, in ruling that such rights are not available to persons employed in the private sector. As such, in declaring the special protection available to PLHIV and AIDS under the South African Employment Equity Act, the court highlight the need for a ‘rights-based approach’ to supply the deficiencies of a ‘human-rights based’ approach. The suggestion therefore is that where a narrow approach to the scope of constitutional guarantees would mean that workers not employed by the State are excluded from the scope of application of inherent rights, then laws should be enacted to plug this gap by establishing a framework for the protection of the rights of PLHIV and AIDS regardless of the form of their work arrangement, and in all areas of economic activity. Such an approach it is submitted would in fact be in fulfillment of the policy objective of ILO Recommendation 200<sup>71</sup>.

Conversely, the court in **Diau**<sup>72</sup> demonstrates the ‘horizontal’ application of Botswana’s Constitution to entities other than organs of the State. In underscoring

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<sup>69</sup> See discussion in **Diau** at footnote 57 at page 24.

<sup>70</sup> Footnote 57 above.

<sup>71</sup> See footnote 29.

<sup>72</sup> See footnote 57 above.

the fact that private entities who wield significant social and economic power over individual citizens are not beyond the reach of the Constitution, the court opined that;

*“...in legal systems where there are no specific human rights laws applicable to private actors, and the only human rights protections are to be found in Constitutional provisions, the application of the Constitution to actors other than the State may offer people living with HIV a measure of protection for their fundamental human rights”.*

The boldness of the court was further highlighted by its willingness to examine international sources of law such as human rights instruments, the Constitutions of other countries and HIV-related case law in other countries, to provide content to its own legal framework. This decision sets a highly persuasive precedent.

The question of whether constitutional guarantees under the Charter of Rights<sup>73</sup> are protected not only against the State but also from the actions of private individuals and entities was a live issue in a matter before the Full Court of the Supreme Court of Jamaica which was decided in 2013<sup>74</sup>. Here the court opined that the objective of the drafters of the Charter of ensuring that it applied between persons natural and juristic, was guided *inter alia* by the report of the Joint Select Committee of Parliament which was convened to deliberate on the Charter as a Bill. The report of the Committee states as follows:

*“The Committee is committed to the principle of ensuring that the Constitution encompasses the widest possible deposit of rights with the most open and liberal form of justiciability for those rights. The Committee agrees that in order to have respect for human rights, a culture of respect for human rights has to be created, and that can only take place when all persons are treated as being obliged to respect the constitutional provisions. The Committee does not agree that an individual’s right to question an action against his interest whether by another individual or by the State, should be curtailed on the ground that it would result in too much litigation or uncertainty. The Committee feels that it would be difficult to justify a distinction as to a constitutional remedy arising on the same set of facts, one which would be available against the State and one not against the*

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<sup>73</sup> See footnote 65.

<sup>74</sup> **Maurice Arnold Tomlinson v Television Jamaica Limited, CVM Television Limited and the Public Broadcasting Corporation of Jamaica** [2013] JMFC Full 5. See clause 49 where the Court notes that “section 13(1) which provides for persons to be under a responsibility to respect and uphold the rights of others is elevated to enforceable rights, breach of which may lead to constitutional redress”.

*State. The Committee is, therefore, of the view that the constitutional protection of fundamental rights and freedoms afforded in the proposed new Chapter III should be extended to cases of infringement by private persons”<sup>75</sup>.*

In light of the fore-going, it is clear that what Antoine<sup>76</sup> opines as appearing to be the prevailing approach of situating constitutional mores within the Caribbean in a narrow conception, is in contradistinction to what obtains in this jurisdiction. Of merit however is the view she advances that “the language of human rights, a public law phenomenon, is (as a result), ill-suited to the private law sphere in which the world of work resides”.<sup>77</sup> The case is therefore being advanced for a pragmatic approach which acknowledges that options aside from the formal human rights agenda may be of greater utility in furthering the cause of ensuring protection for PLHIV and AIDS. This has resonated in a call for a “proactive legislative agenda<sup>78</sup> separate from the Constitution that will accord with the most fundamental human rights”. We will now examine the extent to which such an approach is reflected in our current and prospective legal framework.

## **HIV and AIDS as a Disability - The International Legal Context**

In recent times, there has been broad-based recognition of the epidemic as a human rights issue<sup>79</sup> within the context of discrimination against persons with

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<sup>75</sup> Footnote 73 at clause 46.

<sup>76</sup> See footnote 67 above.

