SOUTHERN AFRICA LITIGATION CENTRE

Comments on the Botswana Public Health Bill 23 of 2012

12 February 2013

Introduction

This memorandum highlights some of the sections in Botswana's Public Health Bill (no 23 of 2012) which might result in human rights violations.

The memorandum to the Public Health Bill explains that it would replace the Public Health Act which has not been amended since its enactment in 1981. This development is encouraged, because it is absolutely crucial that health laws are regularly updated as new information becomes available. Concerns have however been raised that the effectiveness of the Public Health Bill might be compromised by the fact that there was no wide consultation on the provisions of the Bill.[1]

We are aware that the Botswana Constitution allows for the limitation of various rights on public health grounds. However, such limitations must be explicitly explained. We found that some of the provisions in the Public Health Bill which limit the rights of individuals are overly broad without sufficient safeguards to protect the rights of users of the health care system.

This memorandum discusses the following aspects of the Public Health Bill: communicable diseases; notifiable diseases; HIV related provisions; rights of users of health services and complaints regarding health services. It concludes with a list of recommendations on how the Bill can be amended.

Communicable diseases

The Bill accurately defines a "communicable disease" as "any disease which can be transmitted directly or indirectly from one person to another". However, the Public Health Bill has various provisions which potentially infringe the rights of people who have communicable diseases. As it reads now, the sections in the Public Health Bill on communicable and notifiable diseases are no different to those contained in the 1981 Public Health Act. This suggests that the Public Health Bill was not carefully drafted to take into account modern discourse on the interaction between human rights and public health, or current discourse on infection control.

It is important that the proposed measures in the Bill relating to communicable diseases are carefully considered. The measures should not apply to everyone with a communicable disease, but be specifically tailored to address specific public health concerns. For example, it might make

[1]Whilst it appears that there was a process of public hearings to review the Public Health Act, specifically in relation to HIV/AIDS, there has not been space for public participation once the new Public Health Bill had been gazetted. See SADC Parliamentary Forum Report on the Public Hearings on HIV and AIDS in Botswana, 2-12 October 2007. The report on the public hearings on HIV and AIDS emphasised that there should be further processes encouraging public participation in the Public Health Act review.

sense to detain people with some communicable disease which is highly infectious and poses a severe public health risk and for which any other preventative measures are ineffective. However, it does not make sense to detain people who have sexually transmitted communicable diseases, especially not HIV.[2]

There are a range of different types of communicable diseases – for example, diseases preventable by vaccination, sexually transmitted diseases, viral hepatitis, air-borne diseases and serious imported diseases. In many cases, prevention through measures such as site planning, adequate nutrition, good sanitation, personal hygiene, case management, housing, health education, insect and rodent control, and case management are more important than measures which risk stigmatising those who are infected with communicable diseases.

It would make sense to perhaps include different schedules classifying communicable diseases in accordance with seriousness or risk of infection and apply certain provisions only to communicable diseases listed in those schedules.

The following sections are examples which require further consideration:

- Section 53 of the Bill states that a health officer or authorised officer may enter and inspect the premises of a person suffering from, having recently suffered from, or have been exposed to a communicable disease; and may then medically examine such person to establish if the person is, or has recently, suffered from that disease. This is quite a broad provision, especially in its application to all communicable diseases. It would be important for the section to only apply to specific communicable diseases.

  This section potentially violates section 9(1) the Botswana constitution which provides for the right to privacy.

- Section 57(1) allows a medical practitioner, health officer or authorised officer to detain a person in a health facility or temporary place if that person has a communicable disease and they believe detention is necessary to prevent the spread of the disease. Such person can, in terms of section 57(2) be detained until the medical practitioner, health officer or authorised officer is satisfied that the person is no longer infected or that the discharge of the person will not endanger public health. A person who escapes such detention commits an offence [section 57(3)]. Section 57 affects a range of rights.[3] As the section now stands, it provides no remedies for a person who has been detained and no oversight over decisions to detain.

  The section should state that detention must be authorised by the court which should also set out the conditions of detention, specify the periods of detention and afford detainees legal representation.

  Section 57 potentially violates the right to freedom of movement guaranteed in section 14 of the Botswana constitution and article 12(1) of the African Charter on Human and People's Rights (ACHPR) and the right to be free from cruel, inhuman and degrading treatment guaranteed in section 7(1) of the Botswana Constitution and article 5 of the ACHPR and

[2] Detention of people living with HIV features again in section 116(9).
[3] The WHO policy on TB infection control in health-care facilities, congregate settings and households, suggests that there is little evidence that detention of people with TB is effective as an intervention. The policy does however suggest that it is important to separate patients with HIV from TB patients in wards (page 21).

article 7 of the ICCPR. The right to freedom of movement can be limited if it is in the interest of public health provided it can be shown that the limitation is reasonable and justifiable in an open and democratic society. It is possible to argue that the detention of people living with HIV and some other communicable diseases is not reasonably justifiable in a democratic society. A distinction can certainly be made between different types of communicable diseases.

