

No. 4 of 2003.

*HIV/AIDS Management and Prevention Act 2003.*

Certified on: 20.08.03



**INDEPENDENT STATE OF PAPUA NEW GUINEA.**

No.        of 2003.

***HIV/AIDS Management and Prevention Act 2003.***

**ARRANGEMENT OF SECTIONS.**

**PART I. — PRELIMINARY.**

1. Compliance with Constitutional requirements.
2. Interpretation.
  - “AIDS”
  - “approved HIV test kit”
  - “Chairman”
  - “condom”
  - “Council”
  - “counselling”
  - “Database Manager”
  - “detainee”
  - “Director”
  - “discrimination”
  - “education institution”
  - “health care worker”
  - “health facility”
  - “HIV”
  - “HIV test”
  - “HIV test kit”
  - “HIV/AIDS awareness material”
  - “infected”
  - “Infection Control Guidelines”
  - “medical practitioner”
  - “person in custody”
  - “person infected or affected by HIV/AIDS”
  - “Secretariat”
  - “sexual intercourse”
  - “stigmatise”
  - “unlawful”, “unlawful act” or “acting unlawfully”
3. Application of other Acts.
4. Act binds the State.

**PART II. — DISCRIMINATION AND OTHER UNLAWFUL ACTS.**

5. Interpretation of Part II.  
    "public facilities"
6. Unlawful discrimination.
7. Situations of discrimination.
8. Insurance and other risk assessment.
9. Unlawful screening.
10. Unlawful stigmatisation.
11. Access to means of protection.

**PART III. — TESTING, COUNSELLING, REPORTING AND  
CONFIDENTIALITY.**

*Division 1. — Preliminary.*

12. Interpretation of Part III.  
    "authorized person"  
    "confirmed" or "confirmatory"  
    "Director, Medical Services"  
    "request"  
    "voluntary informed consent"  
    "window period"

*Division 2. — Testing and Reporting.*

13. Application of Division 2.
14. Testing.
15. Test results.
16. Reporting of test results.
17. Conduct of HIV tests.

*Division 3. — Confidentiality and Disclosure.*

18. Confidentiality of information.
19. Privacy of proceedings.
20. Partner notification.
21. Unlawful disclosure.

**PART IV. — PERSONS CREATING A RISK TO OTHERS.**

22. Mother to child transmission.
23. Intentional transmission.
24. Reasonable care.
25. Reckless behaviour causing risk of infection.

**PART V. — DEALING WITH UNLAWFUL ACTS.**

26. Interpretation of Part V.

"action"

"Court"

27. Unlawful acts.

28. Relief.

29. Discontinuance of actions.

**PART VI. — MISCELLANEOUS.**

30. HIV/AIDS research.

31. Approval of HIV test kits.

32. Protection from liability.

33. Evidence of certain communications.

34. Regulations.



**INDEPENDENT STATE OF PAPUA NEW GUINEA.**

No. of 2003.

AN ACT

entitled

***HIV/AIDS Management and Prevention Act 2003,***

BEING an Act to give effect to the Basic Rights acknowledged in the Preamble to the *Constitution*, in particular the rights and freedoms of—

- (a) life, liberty, security of the person and the protection of the law; and
- (b) freedom from inhuman treatment; and
- (c) conscience, of expression, of information and of assembly and association; and
- (d) employment and freedom of movement; and
- (e) protection for the privacy of homes and other property,

in providing for—

- (f) the prevention of the spread of HIV/AIDS; and
- (g) the management of the lives and protection from discriminatory practices of people living with HIV/AIDS and of people who are affected by or believed to have HIV/AIDS; and
- (h) the protection of public health,

and for related purposes,

MADE by the National Parliament to come into operation in accordance with a notice in the National Gazette by the Head of State, acting with, and in accordance with, the advice of the Minister.

**PART I. — PRELIMINARY.**

**1. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.**

(1) This Act, to the extent that it regulates or restricts a right or freedom referred to in Subdivision III.3.C (*Qualified rights*) of the *Constitution*, namely—

- (a) the right to freedom from arbitrary search and entry conferred by Section 44; and
- (b) the right to freedom of expression conferred by Section 46; and
- (c) the right to privacy conferred by Section 49; and
- (d) the right to freedom of information conferred by Section 51; and

## *HIV/AIDS Management and Prevention*

(e) the right to freedom of movement conferred by Section 52, of the *Constitution*, is a law that is made for the purpose of giving effect to the public interest in public safety, public welfare and public health, and in order to protect the rights and freedoms of others.

(2) For the purposes of Section 41(2) of the *Organic Law on Provincial Governments and Local-level Governments*, it is declared that this Act relates to a matter of national interest.

(3) For the purposes of Section 41(6) of the *Organic Law on Provincial Governments and Local-level Governments*, it is declared that this Act is an Act of the Parliament on a matter specified in Section 42 or 44, and prevails over any law made under Section 42 or 44 to the extent of any inconsistency.

