

**“AIDS AND THE LAW. DOES PROTECTION
EXIST FOR AIDS VICTIMS?”**

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INTRODUCTION – LIVING IN THE AGE OF AIDS

We who live in the ideallic Pacific islands, tend to consider ourselves above and beyond the everyday cares and woes common to the rest of mankind. The famous Scottish author Robert Louis Stevenson chose Samoa to live out his life. Our lush environment and warm climate provided the perfect tonic for his consumption. It saddens me to admit that this picture of Paradise was recently shattered by an assassin's bullet. My Cabinet colleague was a fellow law graduate of Auckland University in New Zealand. It was a cause of pride to all Auckland alumni in Samoa that Professor Bill Hodge was sent to represent the University at Hon Luagalau Levaula Kamu's funeral. As Bill said in his eulogy, this event represented the death of innocence in Samoa, not unlike the death of innocence in the United States when JFK was assassinated in 1964. Yes, friends and colleagues, even in Paradise, the ugly spectre of violent death looms its ugly head.

The death of innocence. Is this what happened to the world as we knew it, when HIV/AIDS first loomed its ugly head? It was a fatal, deadly virus which struck at the very life blood of human nature, man's ability to procreate, and all the emotional links that implies. It is a blood borne virus, so originally it thrived in the gay community because of their anal sex and other such proclivities. It thrived in illicit drug using groups and later sex workers. As the virus continued its assault, more and more heterosexuals were infected. Heterosexual transmission has spread the virus from high risk groups to the general population. WHO estimates close to 30 million people are now living with HIV/AIDS, 18 million in sub-Sahara Africa alone. New infections are steadying at three million new cases each year with two million adults and 500,000 children dying of AIDS annually (a).

The world's initial reaction was shock, then dismay, and finally loathing. Unfortunately, this loathing initially focused not only on the disease, but its victims. This gave rise to extreme discrimination – especially in housing and employment. People refused to work with HIV/AIDS victims, so they were summarily dismissed. Their tenancies were terminated. They were denied visas to travel. Gay bashing became a popular pass time.

These extreme reactions arose from a basic ignorance of the disease and its means of transmission.

We in Samoa also went through this learning curve. Gays were the objects of hate, as though they were responsible for the disease. Ironically, homosexual activity is only responsible for 20% of deaths so far (only seven) and our two official HIV positives now both contracted the virus through heterosexual activity. The two gay men who have died of AIDS, contracted the disease overseas and came home to die. Our effort to convince our small (175, 000) population that we were not isolated from HIV/AIDS has been successful. HIV/AIDS is now recognised as a Pacific wide problem which must be understood before it can be successfully combated (b). Our slogan was always "Stick to one Partner," but as was poignantly stated in a recent article by a young Samoan mother, who did stick to one partner (her husband), but was tragically infected by him:

'The story of my life has been written, with my fervent hope that it will help and encourage others who may be caught up in the evil web of the AIDS disease and the despondency it bears.' (c)

HIV/AIDS victims themselves, by coming out as this young Samoan mother has done, have achieved a great deal in terms of fostering more understanding of the disease, and compassion for its victims.

It is now universally accepted, until a globally effective vaccine is developed, the HIV/AIDS pandemic can only be successfully controlled by strong and effective leadership. As appointed Vice-President of the World Health Assembly of the World Health Organisation (WHO) in May 1999, I had the honour of chairing the Ministerial Roundtable on "Strategies for Sustaining and Adequate Response to the HIV/AIDS Epidemic" and the United States of America's Secretary of Health Dr Shalala testified that only those African nations exercising strong leadership were winning in the war against HIV/AIDS (d). In the same Roundtable Dr Kiyonga of Uganda attributed their achievements (although approximately two million people remained sero positive) in dealing with the HIV/AIDS pandemic (e), to positive changes in customs, attitudes and

life-styles All delegates acknowledged that the fight against HIV/AIDS was indeed a war being waged, and until every effort and resource was committed to the battle – the virus would win the war. Dr Dlamini of Swaziland referred to her country's 'brain drain to the grave' and the emerging social problems of the new AIDS orphans (f).