- Section 58(1) makes it an offence to expose the public to any communicable disease. For example, a person who suffers from a 'communicable disease' and wilfully exposes himself or herself without proper precautions in any public place commits an offence. The section should make it clear that the term 'wilful' refers to the deliberate intention to spread a disease. As it stands the section is open to various interpretations. The section should only apply to serious, highly infectious communicable diseases clearly stated in a Schedule to the Bill.

Example: In the case of XDR TB, patients suffering from the diseases and relatives of such patients are often immediately isolated and tested. This might make sense in exceptional instances to ensure that they receive immediate treatment and to reduce the risk of XDR TB spreading in communities where HIV is prevalent. However, such public health measures have to be done in a manner that considers the rights of the patients. Thus, the first step would be to engage with people in a respectful manner to explain the reason for the intervention and ensure that the process is completed as quickly and with the least infringement on their rights as possible. It is only once a person is found to be infected with XDR TB and found to be at risk of infecting others, that detention can be considered as last resort. However, there is often a tendency by health care workers to blame people with MDR TB or XDR TB (especially where there was previous treatment failure) without recognition of the range of factors beyond their control which would have led to them becoming infected, such as transport costs; long distances to health facilities to access treatment; staff shortages; lack of family and community support; and lack of infection control at health facilities. People who are detained should be given access to social grants to alleviate the impact of detention on their families and relieve some of the stress which accompanies the detention. They should not be treated as prisoners and should have access to recreational and other facilities.

In the sections in the Public Health Bill dealing with communicable diseases, there is no discussion about rights. The entire chapter is written in a manner that ignores the inherent dignity of individuals who have or were exposed to a communicable disease.[4]

Notifiable diseases

The Public Health Bill states the following regarding notifiable diseases:

- "Notifiable diseases" is defined in the Bill to mean smallpox, cholera, plague, yellow fever, diphtheria, typhoid fever, whooping cough, TB, poliomyelitis, neonatal tetanus, measles, leprosy, urethral discharge syndrome, vaginal discharge syndrome, genital ulcer syndrome, pelvic inflammatory disease, other sexually transmitted infections, HIV, AIDS, pneumonia in under 5 year olds, malaria, bacillary dysentery, meningococcal meningitis and viral hemorrhagic fever, and includes any other disease declared notifiable in terms of section 52.

[4]Section 57 also violates the right to liberty and security of the person guaranteed in article 9(1) of the ICCPR and Article 6 of ACHPR.

- Section 52 provides that notifiable diseases shall be under surveillance and reported within such period as may be prescribed in the Integrated Diseases Surveillance and Response Guidelines prepared by the Minister. Section 52(3) obliges every officer-in-charge of a health facility, medical practitioner or health officer to notify the Director about a notifiable disease that he or she comes across during the course of that officer's work.
- Section 152 provides that any person who does not report a notifiable disease to a health facility commits an offence. Section 152(3) provides that a health worker shall report "all suspected cases of prescribed diseases that come to his or her attention." There is specific reference in section 152 to the reporting of poliomyelitis and measles by a health worker to a public health specialist in the district. A health care worker who does not do so, can be fined or imprisoned.

The list of notifiable diseases in the Bill is much broader than that contained in section 5 of the Public Health Act. The mere implementation of these new notification requirements might impact on health services. There is accordingly a need for careful consideration of the rationale behind making certain diseases notifiable.[5] Section 152(1) places a responsibility on members of the public to report prescribed diseases to a health facility, and makes it an offence if they fail to report. There is a high risk that people will not be aware that they are contravening the law.

The WHO and CDC guidelines on integrated disease surveillance[6] suggest that it is important to conduct surveillance of priority diseases: epidemic prone diseases (yellow fever, typhoid, measles etc); diseases targeted for eradication of elimination (leprosy, neonatal tetanus, poliomyelitis etc); diseases of international concern (SARS, smallpox etc) and major diseases which are of public health importance and are principal causes of mortality and morbidity in an area (HIV/AIDS, malaria, rabies, STIs, tuberculosis, pneumonia in under 5 year olds etc). The methods for such surveillance can however be different for different types of diseases. Since such diseases are notifiable, the method of notification becomes important to avoid public concerns around confidentiality and avoid people being deterred from accessing health services.