## 2. INTERPRETATION

- (1) In this Act, unless the contrary intention appears —
- “AIDS” means the Acquired Immune Deficiency Syndrome;
  - “approved HIV test kit” means an HIV test kit approved for use in the country in accordance with Section 31;
  - “Chairman” means the Chairman of the Council appointed under Section 7(1)(a) of the *National AIDS Council Act 1997*;
  - “condom” includes a female condom;
  - “Council” means the National AIDS Council established by Section 3 of the *National AIDS Council Act 1997*;
  - “counselling” includes the provision of pre-test information and post-test support and the provision of care;
  - “Database Manager” means the person or authority for the time being responsible for the collection, collation and dissemination of statistical information regarding the prevalence of HIV/AIDS in the country;
  - “detainee” has the meaning given to it under the *Correctional Service Act 1995*;
  - “Director” means the Director of the National AIDS Council appointed under Section 21 of the *National AIDS Council Act 1997*;
  - “discrimination” includes harassment;
  - “education institution” means a school, college, university or other institution that provides education or training, other than an institution that —
    - (a) is conducted for private purposes; or
    - (b) is not open to the public; or
    - (c) is not intended to give qualifications for public recognition;
  - “health care worker” means a person registered or enrolled in any of the categories or classes of professions for which registration or enrolment is required under the *Medical Registration Act* (Chapter 398);
  - “health facility” includes a mental health facility and a dental health facility;
  - “HIV” means the Human Immunodeficiency Virus;

## *HIV/AIDS Management and Prevention*

“HIV test” means a test to determine the presence of HIV or HIV antibodies;

“HIV test kit” means articles and reagents used for carrying out an HIV test;

“HIV/AIDS awareness material” includes —

(a) written, drawn, constructed, fabricated, photographic, film, video, theatrical, or audio material, however presented, performed, published or displayed, which raises awareness of HIV/AIDS, its management and prevention; and

(b) instructions for use of condoms and condom lubricant, and other means of prevention of HIV transmission;

“infected”, in relation to HIV, includes carrying HIV antibodies;

“Infection Control Guidelines” means any policy guidelines approved from time to time by the Departmental Head of the national department responsible for health matters for the prevention of infection in health facilities;

“medical practitioner” means a person registered as such under the *Medical Registration Act* (Chapter 398);

“person in custody” means a person of a kind referred to in Sections 64 or 65 of the *Correctional Service Act 1995*;

“person infected or affected by HIV/AIDS” means a person who —

(a) is, or is presumed to be, infected by HIV or has, or is presumed to have, AIDS; or

(b) has had, is having, is seeking to have or has refused to have an HIV test; or

(c) is related to or is associated with a person who is, or is presumed to be, infected by HIV or has, or is presumed to have, AIDS; or

(d) is, or is presumed to be, a member of or associated with a group, activity or occupation, or living in an environment, which is commonly associated with, or presumed to be associated with, infection by, or transmission of, HIV;

“Secretariat” means the National AIDS Council Secretariat established under Section 20 of the *National AIDS Council Act 1997*;

“sexual intercourse” includes any act involving penile penetration of any part of the body of another;

“stigmatise” means to vilify, or to incite hatred, ridicule or contempt against a person or group on the grounds of an attribute of the person or of members of the group, by —

(a) the publication, distribution or dissemination to the public of any matter; or

(b) the making of any communication to the public, including any action or gesture, that is threatening, abusive, insulting, degrading, demeaning, defamatory, disrespectful, embarrassing, critical, provocative or offensive;

## *HIV/AIDS Management and Prevention*

“unlawful”, “unlawful act” or “acting unlawfully” means acts for which remedies and penalties are provided by Part V.

(2) The Minister may, on the advice of the Council, by notice in the National Gazette, declare any material to be, or not to be, HIV/AIDS awareness material where he is of the opinion that, but for the declaration, doubt would exist whether or not the material is HIV/AIDS awareness material.

### **3. APPLICATION OF OTHER ACTS.**

(1) HIV infections and AIDS are not —  
(a) infectious or venereal diseases for the purposes of the *Public Health Act* (Chapter 226); or  
(b) quarantinable diseases for the purposes of the *Quarantine Act* (Chapter 234).

(2) HIV/AIDS awareness materials are not —  
(a) obscene or indecent matter for the purposes of Section 228 of the *Criminal Code* (Chapter 262); or  
(b) indecent articles or other matter for the purposes of Sections 25 and 25A of the *Summary Offences Act* (Chapter 264); or  
(c) objectionable publications or declared publications subject to classification under Part V of the *Classification of Publication (Censorship) Act 1989*; or  
(d) prohibited imports for the purposes of the *Customs Act* (Chapter 101); or  
(e) prohibited statements or advertisements under —  
(i) Section 140 of the *Public Health Act* (Chapter 226); or  
(ii) Section 31 of the *Medicines and Cosmetics Act 1999*.

(3) Condoms and condom lubricant are not —  
(a) obscene or indecent objects or things for the purposes of Section 228 of the *Criminal Code* (Chapter 262); or  
(b) indecent articles for the purposes of Sections 25 and 25A of the *Summary Offences Act* (Chapter 264).