HIV/AIDS AND THE LAW

THE NEED FOR UNDERSTANDING

As lawyers, our main concern in this Conference, is what has the Law done, and what new approaches the Law can take, to combat this deadly disease? I make no apology for my lengthy introduction, for unless and until Lawyers understand the nature of this disease, the law can never be effective, in any role, in combating HIV/AIDS. The Hon Justice Michael Kirby of Australia is one of the most prolific and articulate commentators on the HIV/AIDS pandemic and the Learned Judge hammers home continuously what he terms the AIDS paradox:

“My basic thesis is simple. It is that paradoxically, the protection of the human rights of persons at risk, is the most effective way of arresting or slowing the spread of the virus. This is the AIDS paradox. (g)

Since HIV/AIDS can only be curtailed by behavioural modification, the main premise of Justice Kirby's thesis is that any such successful social response cannot be achieved without the confidence, attention, and support of the group targeted for such behavioural modification; particularly sex workers, intravenous drug users, gays, and the sexually active population in society. Justice Kirby gives the Australian experience as a good example of his AIDS paradox strategy being successful. The Australian experience suggests that any successful strategy prefers compassion over coercion. If we are to completely accept the Kirby thesis (h), then we must accept this basic premise. It is however arguable that a different approach is necessary in countries where the pandemic is much more established, such as in sub-Saharan Africa.

**DOES THE CRIMINAL LAW HAVE A PART TO PLAY IN COMBATTING
HIV/AIDS?**

Since AIDS kills, it is legitimate to argue that the law should protect individuals, communities and nations from the deliberate spread of the virus. The New Zealand Court of Appeal decision in *R V M'Wai* (i) is a well known Commonwealth example of a successful criminal prosecution for the deliberate spread of HIV/AIDS. M'Wai was an African musician who had unprotected sex with many New Zealand women, and was successfully prosecuted for "causing grievous bodily harm" to some of those women, who contracted the AIDS virus, under s. 188 (2) Crimes Act 1961 (NZ). It was an essential ingredient of this successful prosecution that M'Wai knew he had HIV/AIDS and yet deliberately and knowingly had unprotected sex with the complainants. In the judgment of the Court of Appeal delivered by Justice Hardie Boys, the Court observed not just physical harm, but even that serious psychological harm could be argued to be "grievous bodily harm" (j). The Court of Appeal also upheld the seven year term of imprisonment imposed by the Lower Court. M'Wai has since been released from custody, deported to his native Africa, and died of AIDS. It is a moot point if the M'Wai situation would have generated quite so much publicity in New Zealand, and if the criminal law would have been quite so severe, if he was not an African infecting unsuspecting New Zealand women, in albeit consensual sex. To my knowledge there has been no similar prosecution to date of anyone else in New Zealand, since M'Wai.

In pursuit of the objective of curbing the spread of HIV/AIDS, I should prefer to avoid the purely legalistic arguments of the impact of the M'Wai Case (k), and focus instead on the implication of the decision on the notification element in HIV/AIDS control. Where an HIV/AIDS diagnosed person names partners with whom he/she has had unprotected sex - and the health authorities notify those persons, and they decline to come in for voluntary testing, what if they then infect innocent third parties (who may be their spouses) after they have been advised they have been exposed to infection by the HIV/AIDS virus? It is my considered view that such persons may be successfully prosecuted in the criminal courts. This fact is particularly important as in most Commonwealth jurisdictions, the law does not provide for the compulsory testing of

persons, let alone those named as partners of HIV positive persons. If such testing is not compulsory, the health authorities may properly warn that person that since he/she refuses to be tested, after their exposure to infection, criminal charges will be brought should any other persons be exposed to infection by their reckless acts, after that warning has been given them. The deterrence is the threat of prosecution rather than the actual fact of prosecution. However it is important to note that in these situations the duty to warn supersedes any duty of confidentiality – either in terms of the law or medical ethics.