<sup>77</sup> Above at footnote 67. The question of whether labour rights are human rights has been debated ad nauseum. See Virginia Mantauvalou’s contribution to the debacle in the European Labour Law Journal, 2012 ‘Are Labour Rights Human Rights,’ University College of London-Faculty of Law, February 18, 2012.

<sup>78</sup> Footnote 67 at page 9.

<sup>79</sup> See discussion by Jane Hodges, footnote 36 above at page 24. InFocus Programme on Social Dialogue, Labour Law and Labour Administration-Guidelines on addressing HIV/AIDS in the workplace through employment and labour law- International Labour Office-Geneva 2004

disabilities (PWDs). As a result of this development, legislation prohibiting discrimination on the basis of disability and aimed at reintegrating PWDs in the world of work and society generally, has afforded some amount to protection to PLHIV and AIDS. In an effort to ‘level the field’ between persons who possess the protected attribute of a “disability,” these legislations typically require that employers make ‘reasonable accommodation’<sup>80</sup> by physically modifying the workplace as well as business processes and work schedules. These measures enable persons who fall within the scope of the definition of PWDs to remain contributing members of the workforce for as long as they are fit to work. However, this approach is not without challenge as narrow interpretations and subtle points of distinction can effectively negate the concomitant rights and obligations under this dispensation.

An example from the body of international jurisprudence which is supportive of the extension of protections against discrimination on the basis of disability to PLHIV and AIDS is the Canadian decision in **Thwaites v Canada (Canadian Armed Forces)**.<sup>81</sup> Thwaites, a master seafarer in the armed forces alleged discrimination on account of his HIV status after his employment was terminated and his duties and opportunities for advancement curtailed. The Human Rights Tribunal found that he was discriminated against because of his disability, and that the army also failed to accommodate him<sup>82</sup> and which would have required a subjective assessment of his capabilities<sup>83</sup> and the potential risk he posed to other employees.

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<sup>80</sup> As required by the UNCRPWD at Article 2. See footnote 17 above.

<sup>81</sup> [1993] CHR D No. 9

<sup>82</sup> The Court in its endorsement of the ILO’s position that a subjective assessment of fitness to work must be made, stated the following: “the importance of searching for reasonable alternatives or accommodating the individual to permit him or her to do the job or lessen any risk (if risk is a factor) is the bedrock of human rights law in this country. Indeed without reasonable accommodation, the protection given by the Canadian Human Rights Act (CHRA) to certain groups, the disabled in particular, would be quite illusory...it is of critical importance that the accommodation of persons with disabilities be approached on an individual basis. Disabilities differ dramatically from one another. There are also great individual variations within the same...disability group” reported in Hodges; see footnote 36 at pages 14 to 15.

<sup>83</sup> Similarly **Haidongo Nghidipohamba Nanditume v Minister of Defense**; Case No. LC 24/98 delivered on 5 October 2000, the Namibian Labour Court found that an HIV test is insufficient in making an assessment of an individual’s fitness to work and must necessarily therefore form part of a broader assessment of physical fitness.

## The Disabilities Act of Jamaica and Rights at Work

In our local framework, the definitional language of ‘persons with disabilities’ (PWD) under our **Disabilities Act**<sup>84</sup> (not yet in effect), is instructive. Consistent with the social model<sup>85</sup>, a PWD is defined to include ‘a person who has a long-term physical, mental, intellectual or sensory impairment which may hinder his full and effective participation in society, on an equal basis with other persons’. The learning is that coverage could be extended to PLWHIV and AIDS to the extent that its onset impairs life activities and limits physical ability, because although largely episodic in its presentation, “AIDS impairs the ‘essential life function’ of the immune system, limiting the ability of the body to fight infection and preserve health, and causing physical debilitation that affects strength and endurance”<sup>86</sup>.

Part VI of the Act speaks to discrimination in employment on the basis of a disability. It provides that it is unlawful for an employer to discriminate against a PWD who is otherwise qualified for employment with respect to terms and conditions of employment, opportunities for promotion, transfer, and training and other benefits or dismissal, or subjecting to other detriment without reasonable cause. An employer is however afforded a defence where the disparate treatment can be justified or cannot be avoided in the circumstances, provided that the making of ‘reasonable arrangements<sup>87</sup>’ would not have operated as a mitigating factor. Further, an employer is to make reasonable arrangements to prevent disadvantage on account of how the employment is arranged or the physical features of the premises is designed, as well as to redeploy an employee who

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<sup>84</sup> The Disabilities Act of 2014. Please note that this legislation is not operative at the time of writing, as an Appointed Day Notice is yet to be proclaimed.