(4) Where a provision of any other Act is inconsistent with a provision of this Act in relation to matters for which provision is made in this section, this Act prevails to the extent of that inconsistency.

### **4. ACT BINDS THE STATE.**

This Act binds the State.

## **PART II. — DISCRIMINATION AND OTHER UNLAWFUL ACTS.**

### **5. INTERPRETATION OF PART II.**

In this Part, “public facilities” includes —

- (a) public premises; and
- (b) travel and transport services and facilities; and
- (c) health facilities; and



## *HIV/AIDS Management and Prevention*

- (d) facilities by way of banking, insurance or superannuation, or for grants, loans, credit or finance; and
- (e) facilities for entertainment, recreation or refreshment; and
- (f) sporting facilities and activities; and
- (g) services relating to telecommunications; and
- (h) the services of any profession or trade; and
- (i) any service of the National Government, a Provincial Government or a Local-level Government.

### **6. UNLAWFUL DISCRIMINATION.**

(1) Subject to Subsections (2) and (3) and Section 8, it is unlawful to discriminate against a person to the detriment of that person on the grounds that the person is infected or affected by HIV/AIDS.

(2) Subsection (1) does not prevent the taking of any action which is for the special benefit, assistance, welfare, protection or advancement of any person or group of a kind referred to in that subsection.

(3) Notwithstanding Subsection (1), it is not unlawful to discriminate against a person on the ground of infection by HIV or having AIDS if the discrimination is no more detrimental than discrimination on the ground of having another life-threatening medical condition.

(4) For the purposes of Subsection (1), where —

- (a) an act of discrimination is done for two or more reasons; and
- (b) one of the reasons is a ground set out in Subsection (1), whether or not it is the dominant or a substantial reason for doing the act,

the act is presumed to have been done for that reason.

### **7. SITUATIONS OF DISCRIMINATION.**

In particular, and without limiting the generality of Section 6, an act of unlawful discrimination may take place —

- (a) in relation to employment and contract work, in —
  - (i) the arrangements an employer or contracting principal makes for the purpose of determining who should be offered employment or contract work; or
  - (ii) the terms on which an employer or principal offers employment or contract work; or
  - (iii) the refusal or deliberate omission by an employer or principal to offer employment or contract work; or
  - (iv) the way an employer affords access to opportunities for promotion, transfer or training, or to any other benefits, services or facilities, or in the refusal or deliberate omission to afford access to them; or
  - (v) dismissal from employment or termination of contract work; or
  - (vi) the subjecting of a person to any other detriment in relation to employment or contract work; and

## *HIV/AIDS Management and Prevention*

- (b) in relation to partnerships, in —
  - (i) determining who should be invited to become a partner; or
  - (ii) the terms and conditions on which the partnership is offered; or
  - (iii) the denial or limitation of access to any benefit arising from being a partner in the partnership; or
  - (iv) expulsion from the partnership; or
  - (v) the subjecting of the partner to any other detriment in relation to membership of the partnership; and
- (c) in relation to industrial and professional organizations, clubs, sporting associations and other associations, in —
  - (i) the terms of admission to membership or qualification; or
  - (ii) the refusal or deliberate omission to accept applications for membership or qualification; or
  - (iii) the way access is afforded to any benefit, service or facility, or the refusal or deliberate omission to afford access to them; or
  - (iv) deprivation of membership or qualification or variation of the terms of membership or qualification; or
  - (v) the subjecting of a person to any other detriment in relation to admission or membership; and
- (d) in relation to education and training, in —
  - (i) refusal or failure of an education institution to accept an application for admission as a student; or
  - (ii) the terms or conditions on which an education institution is prepared to admit a student; or
  - (iii) denial or limitation of access to any benefit, service or facility provided by an education institution; or
  - (iv) segregation within or expulsion from an education institution; or
  - (v) the subjecting of a person to any other detriment in relation to education or training; and
- (e) in relation to detainees and persons in custody, in—
  - (i) the application of detention, restriction or segregation procedures or conditions; or
  - (ii) the provision of and access to health facilities and care; or
  - (iii) the subjecting of a detainee to any other detriment in relation to detention or custody; and
- (f) in relation to the provision of accommodation, including rental, hotel and guesthouse accommodation, in —
  - (i) the refusal or deliberate omission to accept applications for or to provide accommodation; or
  - (ii) the terms or conditions on which or the manner in which the accommodation is provided; or
  - (iii) eviction from the accommodation; or

## *HIV/AIDS Management and Prevention*

- (iv) the subjecting of a person to any other detriment in relation to the provision of accommodation; or
- (g) in relation to surveillance or research related to HIV/AIDS, whether or not that is the primary purpose of the surveillance or research, in—
  - (i) the selection of subjects for surveillance or research; or
  - (ii) the access to benefits of the research or surveillance; or
  - (iii) the maintenance of confidentiality of personal information acquired for, during or from the surveillance or research; and
- (h) subject to Section 8, in relation to the provision of or access to goods, services or public facilities, in—
  - (i) the refusal to provide goods, services or public facilities; or
  - (ii) the terms or conditions on which or the manner in which the goods, services or public facilities are provided; or
  - (iii) the withdrawal or curtailment of goods, services or public facilities; or
  - (iv) the subjecting of a person to any other detriment in relation to provision of or access to goods, services or public facilities.