The Minister of Health in a statement on the Bill argued that notifiable diseases are not reported by name and that "the rationale for making HIV/AIDS a notifiable disease is to facilitate statistical data analysis and monitoring trends, which is necessary for better planning and service delivery". There is however little information for the public on whether coded identifiers are used, how complex they will be etc.[7] The chapter on notifiable diseases in the Bill does not state penalties where there is a breach of confidentiality as a result of the notification process. Section 114 of the Bill does provide that "a person shall not, in any records of forms used in relation to the notification of a positive HIV result, include any information which directly or indirectly identifies the person to whom an HIV test relates, except in accordance with the confidentiality guidelines.

It is recommended that the procedure for notification of diseases be explained clearly to ensure that issues of breach of confidentiality and stigma do not arise. There should be clear penalties where disclosure does occur. The Bill should emphasise the rights of all patients, not just those

[5] Smallpox, cholera, plague, yellow fever, diphtheria, typhoid fever, whooping-cough, tuberculosis and poliomyelitis.
[6] WHO and CDC Technical Guidelines for Integrated Disease Surveillance and Response in the African Region (October 2010)
[7] UNAIDS, The role of name-based notification in public health and HIV surveillance, Best practice collection.

with non-communicable diseases, since it is this lack of emphasis on rights, which causes the distrust around notification.

We do not think that the notification of HIV is per se unconstitutional, provided that it complies with confidentiality requirements and is done in a manner which does not perpetuate stigma against people living with HIV.

HIV related provisions

The sections dealing with HIV is entitled "HIV testing, prevention and control". This shifts discussion of HIV from a chronic illness which requires treatment, to a discussion on how to control the vectors of HIV. This is inappropriate and does not reflect current discourse on HIV internationally. Hidden between the other sections, section 116(3) does require that health facilities ensure that a person with HIV has received adequate counselling, adequate medical and psychological assessment and appropriate treatment. This duty on health facilities is important and should form a stand-alone section.

Confidentiality of HIV test results

There are a number of positive provisions in the Bill which emphasise the right to confidentiality:

- In terms of section 104(1) (a) a person over 16 years of age is entitled to confidentiality of HIV test results. Importantly, the section places a responsibility on the Minister to "ensure that confidential HIV testing facilities are made available."
- Section 113 further provides that the Minister shall issue guidelines for the confidentiality of HIV test results – including how it should be recorded, collected, stored. A person shall not deal with HIV test results contrary to such guidelines [section 113(3)].
- Recording of HIV test results must not directly or indirectly reveal the identity of the person, unless it complies with the confidentiality guidelines (section 114).

Section 115(1) provides that a person shall not disclose information about "the result of an HIV test, including the HIV or HIV antibody status, the sexual behaviour of a person or the use of drugs by a person" to any person except –

a) With the consent of that person;
b) Where the person died, with the consent of the person's partner, representative or executive;
c) Where the person is under 16, with the consent of the parent;
d) Where the personal has a disability which renders that person *incapable of giving consent*, with the consent of a parent or guardian;
e) To an approved health care worker, medical practitioner, dental practitioner or nurse who is *directly* involved in the treatment of counselling of that person;
f) For the purpose of research *authorised by Minister*;
g) To a court where information in medical records *directly relevant* in proceedings; or
h) Where authorised or required to do so under this Act.

The wording in section 115(1) does include limitations which would protect information from disclosure and only allows disclosure in specific circumstances. Section 115(1) (g) should be read in conjunction with section 121 which states that "where a court is of the opinion that it is

necessary to disclose information relating to the HIV or HIV antibody status of a person, the court may order that the proceedings be held in camera; that only specified persons are present; or that prohibit or limit publication of the proceedings. Despite these safeguards, section 115(1)(g) is quite broad, and it might be more appropriate to phrase it so that a court must first hear an application for admission of such evidence.

Section 115(1)(c) regarding parental consent to disclose a child's HIV status, is contrary to section 140(1) (b) which allows a child to refuse disclosure of his or her medical records to a parent.[8]

Section 115(2) does allow the disclosure of statistical information that doesn't reveal the identity of the person.

Section 122(1) provides that information relating to sexual behaviour disclosed whilst undergoing an HIV test is confidential and may not be disclosed without consent. However section 122(2) states that such confidentiality does not apply where:

a) The court orders the disclosure of information; or
b) The information is required by a medical practitioner or any legal representative who *requires or is entitled* to information in the course of his or her professional duties.

Section 122(2)(b) is problematic since it is phrased too broadly and does not explain whose legal representative it refers to. This would allow a legal representative who is suing the person who underwent the test to make inquiries about his/her sexual behaviour in the absence of a court order. The section violates doctor to patient privilege. This is an example of how the Bill ignores existing ethical guidelines.

Section 122(2)(b) potentially violates the right to dignity[9] and the right to privacy guaranteed in article 17(1) of the ICCPR and should be deleted.