<sup>85</sup> See discussion at footnote 21 above.

<sup>86</sup> Arthur Leonard, “Employment Discrimination against Persons with AIDS”, University of Dayton Law Review at page 346.

<sup>87</sup> Defined at section 2 of the Act as follows: ““reasonable arrangements” means the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case, to ensure to a person with a disability, the enjoyment or exercise on an equal basis with others of privileges, interests, benefits and treatment and the facilitation of such privileges, interests, benefits and treatment by the provision of auxiliary aids and services including (a) equipment or devices that alleviate the effects of a disability being experienced by a person; (b) the acquisition or modification of such equipment or devices; (c) duly qualified interpreters, technologies and effective methods of making aurally delivered and received materials available to a person with a disability; and (d) duly qualified readers, taped audio visually recorded texts or other effective methods of making visually delivered and received materials available to a person with a disability”.

becomes disabled to a position which poses no disadvantage with respect to the utilization of skills and abilities and remuneration, and does not cause 'disproportionate or undue burden'<sup>88</sup> to the employer.

Built into the scheme of the Act by way of the requirement to make reasonable adjustment is the like concept of reasonable accommodation<sup>89</sup> from the body of international law, which places a duty on an employer to put provisions in place up to a threshold where it becomes burdensome, to create a more enabling environment for a PWDs. With respect to the defences of justification and unavoidability which the legislation affords an employer, circumstances where the inherent requirements of the job require that it is performed by someone without the disability, is demonstrative. The decision of the High Court of Australia in **X v The Commonwealth**<sup>90</sup> provides a useful illustration. The Australian Defence Force (ADF) in admitting to the discrimination against the HIV-positive enlistee, argued that its actions were lawful because as contemplated by the statutory<sup>91</sup> 'inherent requirements' exception, the soldier was incapable of 'bleeding safely' which was necessary in combat and training.

In the final analysis, whereas from an international legal perspective the case for linking HIV and AIDS related discrimination with rights accorded to PWDs is well established, it is left to be seen whether such a broad and purposive approach will take root here in Jamaica after the Appointed Day Notice brings the Disabilities Act into effect. One can nevertheless agree that a window of opportunity in this regard, however narrow, does in fact exist.

## **The National Workplace Policy on HIV and AIDS<sup>92</sup> (NWP)**

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<sup>88</sup>See footnote 79 where these concepts appear as qualifiers to the duty to make reasonable arrangements under section 2 of the Act, however the legislation does not provide any guidance as to how a relevant assessment is to be made.

<sup>89</sup> See discussion at footnote 26.

<sup>90</sup> **X v The Commonwealth** [1999] HCA 63 dated 2 December 1999.

<sup>91</sup> The Commonwealth of Australia, Disability Discrimination Act, 1992.

<sup>92</sup> The Ministry of Labour and Social Security, National Workplace Policy on HIV and AIDS, 2010 approved as a Green Paper in 2010 and as a White Paper in 2010. Several other entities including Ministries of Government have

The National Workplace Policy on HIV and AIDS which was approved by Parliament as a White Paper in 2012, is indicative of the Government of Jamaica's recognition of, and response to the fact that stigma, discrimination and other variants of human rights violations on the basis of HIV and AIDS in the workplace, have a crippling effect on the national HIV program's public health driven response.<sup>93</sup> The genesis of the NWP is the fulfillment of the country's obligations as a party to Recommendation 200<sup>94</sup> as well as the ILO's Code of Practice<sup>95</sup>. This policy document is the product of extensive consultations which included the convening of a Joint Select Committee of Parliament and the engaging of several key stakeholders<sup>96</sup> who made submissions to the Committee.

The NWP codifies the ILO's ten (10) key principles for developing and implementing HIV and AIDS related programs and policies. These are:

- i. HIV/AIDS as a workplace issue,
- ii. Non-discrimination,
- iii. Gender equality,
- iv. Healthy work environment,
- v. Social dialogue,
- vi. No screening or mandatory testing for purposes of exclusion from employment and work processes,
- vii. Confidentiality,
- viii. Continuation of employment,
- ix. Prevention,
- x. Care and support.

The principle of non-discrimination under the NWP requires that one's real or perceived HIV status should not:

- Be a barrier to equal access to employment or occupation;

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received the assistance of the Ministry of Labour and Social Security's HIV Unit under its Voluntary Compliance Programme (VCP) in tailoring their own workplace policies.