### **8. INSURANCE AND OTHER RISK ASSESSMENT.**

Nothing in Section 7(h) renders unlawful any discrimination in relation to any class of insurance or superannuation business, membership of a superannuation or provident fund or scheme, or similar matter involving the assessment of risk, where the discrimination—

- (a) is effected by reference to actuarial or statistical data on which it was reasonable to rely; and
- (b) is reasonable having regard to the content of the data and any other relevant factors,

or, where no actuarial or statistical data is available and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.

### **9. UNLAWFUL SCREENING.**

- (1) Subject to Section 14(4), it is unlawful to require or coerce—
  - (a) a person seeking or applying for—
    - (i) employment or contract work; or
    - (ii) acceptance in a partnership; or
    - (iii) membership of an industrial or professional organization, club sporting association or other association; or
    - (iv) admission to an education institution; or
    - (v) accommodation including rental, hotel and guesthouse accommodation; or
    - (vi) the provision of or access to goods, services or public facilities; or
    - (vii) adoption or marriage; or

## *HIV/AIDS Management and Prevention*

- (viii) entry into, residence in or citizenship of the country; or
- (b) a person who is —
  - (i) a contract worker or employee, or
  - (ii) a partner, or
  - (iii) a member of an industrial or professional organization, club, sporting association or other association; or
  - (iv) a student in an education institution, or
  - (v) in accommodation ; or
  - (vi) being provided with goods, services or facilities; or
- (c) a detainee or person in custody,

to undergo an HIV test, produce proof that he is not infected with HIV or answer any questions the answer to which may tend to show that he is a person of a kind referred to in Section 6(1), except in accordance with this Act.

(2) A consent, written or otherwise, by a person of a kind referred to in Subsection (1) to the provision of a medical service or to the performance of a general medical review does not constitute consent to an HIV test.

### **10. UNLAWFUL STIGMATISATION.**

(1) Subject to Subsection (2), it is unlawful to stigmatise a person on the ground that the person is infected or affected by HIV/AIDS.

- (2) Subsection (1) does not apply to —
  - (a) a fair report of an act of stigmatisation referred to in Subsection (1); or
  - (b) the communication, dissemination, distribution or publication of any matter that is subject to a defence of absolute privilege in proceedings under the *Defamation Act* (Chapter 293); or
  - (c) a public act, done reasonably, in good faith and not actuated by ill-will to the person stigmatised, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

### **11. ACCESS TO MEANS OF PROTECTION.**

(1) It is unlawful to deny a person access, without reasonable excuse, to a means of protection from infection of himself or another by HIV.

(2) Proof of a reasonable excuse in Subsection (1) is on the person alleged to be denying the access.

(3) In particular, and without limiting the generality of Subsection (1), “means of protection” includes —

- (a) HIV/AIDS awareness materials; and
- (b) condoms, condom lubricant and any other means of prevention of HIV transmission; and
- (c) exclusive personal use of skin penetrative instruments, including razors, needles and syringes; and
- (d) means of disinfecting skin penetrative instruments.

*HIV/AIDS Management and Prevention*

**PART III. — TESTING, COUNSELLING, REPORTING AND  
CONFIDENTIALITY.**

*Division 1. — Preliminary.*

**12. INTERPRETATION OF PART III.**

(1) In this Part —

“authorised person” means a person authorised in writing by the Director, Medical Services of a province to request HIV tests in that province;

“confirmed” or “confirmatory”, in relation to an HIV test, means that the result of the test has been confirmed by the Central Public Health Laboratory or another laboratory approved for the purpose in writing by the Departmental Head of the department responsible for health matters;

“Director, Medical Services” means a person appointed as such under Section 26(1)(a) of the *Public Hospitals Act 1994*;

“request”, in relation to an HIV test, means a request by a person to a laboratory to perform an HIV test;

“voluntary informed consent”, in relation to an HIV test, means consent specifically related to the performance of an HIV test, freely given, without threat, coercion, duress, fraudulent means or undue influence, after provision of pre-test information and with the reasonable expectation of post-test support;

“window period” means the period of time between first infection by HIV and the detection of HIV by an HIV test.

(2) Pre-test information, in relation to an HIV test, includes information about —

- (a) the nature of HIV and of AIDS; and
- (b) the nature and purpose of an HIV test; and
- (c) the testing process and the probable time-frame for obtaining test results; and
- (d) the legal and social consequences, including the possibility of notifying sexual partners, of —
  - (i) having an HIV test; and
  - (ii) being infected with HIV; and
- (e) the ways to prevent transmission of HIV.