In Samoa, we strictly adhere to all the confidentiality provisions of the testing process as required by law and medical ethics. No persons would approach us for testing if such confidentiality were not guaranteed. However, we do counsel HIV/AIDS victims to name all their partners, and we do counsel those named partners to be tested. Should they refuse to be tested, the warning of possible criminal prosecution against them in the future, is then issued. As Minister of Health, I am very firm on this point. The reason is that the mother of a woman, who thankfully tested negative, after her husband had tested positive, made her views known to me in very strong terms, of what she would do if the health authorities had learnt of her daughter's husband's exposure to the virus, and had not warned her daughter immediately of the danger to her (1). The point is that the victim's right should always be balanced against the right of society for protection. It should be assumed that in normal circumstances, any spouse advised of exposure to HIV/AIDS in extra marital activity, should immediately wish to protect their spouse, if for no reason than that one parent may survive to care for their children.

The issue is, can any person dispute that the deliberate transmission of a potentially lethal infection, should bring to bear the full weight of the criminal law? This issue is relevant, in spite of the possible distinction that sexual intercourse is biologically driven? (m) It was eloquently put by a lady Minister of Health at the recent World Health Assembly in Geneva, HIV/AIDS is an insurmountable problem until a vaccine is developed, for it concerns that basic human drive to procreate, and in some male dominated third world countries, women are brought up in polygamous societies to consider themselves as chattels, trained to satisfy male lust. Some African societies still practice female genital mutilation. Indeed, the empowerment of women, and the full emancipation of women,

in most of the third world, are crucial to any truly successful strategies to control the World Population explosion, and equally crucial to any successful campaign against HIV/AIDS.

In our discussions of the criminal law, we should note it is completely opposed by Justice Michael Kirby's AIDS Paradox analyses, as of any real significance in the fight against the spread of the disease. In any case, it should never be a weapon of first resort (n) since the fight needs support, and any actions which fuel personal prejudice and cause loathing of the at risk, will impede rather than assist efforts to combat the spread of the disease.

We have already discussed the extreme measures HIV/AIDS initially gave rise to, in some countries, such as compulsory screening and testing of the at risk, and even the establishment of registers of HIV-infected persons. These actions gave rise to other restrictions on basic freedoms, such as the right to work, the freedom of movement and residence, and even in extreme cases, to the access to health care of HIV -- infected persons. Most Commonwealth countries require mandatory HIV testing for those applying for permanent residency and/or citizenship. Indeed, this extreme ostracism, as we shall discuss below, did not even allow innocent children to escape.

HIV/AIDS AND THE RIGHTS OF CHILDREN

Children born infected with HIV pose a very special problem with special legal issues involved. The WHO expect the number of children born infected with HIV to reach 10 million by the year 2000, yet any response has no where near matched the challenge this perinatal transmission of HIV poses. My own experience from the recent WHO World Health Assembly is that this gives rise to what I would call a feeding and expense paradox.

What is the expense paradox? There are drugs such as AZT and the more recently developed and cheaper Nevirapine, which can reduce the incidence of HIV being transmitted from pregnant mother to child by 90%. Unfortunately, these drugs are my and large not affordable to 90% of all third world mothers who need them. The expense

paradox is further compounded by the fact that most third world mothers know of these drugs, and are putting enormous pressure on their cash strapped governments to provide them. This applies to HIV/AIDS drugs, especially expensive protease inhibitors. The legal issue where these drugs are affordable is – does the existence of such drugs justify the compulsory HIV testing of all pregnant mothers? As we concluded in our discussion on criminal sanctions, as long as mothers are made aware, and are certain the drugs will be provided free – why should they object to HIV testing? It is arguable that the legal rights of the unborn child demand compulsory testing. The case has been made that it is possible to charge such a mother with murder (o), it is not recommended as being an effective means of reducing this means of transmission.