Consent for HIV testing

Section 104(2) prohibits mandatory HIV testing for the purpose of employment or *provision of goods or services*. This section is encouraging, especially since it extends beyond the workplace. This is in line with the Ministry of Health's National Guidelines on HIV testing and counselling[10] which states that "mandatory HIV testing is neither effective for public health interventions nor ethical, because it denies individuals choice and violates principles such as the right to health and the right to privacy".

Section 104(3)(a) does allow the routine *offer* of HIV tests in accordance with guidelines issued by the Department.[11] The National Guidelines on HIV testing provide that "patients or clients attending health facilities have a right to decline HIV testing if they do not think that it is in their best interest or if they need more time to consider the implications of the test." [12]

[8] See Guideline 8(38)(h) of the International Guidelines on HIV/AIDS and Human Rights
[9] The right to dignity has been read into the other rights provided for in the Botswana Bill of Rights. See *Diau v Botswana Building Society(BBS)* 2003 (2) BLR 409 (BwIc), in which the court stated that the right to dignity lays the foundation for the right to equality and all other rights that human being possess.
[10] Ministry of Health, Botswana, National Guidelines: HIV Testing and Counselling, 2009, section 2.3
[11] The instances in which routine offer should happen is set out in the National Guidelines on HIV testing.
[12] Ministry of Health, Botswana, National Guidelines: HIV Testing and Counselling, 2009, section 2.2

Section 104(3)(b) allows a Director of Health Services or person authorised by him or her, "where *necessary and reasonable*" to "require a person or category of persons to undergo an HIV test." Section 104(4) further provides that, if a person who is required to undergo an HIV test by the Director refuses to do so, the Director may apply to a magistrate for an order that the person undergoes the HIV test. Such application must be in camera and the magistrate must carefully consider "whether another person is or has been exposed to the possibility of transmission of HIV; the right to information of the person exposed to the possibility of transmission of HIV; and the availability of treatment in relation to HIV." Section 104(7) requires that the magistrate must be satisfied on a balance of probabilities that such an order is in the interest of public health or public interest. Such a provision requires extensive training of all magistrates. If the provision is retained, then the Act should require the development of guidelines for magistrates on implementation of provisions in this Act. The Minister of Health, in a statement issued on the Bill, indicated that "this clause envisages instances where it may be necessary to determine one's HIV status for protection of others e.g. children that have been sexually abused by a close family member such as a parent or guardian".

Guideline 3(28)(b) of the International Guidelines on HIV/AIDS and Human Rights provides that "exceptions to voluntary testing would need specific judicial authorisation, granted only after due evaluation of the important considerations involved in terms of privacy and liberty." We are not persuaded that there are circumstances justifying this section.

In the absence of clear protections afforded under section 104(3)(b) and adequate training of magistrates, the section has the potential to violate the right to privacy guaranteed in article 17(1) of the ICCPR. The section also violates the right to be protected from cruel, inhuman or degrading treatment enshrined in section 7(1) of the Botswana Constitution, article 5 of the ACHPR and article 7 of the ICCPR. The right enshrined in section 7(1) has been given a broad interpretation. The section does not identify the person it refers to and therefore innocent people are not protected. [13]

Section 105(1) provides for HIV testing in 4 circumstances:

a) With consent of the person;
b) With the consent of the parent if the person is under 16 years of age;
c) Where the person cannot give consent due to a disability which render the person incapable of consenting, but consent is provided by a parent, guardian, partner etc.; or
d) Where an HIV test is required under any Act.

In terms of section 105(2), a medical practitioner "responsible for the treatment of a person" may conduct an HIV test without the consent of the person where "that person is unconscious

[13] In *S v Ndou* [2008] BWCA 60 in interpreting the right to be protected from inhumane treatment, the court held the following, 'the proscribed elements of torture, and inhuman or degrading punishment or other treatment are pregnant with meaning and are powerful concepts reaching down to the very depths of a person's humanity and to his right not to be treated in a manner which robs him of his human dignity and worth."[13] In *Moatshe v The State; Motshwari and Others v The State* [2004] 1 BLR 1 (CA) the court referred to the oxford dictionary and defined inhumane as "destitute of natural kindness or pity, brutal, unfeeling, cruel, savage, barbarous or, - in short "cruel" or "brutal." Compelling one to undergo mandatory testing has the effect of robbing them of their dignity and worth. Furthermore in *Diau v Botswana Building Society* the court also stated that, 'it is incompetent to force people to undergo HIV testing, people must be encouraged to test voluntarily.'

and unable to give consent AND the medical practitioner believes such a test is clinically necessary or desirable in the interests of that person." In such a case, section 105(3) absolves the medical practitioner of civil or criminal liability. This section is similar to section 2.4.5 of the National Guidelines on HIV testing. The section provides sufficient safeguards in its wording to ensure that HIV testing without consent only happens when clinically necessary and in the interest of the patient. Thus, this provision would not justify HIV testing of such persons without their consent, or testing to satisfy the curiosity of the medical practitioner.