(3) Post-test support, in relation to an HIV test, includes —

- (a) where the HIV test result is negative — information about —
  - (i) the nature of HIV and of AIDS; and
  - (ii) the effects of the window period and the desirability of repeating the test after a specified time; and
  - (iii) the ways to prevent infection by HIV; or
- (b) where the HIV test result is positive — information about —
  - (i) the nature of HIV and of AIDS; and

## ***HIV/AIDS Management and Prevention***

- (ii) the legal and social issues associated with HIV and AIDS; and
- (iii) the ways to prevent transmission of HIV; and
- (iv) the treatment available (if any) to mitigate the effects of infection; and
- (v) the care available, together with any necessary referral to an appropriate care service; and
- (vi) the desirability of informing the tested person's sexual partner or partners, and the action that may be taken under Section 20 in the event of failure or refusal by the tested person to inform the sexual partner or partners; and
- (vii) any other matter relevant to the personal circumstances of the tested person.

### ***Division 2. — Testing and Reporting.***

#### **13. APPLICATION OF DIVISION 2.**

This Division applies to all HIV tests except an HIV test performed —

- (a) on blood, tissue or organs donated by or taken from the body of a person, whether living or dead, for the purposes of transfusion or transplant to another person; or
- (b) by a person on himself using an HIV test kit approved for the purpose in accordance with Section 31.

#### **14. TESTING.**

(1) It is unlawful for any person —

- (a) not being a medical practitioner or authorized person — to request an HIV test; or
- (b) to perform an HIV test except on the request of a medical practitioner or authorized person.

(2) Subject to Subsection (4) and Section 23(4), it is unlawful to request an HIV test except —

- (a) with the voluntary informed consent of the person to be tested; or
- (b) where the person to be tested is aged 12 years or less and is, in the opinion of the person providing the pre-test information, not capable of understanding the meaning and consequences of an HIV test — with the voluntary informed consent of a parent or guardian of the person; or
- (c) subject to Subsection (3), where the person to be tested has a disability which, in the opinion of the person providing the pre-test information, renders the person incapable of giving consent — with the voluntary informed consent, in order, of —
  - (i) a guardian of the person; or
  - (ii) a partner of the person; or
  - (iii) a parent of the person; or
  - (iv) a child aged 18 years or more of the person; or

*HIV/AIDS Management and Prevention*

(d) where a person is required to undergo an HIV test in accordance with Section 23, or the blood, tissue or an organ of a person is required to be tested, under this Act or any other law.

(3) The voluntary informed consent required under Subsection (2)(c) shall be obtained in the following manner:-

- (a) the consent of the person in the categories referred to in Subsection (2)(c)(i), (ii), (iii) and (iv) shall be sought in the order of those Paragraphs;
- (b) if that person refuses consent — no further request for consent shall be sought;
- (c) where there is no person in a category or the person cannot, after reasonable inquiry, be found — a request may be made to the person in the next category.

(4) Notwithstanding Subsection (2) or Section 9, a medical practitioner responsible for the care and treatment of a person may request an HIV test in respect of that person without the consent required by Subsection (1) where —

- (a) the person is unconscious or otherwise unable to give consent; and
- (b) the medical practitioner believes that the test is clinically necessary or desirable —
  - (i) in the interests of that person; and
  - (ii) for the purposes of treatment of that person.

**15. TEST RESULTS.**

(1) A person who requests, performs or is otherwise involved in the performance of an HIV test shall take all measures within his control to ensure that —

- (a) the testing process is carried out promptly and efficiently; and
- (b) the result of the test is communicated, in accordance with this Part, to the person who gave the consent to the test.

(2) Failure to comply with Subsection (1) is unlawful.

(3) It is unlawful for a person who has requested an HIV test to divulge information about the result of that test except —

- (a) to the person who has been tested; or
- (b) where another person gave the voluntary informed consent to the test in accordance with Section 14(2)(b) or (c) — to that person; or
- (c) with the consent of the person who gave the voluntary informed consent — to a person who is directly involved in providing care to, or treatment or counselling of, the person tested, where the information is required in connection with providing the care, treatment or counselling; or
- (d) by order of a court; or
- (e) in accordance with Section 16.

## *HIV/AIDS Management and Prevention*

(4) It is unlawful to inform a person of the result, either negative or positive, of an HIV test without also offering post-test support.

### **16. REPORTING OF TEST RESULTS.**

(1) A person who performs a confirmatory test which produces a positive result shall, as soon as practicable, send —

(a) to the Database Manager — a report in a form approved by the Database Manager; and

(b) to the person requesting the test — the result of the test, and to no other person.

(2) A requesting person who receives a notification under Subsection (1)(b) shall, as far as is practicable, provide the Database Manager with such information as the Database Manager requires in respect of the person to whom the test relates.

### **17. CONDUCT OF HIV TESTS.**

(1) The regulations may make further provision for —

(a) the conduct of HIV tests; and

(b) the informing of the results of HIV tests; and

(c) the reporting of test results; and

(d) any other matter necessary or convenient to be prescribed in relation to HIV tests.