<sup>93</sup> Guidance Note 2012, "Key Programmes to reduce stigma and discrimination and increase access to Justice in National HIV Responses", UNAIDS at page 5.

<sup>94</sup> See footnote 29.

<sup>95</sup> See footnote 30.

<sup>96</sup> Representation was made on behalf of the Jamaica Confederation of Trade Unions, the National HIV/STI Programme, the Ministry of Health, the Jamaica Bar Association, the Child Development Agency, the Jamaica Association of Guidance Counsellors in Education, the Jamaica Network of Seropositives, the Jamaica AIDS Support, the Insurance Association of Jamaica, the Independent Jamaica Council for Human Rights and the Lawyers' Christian Fellowship.

- Affect terms and conditions of employment including working conditions, remuneration and access to benefit
- Be a ground for dismissal
- Prevent PLHIV from being employed subject to their being medically fit, with reasonable accommodation if necessary

The requirements of privacy and confidentiality in a practical sense are as follows:

- No workers, including job applicants, should be required to undertake and HIV test or disclose their status;
- HIV testing should be voluntary, confidential and include pre and post-test counselling;
- An employer is to be concerned with the question of whether a worker is fit to carry out the required work rather than the actual status of the worker;
- A negative result should not be a prerequisite for gaining or retaining employment;
- An employee's medical information is to be kept confidential.

The legal status and weight to be given to the principles outlined in National Workplace Policies on HIV and AIDS (NWP) has been examined in international Jurisprudence. Specifically for example, the implications of the practice of mandatory testing which is precluded by the NWP, is illustrated by the decision of the High Court of Zambia in **Kingaibe et al v Zambia Air Force**<sup>97</sup>. Two officers in the Zambian Air Force (ZAF) tested positive for HIV and were prescribed antiretroviral drugs (ARVs). They were subsequently discharged. Their testimony was that they were never advised of their HIV-positive status or of the nature of the drugs prescribed for them. The High Court found that in subjecting the complainants to HIV testing without their knowledge or informed consent, the ZAF violated their rights to privacy and to be free from inhumane and degrading treatment.

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<sup>97</sup> **Kingaibe et al v Zambia Air Force**, Livingstone High Court, case No. 2009/HL/86, delivered 27 May 2010.



In general terms, the Botswanian decision in **R v Jimson**,<sup>98</sup> proves also instructive. Whilst the court indicated that the National AIDS Policy could not form the basis of its decision as it is not law, it nevertheless used the policy advice pertaining to pre and post-test counselling in arriving at its decision that that the circumstances rendered the employer's dismissal of the worker procedurally unfair. Similarly in **Diau**<sup>99</sup>, whilst acknowledging that the National HIV/AIDS Policy was not binding on the court as it was not law, the court used the values espoused as an interpretive aid in its constitutional analysis.<sup>100</sup> This perspective of the NWP being a document worthy of judicial note for the purpose of giving content to international obligations for addressing discrimination against PLHIV and AIDS in the workplace, also did in fact inform the thinking of the framers of the NWP of India.

Jamaica's NWP, in essence therefore recognizes that HIV and AIDS have implications for the workplace, and therefore seeks to protect against human rights violations at work, such as denial of access to employment and advancement, mandatory testing or screening, breaches of privacy and confidentiality, discriminatory terms and conditions of employment and arbitrary dismissal. Whilst not 'hard law' and as such does not create any enforceable legal rights, it is suggested on the strength of the authorities cited above<sup>101</sup>, that the policy will be critical to providing guidance as to what the justice of the case may require in dealing with allegations of discrimination against PLHIV and AIDS at work. As it is currently, these principles have not yet been legally tested in this jurisdiction and so we may have to await an appropriate test case to ascertain the extent to which international jurisprudential indicators will be assimilated into local law. In any event, this course of action may soon become moot as it is the intention of the Ministry of Labour and Social Security that the NWP is to form the basis of HIV Regulations to be appended to the proposed Occupational Safety and Health Act.

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<sup>98</sup> *Jimson v Botswana Building Society*, Industrial Court case No. 35 of 03.

<sup>99</sup> See footnote 57.

<sup>100</sup> See full quote at footnote 64.

<sup>101</sup> See for example *Diau and Tapela* at footnotes 57 and 63 respectively.