What is the feeding paradox? This is the situation in many third world countries where UNAIDS advise against HIV infected mothers breast feeding their babies, and yet without breast feeding, many of these children will starve to death. It is a situation where economic reality rules including dominating any attempts by the law to impose norms or rules which are plain just not enforceable in poor societies where many children's only access to decent nourishment is their mother's breast milk. The feeding paradox poses a real dilemma, especially as the transmission of the HIV/AIDS virus through mother's milk is still a hotly debated issue among the experts.

Any solution to these problems, must be holistic to be successful. It involves countries adopting the spirit and letter, as well as acceding to, the Convention to Eliminate All Forms of Discrimination against Women (CEDAW). It involves progressive family planning policies, implementing measures to ensure good maternal and child health care, and the adoption of the Convention on the Rights of the Child.

**HIV/AIDS – THE NEED TO ENSURE LAWS ARE CULTURALLY SENSITIVE
AND ADHERE TO APPLICABLE RELIGIOUS PRINCIPLES**

It is important to ensure all laws and policies are culturally sensitive. Any legislation to combat HIV/AIDS, cannot succeed, if not culturally sensitive. In Samoa, a very strongly Christian country, we have adapted our HIV/AIDS prevention campaign in accordance

with the basic Christian principle that sex can only occur within the sacred sanctity of marriage, but we push our condom use message as being appropriate in situations where such a Christian ideal is unachievable. Sceptics may criticise such an approach as being inherently hypocritical, but it serves its purpose and is successful. Samoan custom and traditions also make discussion of explicit sex taboo – so we do not place condoms in plastic phalluses, but rather use much more subtle, but equally effective, teaching techniques which are not offensive to our people. Our gay community is very organised, and are much more receptive, to health messages. They are much more HIV/AIDS conscious than the rest of the community put together, since they acknowledge they are much more at risk. This combination of culture and custom, religion, and an enlightened approach to the law (not using the strong arm of the law!) has meant we have officially only two HIV positive cases at present.

In the Commonwealth, we represent a wide diversity of cultures, religious beliefs, and ethnical origins. No standard formulae or guidelines can possibly be adopted, either legal or otherwise, that can help stem this pandemic. The extent of the spread of the disease is also quite different for all of us. The extent to which our legal systems can trade off the “rights of the many” as against “the rights of the few,” depend largely on the types of society we live in, the cultural and religious norms, and the best means of ensuring the basic human rights of HIV/AIDS victims, while at the same time protecting the rights of the majority of our populations (thankfully in most Commonwealth countries they are still the majority) who are not infected with the HIV virus. This situation is, in and of itself, a paradox. As reported by the United Nations, “Report of an International Consultation on AIDS and Human Rights” (p).

“To justify AIDS-related discrimination a conflict was claimed to exist between the rights of the “uninfected majority” and rights of those infected with HIV or ill with AIDS. Consequently, the rights of persons infected with HIV and AIDS patients were restricted or denied altogether. This does not represent a conceptual conflict between the rights of some and the rights of others, but between the recognition of human rights of all human beings and their denial.”

HIV/AIDS – THE APPROACHES THE LAW CAN TAKE

Most Commonwealth countries, certainly most Pacific Island Countries, believe HIV/AIDS is a purely health, medical, or social behavioural issue. They believe the best legislative approach is to let sleeping dogs lie and do nothing at all. However, more and more this do-nothing-approach is being rejected. In keeping with Justice Kirby's AIDS paradox approach, it is accepted that to be effective any approach must incorporate a legal ethics, and human rights response. (q)

At the other extreme from the do-nothing approach is the coercive and punitive approach. Such an approach is not favoured in the Commonwealth, or indeed recommended here. Main examples of such measures being implemented are in Cuba and China, including compulsory testing and even compulsory detention and isolation (r)