(2) Where no regulations have been made under Subsection (1), the Council may from time to time issue Guidelines in respect of the matters set out in that section.

(3) It is unlawful to —

(a) request or conduct an HIV test; or

(b) provide or fail to provide information on the result of a test; or

(c) report, or fail to report, the result of a test

except in accordance with —

(d) this Division and any regulations made under Subsection (1); and

(e) any Guidelines issued under Subsection (2).

### *Division 3. — Confidentiality and Disclosure.*

### **18. CONFIDENTIALITY OF INFORMATION.**

(1) Subject to Subsection (2), Section 19(3) and Section 20, a person who —

(a) while providing, or being associated in the course of his duties whether paid or unpaid with the provision of, an HIV testing, treatment, care, counselling, or associated health care service; or

(b) while acting or assisting in the administration of this Act; or

(c) while present in any room or place where a matter is being investigated, inquired into or heard under this Act; or



## *HIV/AIDS Management and Prevention*

(d) while acting in his professional capacity as a clergyman of a church or other religious leader of any religious denomination; or

(e) while conducting surveillance or research, acquires information that another person, whether dead or alive —

(f) is, or is presumed to be, infected by HIV or has, or is presumed to have, AIDS; or

(g) has been, is being, is seeking or has refused to be tested for HIV; or

(h) is related to or associated with a person who is, or is presumed to be, infected by HIV or has, or is presumed to have, AIDS,

shall take all reasonable steps to prevent disclosure of the information to any other person.

- (2) The information referred to in Subsection (1) may be disclosed —
- (a) with the consent of the person to whom it relates, in accordance with the terms of that consent; or
- (b) where the person to whom the information relates is aged 12 years or less and consent to testing of that person has been given by a parent or guardian under Section 14(2)(b) — with the consent of that parent or guardian; or
- (c) by order of a court or person acting judicially or otherwise empowered to examine witnesses, where the information is directly relevant to proceedings in the court or before the person; or
- (d) where the information is statistical only or cannot otherwise reasonably be expected to lead to the identification of the person to whom it relates; or
- (e) to the extent authorized by this Act or any other law.

### **19. PRIVACY OF PROCEEDINGS.**

(1) Where, in any proceedings before a court or tribunal, it appears that information of a kind referred to in Section 18(1) is proposed to be given, the court or tribunal —

- (a) shall, if requested by the person to whom the information relates; or
- (b) may, where it considers that because of the social, psychological or economic consequences to the person to whom the information relates, the information should not be publicly disclosed,

make all or any of the following orders:—

- (c) that all or any persons be excluded from the room or place in which the proceedings or any part of the proceedings are being conducted;
- (d) that only persons specified by it may be present during the whole or any part of the proceedings;
- (e) that the publication of a report of the whole or any part of the proceedings be prohibited.

## *HIV/AIDS Management and Prevention*

(2) Subject to Subsection (3), it is unlawful to print or publish, except on the written authority of the Director —

- (a) a report of any proceedings or matter heard in camera or in private under Subsection (1) or Part V; or
- (b) a report contrary to Subsection (1)(e).

(3) Subsection (2) does not apply to the printing or publishing of —

- (a) any pleading, transcript of evidence or other document for use in connection with any judicial proceedings, or to the communication of the contents of any such pleading, transcript or document to a person concerned in the proceedings; or
- (b) a notice or report under the directions of a court or Judge; or
- (c) any matter in a separate volume or part of a bona fide series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts; or
- (d) a report of any conclusions, recommendations and suggestions of the Ombudsman Commission; or
- (e) any matter in a publication of a technical character *bona fide* intended for circulation among members of the legal or medical profession.

### **20. PARTNER NOTIFICATION.**

(1) Notwithstanding Section 18, a person providing a treatment, care or counselling service to a person infected with HIV may notify a sexual partner of the person that the person is infected with HIV where —

- (a) the notifying person is requested by the infected person to do so; or
- (b) in the opinion of the notifying person —
  - (i) counselling of the infected person has failed to achieve appropriate behavioural change; and
  - (ii) the infected person has refused to notify, or consent to the notification of, the sexual partner; and
  - (iii) there is a real risk of transmission of HIV by the infected person to the sexual partner; or
- (c) the infected person is —
  - (i) dead, unconscious or otherwise unable to give consent; and
  - (ii) unlikely to regain consciousness or the ability to give consent; and
  - (iii) in the opinion of the notifying person, there is or was a real risk of transmission of HIV by the infected person to the sexual partner.

(2) A notification under Subsection (1) shall be made in such a manner as to conceal, so far as is possible, the identity of the infected person from the sexual partner.

(3) Where a person has been notified under Subsection (1), the notifying person shall offer appropriate counselling.

*HIV/AIDS Management and Prevention*

**21. UNLAWFUL DISCLOSURE.**

It is unlawful to disclose information of a kind referred to in Section 18(1) contrary to this Division.