## **HIV and AIDS and Safety and Health at Work**

Among the obligations of State parties to ILO Recommendation 200<sup>102</sup> is the requirement that national policies and programmes on HIV and AIDS as well as on occupational safety and health be implemented. Also relevant is the ILO Code of Practice<sup>103</sup> which encourages a consultative approach to include the most representative organization of employers and workers as well as organizations representing PLHIV and AIDS.

The aspects of employment which the proposed Occupational Safety and Health law purports to treat with, includes HIV and AIDS as a workplace issue. Further, in an approach which reflects the policy of Recommendation 200<sup>104</sup>, the new law intends to apply to all workers in all areas of economic activity. This it endeavors to achieve by proposing to replace the limiting concepts of ‘employer’ and ‘employee’ with ‘person conducting a business or undertaking’ (PCBU) and ‘worker’.

The proposed framework seeks to prohibit a person from engaging in discriminatory conduct for a prohibited reason. Discriminatory conduct includes dismissing or altering the position of a worker or treating a prospective worker less favorably than another. Among the reasons prohibited as forming the basis for discriminatory conduct is on the basis of the real or perceived status of a worker as being HIV positive or having AIDS or other life threatening illness.

Discrimination for the purposes of the new law would be defined to reflect the schema of the *Discrimination Convention*<sup>105</sup> as pertaining to any distinction, exclusion or preference pertaining to occupational safety and health measures, which has the effect of nullifying or impairing equality of opportunity or treatment in access to training, job promotion, job processes, security of tenure, remuneration, leave entitlements, rest periods, social security benefits or other conditions of work.

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<sup>102</sup> See footnote 29.

<sup>103</sup> See footnote 30 at paragraphs 4 and 6-7.

<sup>104</sup> See footnote 29.

<sup>105</sup> See footnote 35.

The framework would provide that a person who engages in discriminatory conduct for a prohibited reason will be guilty of a criminal offence. Where the reason forms a substantial basis for the conduct, proceedings before the Occupational Safety and Health Division (OSH Div.) of a “new look” Industrial Disputes Tribunal (IDT) may then obtain<sup>106</sup>. However where the discriminatory reason is substantially the basis of the conduct then criminal proceedings subject to the ruling of the Director of Public Prosecutions (DPP) may ensue.

Under the proposed OSH framework, a worker will also have the right to cease or refuse to carry out work which presents an imminent and serious danger. It should however be noted that the policy which informs this provision does not endorse a position whereby the mere presence of a PLHIV or AIDS in the workplace is to be considered as presenting a hazard, without more.<sup>107</sup> The decision of the European Court on Human Rights (ECHR) in the case of **IB v Greece**<sup>108</sup> where the employer fired the PLHIV in the interest of preserving good working relations after being petitioned by other workers who claimed to have apprehended that his presence posed a risk to their health, puts this issue into perspective as follows:

*“if it were a well-established principle in Greece that an HIV-positive employee could not be dismissed, employees who harbored prejudice would know that they could not obtain a dismissal, would not disrupt the operation of the company, and would refrain from interfering in the professional and private life of the employee in question. In the present case the motives of the employees were inseparable from those of the employer and it could not be claimed that the dismissal was not discriminatory on the pretext that the employer’s motives, taken alone, constituted valid grounds for dismissal”<sup>109</sup>.*

It is the real risk that similar situations could obtain in this jurisdiction, that necessitated that embedded within the NWP<sup>110</sup> is a requirement for there to be

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<sup>106</sup> Note that there is currently only one Division of the IDT as contemplated by the Labour Relations and Industrial Disputes Act, 1975.

<sup>107</sup> See the National Workplace Policy on HIV/AIDS at footnote 91, which in its discussion on the Guiding Principles relative to a ‘healthy work environment’ notes at page 26 that “awareness-raising measures should emphasize that HIV is not transmitted by casual physical contact and that the presence of a person living with HIV should not be considered a workplace hazard”. T

<sup>108</sup> European Court of Human Rights, Strasbourg; **IB v Greece**, Application No. 552 of 2010 decided 03/01/2014.

<sup>109</sup> Footnote 107 at paragraph 61.

<sup>110</sup> See footnote 91.

training “Education, Training and Improved Awareness”<sup>111</sup> to ensure that workers are exposed to information on modes of transmission with a view to dispelling myths and bringing about behavior modification.