Alternatively, a government could take the generic approach and pass one single law that makes the necessary amendments to existing legislation to ensure that people with HIV/AIDS are able to live their lives with dignity and respect. Such an approach was taken in the Philippines where the legislation provides inter-alia that "The State shall extend to every person suspected or known to be infected with HIV/AIDS full protection of his/her human rights and civil liberties" (s). This legislation is holistic as well as generic and among its provisions:

- i. compulsory testing declared unlawful;
- ii. right to privacy guaranteed;
- iii. discrimination declared contrary to the national interest;
- iv. provision of basic health and social services assured;
- v. state imposed a duty to promote precautions to prevent transmission;
- vi. state must positively eradicate conditions that encourage the spread of HIV infection including general conditions such as poverty, gender inequality, prostitution, child and drug abuse, even ignorance;
- vii. State use HIV infected persons to raise awareness

Clearly such legislation is great in theory, however as we have already discussed, it can only succeed in practice when society accepts in principle a compassionate approach to HIV/AIDS. It is important to note that such generic legislation does have to recommend it the fact that it removes uncertainty and gives legal muscle to the human rights of HIV/AIDS sufferers.

The final approach available to Governments would be the piece-meal approach, amending current legislation law by law, regulation by regulation, or decree by decree. Such an approach has been adopted in Denmark, Brazil and a few other countries.

If we accept Justice Kirby's AIDS Paradox approach – compassion over coercion, and this same approach seems to be adopted by all the relevant United Nations Agencies, then again Commonwealth countries must adopt the right approach on a country by country basis. The correct approach will depend on the situation facing HIV/AIDS sufferers in the particular country, and the extent to which the disease has spread. Clearly the approach necessary in a sub-Saharan nation where 25% of the adult population are infected, is completely different from the approach in Pacific Island States, although it is recognised the Pacific must act now, and not wait until the disease is out of control as in some countries in the region.

CONCLUSION

In the course of this Paper, we have examined the role the law can play in protecting the human rights of HIV/AIDS sufferers. We have come full circle from our Introduction to this Conclusion. We must fully understand the enemy; we must fully understand the nature and methods of transmission of the HIV/AIDS virus, if we are to win the war against it. Make no mistake, the countries of Africa and parts of Asia consider it our greatest war in the history of mankind. No country is isolated from the disease, we live in an age of high speed travel – breakfast in Europe and dine in Australia.

We must understand the enemy, and we must clearly identify that enemy. The enemy is the disease and not the sufferer. We must all work hard to lift the veil of prejudice which

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hinders any really successful strategies to combat the disease. It is a blood-borne virus, there is absolutely no risk of infection from daily contact with the infected, no risk from sharing cups, cutlery, toilet seats, or even touching.

Once these facts are universally understood, and more importantly universally accepted – we are only then, not only a long way towards guaranteeing the rights of HIV/AIDS sufferers, we are also a long way towards implementing strategies to win the war against the disease. The Anglican Bishop of Polynesia, based in Suva, Fiji, the Right Reverend Jabez Bryce has said “Those who discriminate against persons with AIDS do not follow the gospel of Christ.” The World Council of Churches has gone further and admonished the silence of the Church on the subject of HIV/AIDS: “... through their silence, many churches share responsibility for the fear that has swept our world more quickly than the virus itself. Sometimes churches have hampered the spread of accurate information, or created barriers to open discussion and understanding.” (t)

Since HIV/AIDS has either touched in a personal way, or affected, all our lives has been a special privilege and honour for me to address such an august and learned body of lawyers on this topic.

I trust you will now have a better understanding of this disease, but more importantly, more compassion for its sufferers.