We recommend that section 105(2)(b) should amended to read that the test must be clinically necessary AND desirable in the interests of that person.

In terms of section 105(1)(b) a child under the age of 16 years cannot consent to an HIV test. During the public hearings on HIV and AIDS, there was overwhelming support for the notion that children under 16 years of age should also be able to consent to HIV testing without parental consent. This has not been taken into consideration in the Public Health Bill. Guideline 8(38)(h) of the International Guidelines on HIV/AIDS and Human Rights provides that "States should ensure that children and adolescents have adequate access to confidential sexual and reproductive health services, including HIV/AIDS information, counselling, testing and prevention measures such as condoms, and to social support services if affected by HIV/AIDS. The provision of these services to children/adolescents should reflect the appropriate balance between the rights of the child/adolescent to be involved in decision-making according to his or her evolving capabilities and the rights and duties of parents/guardians for the health and well-being of the child."

We recommend that in light of the public hearings, a lower age to consent to HIV testing should be given to allow child orphans and other children to access treatment.

In terms of section 105(1)(d) an HIV test can be conducted where it is required under any law.[14] Does this mean that consent is never required for such test? Section 104 ensures confidentiality of HIV test results obtained in such circumstances. Examples of such tests:

- Section 106(1) which requires an HIV test prior to the donation of any tissue;
- Section 108 which states that "a person *convicted* with the offence of rape or defilement under the Penal Code shall be required to undergo an HIV test". The National Guidelines on HIV testing does provide that mandatory testing of a person convicted of rape should still only occur on the basis of a court order.[15] The National Guidelines on HIV testing further refers to the mandatory HIV testing of rape suspects.[16] However, such mandatory testing in a policy is not sufficient unless also provided for in law.

In terms of section 110, pre-test counselling (on the medical and social consequences of being tested) must be conducted by a medical practitioner or approved health care worker before any HIV test is undertaken. The Bill does not refer to post-test counselling. The National Guidelines

[14] Section 2.3 of the National Guidelines on HIV testing provides for mandatory HIV testing of source patients in cases of occupational exposure in health facilities. It is submitted that such testing is not valid since not authorised by law, and it would be better, where a source patient refuses testing, for a health worker to resume post-exposure prophylaxis in any event.

[15] The Penal Code (Amendment) Act 5 of 1998 allowed for the mandatory HIV testing of persons convicted in rape cases. Various human rights violations are implicated by this amendment. See Zein Kebonang, "Challenges of HIV/AIDS criminal legislation in Botswana, *Journal of Politics and Law*, March 2012, 5(1):189-195, Canadian Center of Science and Education.

[16] Ministry of Health, Botswana, National Guidelines: HIV Testing and Counselling, 2009, section 2.3

on HIV testing refers to the content of pre- and post-test counselling in chapter 5. A person must be informed of the results of an HIV test as soon as possible (section 111).

There should be a discussion on whether post-test counselling should be required by the Bill.

Disclosure to sexual partners and care-givers

Section 116(1)(b) provides that a person who is aware of being HIV positive shall inform, in advance, any sexual contact or care-giver or person with whom sharp instruments are shared.

In terms of section 116(4) a person may, in writing, request that a medical practitioner or health care worker informs that person's care-giver or sexual contact of the person's HIV status. The inclusion of care-givers in the section appears to stem from the 2007 public hearings on HIV and AIDS, where people expressed the view that "if a person is bedridden or terminally ill, their status should be disclosed to the care-givers to ensure that they equally take appropriate precautions and prevent transmission". It should however be noted that the rationale of preventing risk of transmission to a care-giver is exaggerated, since the risk of transmission is miniscule and everyone living in high HIV prevalence settings should rather be educated around the use of universal precautions to reduce risk of transmission.

The 2007 public hearings on HIV and AIDS emphasised that "it is important that individuals feel they are in control of their information, with regard to whom to tell, when and how". The hearings "advocated for public education to be intensified to facilitate acceptance, positive behaviour change" to encourage voluntary disclosure and responsibility in sexual relationships.

In terms of section 116(7) a medical practitioner responsible for the treatment of a person who becomes aware that the person has not, after *reasonable opportunity*, informed a care-giver or sexual contact, or requested that they be informed; may, after consultation with an approved specialist medical practitioner, inform such care-giver or sexual contact. Such medical practitioner is absolved from civil and criminal liability in terms of section 116(8).

Section 116(7) is too broadly stated – it could for example include a provision which requires that the medical practitioner first informs his or her patient that he or she will disclose the person's HIV status and giving the person an opportunity to first do so.[17] The section further does not recognise the complexities of domestic violence and does not anticipate screening for violence prior to making a decision on disclosure. The Minister of Health in a statement on the Bill has suggested that such disclosure in section 116(7) is only allowed "after a reasonable opportunity" has been given for the person to disclose, but the Bill does not suggest what would constitute such a reasonable opportunity.