**PART IV. — PERSONS CREATING A RISK TO OTHERS.**

**22. MOTHER TO CHILD TRANSMISSION.**

Nothing in this Part applies to the transmission of HIV by a woman to her child, either before, during or after the birth of the child.

**23. INTENTIONAL TRANSMISSION.**

(1) The intentional transmission or attempted transmission of HIV to another person is —

(a) an assault or attempted assault, as the case may be, occasioning bodily harm within the meaning of Section 340; and

(b) where death has occurred — an act of unlawful killing within the meaning of Section 298,

of the *Criminal Code Act* (Chapter 262).

(2) Section 297 of the *Criminal Code Act* (Chapter 262) shall not apply in a prosecution under Subsection (1)(b).

(3) It is a defence to a charge of an offence relating to the intentional or attempted transmission of HIV to another person that —

(a) the other person was aware of the risk of infection by HIV and voluntarily accepted that risk; or

(b) the other person was already infected with HIV; or

(c) where the transmission or attempted transmission is alleged to have occurred by sexual intercourse —

(i) a condom or other effective means of prevention of HIV transmission was used during penetration; or

(ii) the accused person was not aware of being infected with HIV.

(4) A court may, in any proceedings under this section, order either or both of the following:—

(a) that an HIV test be performed on the accused;

(b) that the court be informed of any information regarding the HIV status of the accused.

(5) In making an order under Subsection (4), the court may make any ancillary order it considers necessary or desirable, and in particular, orders relating to—

(a) the provision of counselling to the accused; and

(b) the release or suppression of the results of any test performed or of any information obtained.

## *HIV/AIDS Management and Prevention*

### **24. REASONABLE CARE.**

A person who is, and is aware of being, infected with HIV shall —

- (a) take all reasonable measures and precautions to prevent the transmission of HIV to others, including the use of a condom or other effective means of protection from infection during sexual intercourse; and
- (b) inform any intended sexual partner or any person with whom a skin penetrative instrument is to be shared, in advance of the sexual intercourse or sharing of the skin penetrative instrument, that he is infected with HIV,

and the taking of those measures and precautions and the giving of that information shall constitute the taking of reasonable care within the meaning of Section 286 of the *Criminal Code Act* (Chapter 262).

### **25. RECKLESS BEHAVIOUR CAUSING RISK OF INFECTION.**

(1) Where the Director believes, on reasonable grounds, that a person —

- (a) is and is aware of being infected with HIV; and
- (b) has behaved in such a way as to expose others to a significant risk of infection; and
- (c) is likely to continue that behaviour in future; and
- (d) has been counselled without success in achieving appropriate behaviour change; and
- (e) presents a real danger of infection to others,

the Director may issue a written notice to the person.

(2) A notice under Subsection (1) shall state —

- (a) the grounds upon which the Director believes that it should be issued; and
- (b) the reasons why the person should not continue the behaviour referred to in Paragraph (a); and
- (c) a direction that the person should not continue that behaviour, or should commence to behave in a specified manner; and
- (d) any other matters or directions that the Director considers are necessary or convenient to ensure an appropriate change of behaviour; and
- (e) that breach of a direction in the notice is an unlawful act, and may be dealt with according to this Act.

(3) A notice under Subsection (1) may be delivered to the person to whom it is directed by —

- (a) delivering a sealed copy of the notice to the person personally or, if the person cannot be found, by leaving it at the person's last known place of residence with some other person apparently residing at that place and apparently not less than 16 years of age; or
- (b) delivering a sealed copy of the notice to another person who is known to be providing treatment, care or counselling to the person to whom the notice is directed.

## *HIV/AIDS Management and Prevention*

- (4) Failure to comply with a notice under Subsection (2) is unlawful.

### **PART V. — DEALING WITH UNLAWFUL ACTS.**

#### **26. INTERPRETATION OF PART V.**

In this Part —

“action” means a complaint, application or other process by which a proceeding or investigation is commenced under this Part;

“Court” means the National Court or a District Court.

#### **27. UNLAWFUL ACTS.**

(1) An unlawful act under this Act —

- (a) is a discriminatory practice within the meaning of —
  - (i) Section 219(1)(c) of the *Constitution*; and
  - (ii) the *Organic Law on the Ombudsman Commission*; and
- (b) is professional misconduct under the *Medical Registration Act* (Chapter 398) and the *Lawyers Act 1986*; and
- (c) is a disciplinary offence under the *Public Services (Management) Act 1995*, the *Police Act 1988*, the *Correctional Service Act 1995* and the *Defence Act* (Chapter 74); and
- (d) may be the subject of an action under Section 28; and
- (e) is an offence to which the penalty is —
  - (i) in the case of a corporation — a fine not exceeding K10,000.00; and
  - (ii) in the case of a natural person — a fine not exceeding K5,000.00 or imprisonment for a term not exceeding three years, or both.

(2) Action in respect of an unlawful act may be taken in accordance with any paragraph of Subsection (1) by any person who has an interest in the unlawful act complained of, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his right under this section, by a person acting on his behalf, whether or not by his authority.