In keeping with the requirement of the *Occupational Health Services Convention*,<sup>112</sup> PCBUs will be required under OSHA to provide/access to occupational health services, whose mandate *inter alia* will be the carrying out non-discriminatory medical surveillance in a manner which accords with the confidentiality<sup>113</sup> requirement under the NWP.

Further, the PCBU as envisioned by OSHA, is proposed to have a primary duty of care to workers to ensure their health and safety, so far as is reasonably practicable and to the extent of their capacity to influence and control. Integral to discharging this duty is the obligation to minimize the risks associated with a hazard which cannot be eliminated. As such, a PCBU is to provide personal protective equipment without levy to workers, which would include universal precautions<sup>114</sup> to prevent the occupational transmission of HIV, which is recognized as an occupational disease<sup>115</sup>.

Of relevance also is the fact that the NWP is intended to form the basis for institution of Occupational Safety and Health HIV Regulations. This approach reflects an appreciation of the shared global understanding of the right to safety and health at work as a fundamental human right. Hence in keeping with the right of everyone to just and favorable conditions of work as espoused by the UNDHR<sup>116</sup> among other international instruments, the whole scheme of the OSH law will seek to preserve those rights by ensuring the adaptation of work to man and of each man to his job<sup>117</sup>. Addressing HIV and AIDS in this rights-based framework will include both direct and indirect discrimination<sup>118</sup> at all stages of the employment

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<sup>111</sup> See footnote 91 at page 22,

<sup>112</sup> See footnote 52.

<sup>113</sup> Footnote 91 at page 26.

<sup>114</sup> See footnote 29 at paragraphs 31-32 of Recommendation 200.

<sup>115</sup> R194- List of Occupational Diseases Recommendation, 2002 (No.1994) which it is proposed to be appended as a Schedule to the OSH Act, includes the Human Immunodeficiency Virus (HIV).

<sup>116</sup> See footnote 9.

<sup>117</sup> See the ILO/WHO Committee on Occupational Health, 1995.

<sup>118</sup> See footnote 36.

relationship as well as the implementation of HIV risk management procedures where the nature of the occupation poses a risk to exposure.

In an effort to transition organizations to a state of readiness, the Ministry of Labour and Social Security's Occupational Safety and Health Division has already proactively embarked on an HIV/OSH Voluntary Compliance Program (VCP), which is credited with assisting with the crafting of several tailor-made HIV policies in both the private and public sectors. Coming out of my involvement with the National HIV Discrimination Response and Redress System (NHDRRS)<sup>119</sup> as the Ministry's representative, there exists a personal appreciation for the fact that the legal structure that is the OSH Act which is being mounted around a human rights framework, must be scaffolded by certain administrative procedures such as would ensure the privacy of persons seeking to assert their rights. This is because although several reports are received by the NHDRRS regarding human rights abuse against PLHIV and AIDS, persons are unwilling to access justice due to well-placed fears that they will be identified by their plight, and become the victims of further stigma and discrimination. The Ministry is therefore taking steps to put dedicated systems and personnel in place to afford PLHIV and AIDS a more enabling environment as they pursue their rights. This approach is proposed to be complimented by the naming of parties to a complaint in a manner that would not breach their right to privacy in relation to accessing both internal and external mechanisms for addressing discrimination and other work-related abuses.

## **CONCLUSION**

At this juncture, we trust that any question as to whether discrimination against PLHIVs and AIDS is of any contemporary significance and importance in the Jamaican workplace has been answered both by this paper and through the extensive efforts being made by the Government through the work of the Ministry of Labour and Social Security to address this workplace issue. Much has been said, but more critically, there is a lot that needs to be done. HIV and AIDS related discrimination is in the final analysis, a social issue. The 'twin evils' of stigma and

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<sup>119</sup> The NHDRRS is a function of the Ministry of Health's National HIV/STI Programme and is currently driven by the National Family Planning Board.

discrimination are bred out of ignorance and fear of the disease. A lot can be done from a legal standpoint but let us not discount the good that a positive, inclusive mindset can accomplish insofar as countering human rights violations is concerned. When employers refuse to employ PLHIVs and AIDS or as fellow workers we shun them and refuse to accommodate their failing abilities, we by our lack of humanity effectively condemn these persons to virtual economic death. Armed with the information presented today, it is hoped that as practitioners of the law, we will be able to guide all stakeholders in the employment realm to act in a manner which is humane, just and consistent with international standards, whilst endeavoring to cultivate our home-grown jurisprudence in addressing the issue of stigma and discrimination against PLHIV and AIDS generally, but especially in respect of the world of work.

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