Guideline 3(28)(g) of the International Guidelines on HIV/AIDS and Human Rights provides that disclosure of a person's HIV status by a medical practitioner to a sexual partner "should only be made in accordance with the following criteria:

- The HIV-positive person in question has been thoroughly counselled;
- Counselling of the HIV-positive person has failed to achieve appropriate behavioural changes;

[17] In *Maje v Botswana Life Insurance* 2001 (2) BLR 626 (HC) it was held that courts have readily acknowledged that disclosure of a person's HIV status without consent is capable of causing great mental suffering.

- The HIV-positive person has refused to notify, or consent to the notification of his/her partner(s);
- A real risk of HIV transmission to the partner(s) exists;
- The HIV-positive person is given reasonable advance notice;
- The identity of the HIV-positive person is concealed from the partner(s), if this is possible in practice;
- Follow-up is provided to ensure support to those involved, as necessary."

The approach to partner disclosure in section116 is different to that in section 2.7.2 of the National Guidelines on HIV Testing, which is framed in a way to encourage and empower patients to notify their partners.

We recommend that the regulations specify what constitutes 'reasonable opportunity' in line with the International Guidelines on HIV/AIDS and Human Rights.

Harmful behaviour

Section 116(1)(a) and (c) requires that a person who is aware of being HIV positive take all reasonable measures and precautions to prevent transmission of HIV to others and not place another person at risk of becoming infected with HIV.

Section 116(9) allows a Director in writing to apply to a magistrate for an order, where the Director reasonably believes that a person with HIV "knowingly or recklessly places another person at risk of becoming infected with HIV without the knowledge of that person of the infected person's HIV status." Section 116(10) then allows the magistrate to order that such person with HIV undergoes medical and psychological assessment; to impose restrictions on the behaviour or movement of that person for a period of up to 28 days; or to isolate and detain that person for up to 28 days. The period of detention of 28 days may be renewed.

There does not appear to be a legitimate government objective for section 116(9).

The magistrate when making an order must take into account:

a) Whether, and by what method, the person transmitted HIV;
b) The seriousness of the risk of the person infecting other persons;
c) The past behaviour and likely future behaviour of the person; and
d) Any other matter the magistrate considers relevant.

The Bill provides that section 116(9) proceedings must be in camera and information related to such proceedings may not be published. A police officer can arrest a person in terms of a warrant if a magistrate made an isolation order (section 118).

The above provisions raise the concern whether we can expect magistrates to be qualified to make the above assessment of HIV risk. The Act does not explain the application process in detail. The provision of detention does not make much sense, and since it would violate a range of rights, it is important that the Act explains the remedy available to the person who might be detained. Is such person entitled to a legal representative at state expense to defend the application by the Director? Will the person be notified timeously of such application?

Guideline 3(28)(d) of the International Guidelines on HIV/AIDS and Human Rights specifically provide that "public health legislation should ensure that people not be subjected to coercive

measures such as isolation, detention or quarantine on the basis of their HIV status. Where the liberty of persons living with HIV is restricted, due process protection (e.g. notice, rights of review/appeal, fixed rather than indeterminate periods of order and rights of representation) should be guaranteed." The only part of this guideline which section 117 adheres to is that it gives a fixed period of detention of 28 days, and even then, the Bill allows for the renewal of such period!

Section 116(9) should be subjected to constitutional scrutiny since it violates the right to freedom of movement guaranteed in section 14 of the Botswana Constitution and article 12(1) of the ACHPR, the right to dignity and the right to be free from cruel, inhuman and degrading treatment guaranteed in section 7(1) of the Botswana Constitution and article 5 of the ACHPR and article 7 of the ICCPR.

Section 117 further allows the Director of Public Prosecutions to institute proceedings against a person who committed the offence of publicly promoting participation in a sexual activity of a kind which is likely to cause damage to health through the sexual transmission of HIV. This provision is astoundingly ambiguous. A reasonable person must be able to determine from the wording of an offence which actions are prohibited. This is not the case here.

Section 117 is vague and ambiguous and should be deleted. This section is at risk of arbitrary enforcement and violates section 10(8) of the Botswana Constitution which deals with secure protection of law. Section 10(8) provides that no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law.

HIV testing

Section 105(4) states that the results of an HIV test shall be considered valid if the person was tested at a centre or health facility approved to carry out HIV testing, or if it was conducted in terms of epidemiological study authorised by the Minister. This section must be read with section 119.

Section 119 provides that "a person shall not carry out an HIV test unless the test is carried out in a centre, structure or health facility approved for the purpose of carrying out HIV testing. Section 120 makes it an offence to manufacture or sell HIV tests which are not approved.