God Bless you all

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NOTES:

- (a) Information provided to the WHO Health Assembly, May 1999. See also World Health Report 1999, pp25-25 WHO Publication "The World Health Report 1999 - Making a Difference"
- (b) These figures are supplied by UNAIDS in Suva Fiji, however Pacific Commissioner Mr Steven Vete urged me to note his "Be Wary of Figures" publication. This latter document also explains the composition of the infected in terms of occupation and demographics.
- (c) As reported in "Talamua", a monthly magazine published in Samoa, (July 1999 edition), Volume 6 at pp 12-14

Mrs Peati Iupeli was the wife of a prominent Samoan international rugby player who died of AIDS in November 1996. She now works for the Department of Women's Affairs and is helping to spread a greater understanding of the disease among Samoan women. She was initially ostracized, and summarily dismissed from her former employment. In a small community such as exists in Samoa, it is difficult if not impossible to keep such matters confidential.

- (d) Summary of the Round Table I chaired is reported as WHO Document A52/RT/SR/4 - 19 May 1999. This Summary is still provisional, and it is being finalised, Dr Shalala is quoted from p.4 of that document.
- (e) *ibid* at pp 5, 6

- (f) Ibid at p. 9
- (g) From Justice Kirby's Papers – Hon Justice Michael Kirby's Paper delivered to the "Third International Conference on AIDS in Asia and the Pacific" on (10 November 1995) – "Facing up to the AIDS PARADOX"
- (h) See also – Justice Kirby's Papers – HIV and the Law: A Paradoxical Relationship of Mutual Interest. Delivered 22 March 1995 to the IUVDT World STD/AIDS Congress in Singapore.
- (i) (1995) 3 NZLR 149
(1995) 13 CRNZ 273
- (j) (1995) 3 NZLR 149 pp 154, 155 at p 155 (obiter) "Therefore we would respectfully adopt the approach taken in *R V Chan Fook* and, applying it to a charge under S.188(2), hold that grievous bodily harm includes really serious psychiatric injury identified as such, by appropriate specialist evidence"
- (k) See (1996) NZ Law Review 49
(1997) NZ Law Review 24
(1997) NZ LJ 393
- (l) although traditionally Commonwealth Courts have been reluctant to impose duties of affirmative action on professionals, in the Tarasoff Case, the Supreme Court of California held a psychotherapist had a duty of care to a third party to protect that person from harm – *Tarasoff v Regents of the University of California* 17 Cal 3d435,551, 2d, 334 (1976).
- (m) Gostin, "The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties" (1989) 49 Ohio State Law Journal 1017 at 1055

- (n) See Schultz and Reuter, "AIDS Legislation in Missouri: an Analysis and a Proposal: (1988) 53 Missouri Law Review 599
- (o) "Regulating HIV – positive Women" by Samantha Hardy published in the Journal of Law and Medicine Volume 6, pp 389 – 408 – at p. 404: "If a seropositive woman becomes pregnant, knowing of the risk of transmission to her child, and gives birth to a child infected with the virus who subsequently dies, it is possible that under the current law she could be charged with murder."

Ms Hardy cites Australian statues where such a charge could be laid, but she concludes at p405 "it is likely that criminal sanctions will be effective." And goes on to give good reasons why this would be so.

- (p) "Report of an International Consultation on AIDS and Human Rights" Geneva 26-28 July 1989 published by the United Nations, New York in 1991 – at p.8.
- (q) UNDP Publication "Time to Act: The Pacific response to HIV and AIDS (UNDP, Fiji, 1996) pp 71 to 91 recommends such an approach for the Pacific Region.
- (r) Cuba's Ministerial Resolution No 42 of 28 Feb 1986 enforced the repatriation of aliens who tested positive in compulsory testing regimens.
China's Presidential Decree No. 15 of 21 February 1989 promulgated a law providing for the isolation of AIDS sufferers.
- (s) Philippines AIDS Prevention and Control Act 1998 (Republic Act No. 8504). The Act is described in its preamble as "an Act Promulgating Policies and Prescribing Measures for the Prevention and Control of HIV/AIDS, Instituting a Nation – Wide HIV/AIDS Information and Educational Programme, Establishing a Comprehensive HIV/AIDS Monitoring System, Strengthening the Philippine National AIDS Council, and for Other "Purposes."

- (t) World Council of Churches Publication: "Facing Aids: The Challenge, the Churches' Response.