HIV testing prior to accessing services

In terms of section 109(3), where a surgical or dental procedure is not deemed urgent, a medical practitioner, nurse or dental practitioner "may require the person to undergo an HIV test before carrying out that procedure". In terms of section 109(4) and (5), irrespective of whether a person then tests HIV positive or refuses to undergo the test, the medical practitioner, nurse or dental practitioner shall:

a) Carry out the appropriate surgical or dental procedure;
b) Refer the person to someone available to carry out the procedure; or
c) Seek advice from the Director on appropriate action.

Section 109(7) specifically provides that this section "shall not interfere with the right of a medical practitioner, nurse or dental practitioner to make a decision on medical grounds, whether or not to carry out any surgical or dental procedure irrespective of the result of the HIV test."

These sections are unclear. Is section 109(7) providing a right to doctors, nurses or dentists to refuse to conduct a procedure if a person refuses to test or tests HIV positive? It suggests that the doctor, nurse or dentist can, based on the outcome, refer a person away. But what does this mean for access to health services where no other services are available?

The Minister of Health in a statement on the Bill indicated that section 109 is intended for cases where it is clinically necessary for an HIV test to be done prior to the procedure in order to plan appropriate management of the patient after the procedure. If that is the rationale, then it is not clearly stated in the section and should be specifically worded to this effect.

The section creates an incorrect impression that conscientious objection is a valid defence for health workers to not provide services in cases of HIV.

As section 109(3)-(7) currently stands it violates the rights guaranteed under sections 3 and 15 of the Botswana Constitution that guarantees equal protection and freedom from discrimination.

Rights of users of health services

Section 136(1) provides that *every user of health services* has a right to participate in any decision affecting his or her personal health and treatment unless it is not reasonably practicable for the user to participate.

Section 136(2) provides that every health care provider shall inform the user of health services in an appropriate manner of –

a) The user's health status;
b) The range of diagnostic procedures and treatment options generally available to the user;
c) The benefits, risks, costs and consequences generally associated with the procedures and options; and
d) The risks, costs, consequences that may arise in case of user's premature discontinuation of treatment.

Section 136 is located directly under the heading "non-communicable diseases". It is recommended that this section be located elsewhere so that it does not appear that only users with non-communicable diseases are entitled to participate in decisions and access information.

Sections 137 to 139 entitle users with non-communicable diseases to certain rights not specified for other users of the health service. It does not make sense why such services and rights should be qualified to only apply to users with non-communicable diseases:

- Section 137 then states that "every user of health services *who has a non-communicable chronic condition* has a right to basic health services that ensure –
  a) Continuity of health care;
  b) Greater access to appropriate specialised services;
  c) Access to appropriate care and monitoring chronic care;
  d) Home treatment and community services appropriate to chronic care and
  e) Standard appropriate, evidence based treatment for the condition.
- Section 138 provides that "the Director shall ensure that pharmacy management systems in public health facilities are established and efficient at all levels of the health system to meet the needs of the *patients with non-communicable diseases*."

- Section 139 provides that "the Director shall ensure that the provision of services for the management, prevention and control of *non-communicable disease* is efficient.

Where sections 137 to 139 are currently located, and their limitation to persons with non-communicable diseases, violates the right to equal protection of the law under section 3 of the Botswana Constitution since it differentiates between people based on the type of illness they have.

Sections 137to 139 also violates section 15 of the Botswana Constitution which prohibits discrimination.[18]

Section 149(1) provides that a health facility may not unfairly discriminate against a health care provider based on the provider's health status. However section 149(2) allows the *head of a facility* to impose conditions he or she deems necessary on the services that may be rendered by a health care provider on the basis of the health status of the user of the health service. The purpose of section 149(2) is not clear. The section further suggests the possibility of inconsistent treatment between facilities if decisions are made by the head of a facility.

Section 169(3) provides that organs may not be transplanted into someone who is not a citizen or permanent resident, without authorisation of the Minister.

Section 169(3) violates section 3(a) of the Botswana Constitution which provides for the right to life, liberty, security of the person and the section should be deleted.

Section 151 allows for a medical procedure to be conducted on a child without a parent or legal guardian's consent if a medical practitioner is of the opinion that failure to administer such treatment or procedure would put the child's life at risk. The medical practitioner must obtain an opinion from another medical practitioner which supports such action. The provision places guardianship rights in the hands of doctors. It is acknowledged that a procedure which requires consent from the High Court might not be appropriate where urgent life-saving action is required, but then at least the consent of the head of the facility must also be obtained. The section should be considered carefully and redrafted.

Complaints regarding health services

Section 146 provides that "a person may, in writing, lay a complaint about the manner in which he or she is treated at a health facility and the complaint shall be investigated." Section 147 provides that the Minister shall prescribe procedures for complaints to be lodged and establish mechanisms to inform users of these procedures.

The International Guidelines on HIV/AIDS and Human Rights in guideline 3(28)(j) states the "public health legislation should require that health-care workers undergo a minimum of ethics and/or human rights training in order to be licensed to practice and should encourage professional societies of health–care workers to develop and enforce codes of conduct based on human rights and ethics, including HIV-related issues such as confidentiality and the duty to provide treatment." It is regrettable that no such provision has been included in the Public Health Bill. Instead, the rights of users are not generally stated, and the right to complain is

[18] In *Diau v Building Society* the court held that the grounds listed in terms of 15(3) are not exhaustive and that the ground of HIV status or perceived HIV status must be considered as an unlisted ground in section 15(3).

watered down in a context where the Bill absolved health practitioners from civil and criminal liability in many instances.

Recommendations

Section in Public Health Bill	Potential Rights Violation or Comments	Recommendation
Section 52	Notification of diseases to broad, process not specified.	Reconsider list of notifiable diseases. Prescribed process of notification in regulations. Provide clear penalties for breach of confidentiality during notification process.
Section 53	Right to privacy guaranteed in section 9(1) of the Botswana Constitution.	Section should only apply to specific communicable diseases.
Section 57	Right to be protected from cruel, inhuman or degrading treatment guaranteed in section 7(1) of the Botswana Constitution, article 5 of the ACHPR and article 7 of the ICCPR, and the right to freedom of movement guaranteed in section 14 of the Botswana constitution and article 12(1) of the ACHPR.	Detention must be authorised by the court which should also set out the conditions of detention, specify the periods of detention and afford detainees legal representation There should also be schedules classifying the different communicable diseases and emphasise protection of rights of patients.
Section 58	Section is vague and ambiguous and violates section 10(8) of the Botswana Constitution.	The section should make it clear that the term 'wilful' refers to the deliberate intention to spread a disease listed in a Schedule to the Bill.
Section 104(3)(b)	Right to be protected from cruel, inhuman or degrading treatment guaranteed in section 7(1)of the Botswana Constitution, article 5 of the ACHPR and article 7 of the ICCPR and the right to dignity as recognised by the Botswana Courts.	Delete sections
Section 105(1)(b)	Best interests of the child.	Allow for a lower age to consent to HIV
Section 105(2)	Sub-sections (a) and (b) should be read together because of the use of the word "and" in the Bill.	In section 105(2)(b), change clinically necessary OR desirable in interests of that person TO clinically AND desirable in the interests of that person.
Section 109(3)-(7)	Right to equality and freedom from discrimination guaranteed in sections 3 and 15 of the Botswana Constitution, the right to dignity and	Delete section.

	the right to be protected from cruel, inhuman or degrading treatment guaranteed in section 7(1) of the Botswana Constitution, article 5 of the ACHPR and article 7 of the ICCPR.	
Section 110	No requirement of post-test counselling.	Discuss whether this should be included in Bill.
Section 115(g)	Process of disclosure in court not clear.	Provide that court should first hear application to admit evidence.
Section 116(1)(b)	No rationale for including care-giver.	Delete obligation to inform care-giver.
Section 116(7)	Unclear circumstances when medical practitioner can disclose HIV status, discretion too broad.	Regulations should specify what constitutes "reasonable opportunity".
Section 116(9)	Right to be protected from cruel, inhuman or degrading treatment guaranteed in section 7(1) of the Botswana Constitution, article 5 of the ACHPR and article 7 of the ICCPR, the right to dignity and the right to freedom of movement guaranteed in section 14 of the Botswana Constitution and article 12(1) of ACHPR.	Delete section, which is duplication of section 57.
Section 117	Vague and overly broad, violates section 10(8) of the Botswana Constitution which provides for secure protection of law.	Delete section.
Section 122(2)(b)	The right to dignity[19] and the right to privacy guaranteed in article 17(1) of the ICCPR.	Delete section.
Section 136 to 139	Right to equality and freedom from discrimination guaranteed in section 3 and 15 of the Botswana Constitution.	Broaden to include every person, delete limited application to "communicable diseases" and move to general section in Bill.
Section 149(2)	Section 15 of Botswana Constitution which provides for freedom from discrimination.	Delete section.
Section 151	Violates parental rights.	Add requirement of authority from head of the facility.
Section 169(3)	Section 3(a) of the Botswana Constitution which provides for the right to life, liberty, security of the person.	Delete section

[19] The right to dignity has been read into the other rights provided for in the Botswana Bill of Rights. See *Diau v Botswana Building Society(BBS)* 2003 (2) BLR 409 (BwIc), in which the court stated that the right to dignity lays the foundation for the right to equality and all other rights that human being possess.