(3) Action in respect of an unlawful act may be taken in accordance with any paragraph of Subsection (1) notwithstanding either or both of the following:-

- (a) that the person the object of the unlawful act has died, whether the death occurred before or after the occurrence of the act;
- (b) subject to Section 29 — that action has been or is being taken in accordance with any other paragraph of Subsection (1).

#### **28. RELIEF.**

(1) An action for relief from an unlawful act may be taken in the National Court or a District Court.

### *HIV/AIDS Management and Prevention*

(2) The provisions of the *Claims by and Against the State Act 1996* apply to an application made under Subsection (1) against the State.

(3) Relief under Subsection (1) may include any order or declaration the Court considers necessary or appropriate in the circumstances of the case, including but not limited to, the following:—

- (a) a declaration that the act complained of is unlawful;
- (b) an order that the act is not to be repeated or continued;
- (c) a declaration that an act similar to the act complained of is not to be performed in future;
- (d) an order for apology or retraction;
- (e) an order for damages by way of compensation for any loss, damage or injury to feelings suffered by reason of the act complained of;
- (f) an order for payment of punitive or exemplary damages;
- (g) an order for provision or restoration of access, admission, readmission or reinstatement to the place, facility, situation, workplace or institution from which the person the object of the act complained of has been excluded, ejected or dismissed;
- (h) an order for employment, re-employment, promotion or restoration of benefits;
- (i) an order for provision of or restoration of access to a means of protection from infection by HIV;
- (j) an order for the performance of any reasonable act or course of conduct to redress any loss or damage suffered by reason of the unlawful act;
- (k) an order declaring void in whole or in part, either *ab initio* or from such date as may be specified in the order, any contract or agreement made in contravention of this Act;
- (l) a declaration that the termination of a contract or agreement should be varied to redress any loss or damage suffered by reason of the termination;
- (m) a declaration that it would be inappropriate for any further action to be taken in the matter.

(4) Relief under this section is not limited to cases of actual or imminent unlawful acts but may, if the Court thinks it proper to do so, be given in cases in which—

- (a) there is a reasonable probability that the act will be performed;
- or
- (b) something that a person reasonably desires to do is inhibited by the likelihood that, or a reasonable fear that, the act will be performed.

(5) A matter under this section shall be heard and decided in camera.

## *HIV/AIDS Management and Prevention*

### **29. DISCONTINUANCE OF ACTIONS.**

(1) Notwithstanding Section 27(2), a court or other body called upon to act in respect of an unlawful act may decide not to act, or to continue to act, where it considers that —

- (a) the subject matter of the action relates to an act which is not unlawful; or
- (b) some other more appropriate action or remedy in relation to the subject matter of the action is reasonably available to the applicant; or
- (c) the subject matter of the action could be more effectively or conveniently dealt with in some other manner; or
- (d) in a case where some other remedy has been sought in relation to the subject matter of the action, or it has already been dealt with in the same or some other manner — the subject matter of the action has been adequately dealt with; or
- (e) the action is trivial, frivolous, vexatious or not made in good faith.

(2) A decision under Subsection (1) by a court or other body not to act, or continue to act, does not prevent the taking of any other or further action permitted by this or any other law.

## **PART VI. — MISCELLANEOUS.**

### **30. HIV/AIDS RESEARCH.**

(1) The Council may from time to time issue Guidelines for the conduct of research relating to HIV/AIDS.

(2) No person shall conduct research relating to HIV/AIDS, whether or not that is the primary purpose of the research, without the approval of the Council or a Committee of the Council appointed for the purpose under the *National AIDS Council Act 1997*.

- (3) It is unlawful to conduct research except in accordance with —
- (a) this Act; and
  - (b) any Guidelines issued under Subsection (1); and
  - (c) approval under Subsection (2).

### **31. APPROVAL OF HIV TEST KITS.**

(1) The Minister may, upon the recommendation of the Council, by notice in the National Gazette, approve a type or class of HIV test kit for use in the country.

(2) An approval under Subsection (1) may include conditions as to use.

(3) A person who manufactures, imports, sells, distributes, supplies, uses or authorises the use of or otherwise deals with an HIV test kit —

- (a) that is not an approved HIV test kit; or
- (b) contrary to any condition of approval for its use,

is guilty of an offence.

## *HIV/AIDS Management and Prevention*

Penalty: A fine not exceeding K10,000.00.

(4) Any HIV test kit in respect of which a person is convicted of an offence under Subsection (3) is forfeited to the State and shall be disposed of as the Director directs.

### **32. PROTECTION FROM LIABILITY.**

(1) The Chairman, a member of the Council, the Director or an officer of the Secretariat is not personally liable for any matter or thing done by him in good faith and without negligence in the exercise of his powers or the performance of his duties under this Act.

(2) Subject to Subsection (3), a person is not liable to any civil or criminal liability, and does not act unlawfully, in respect of—

(a) any exercise or supposed exercise of the powers conferred by;  
or

(b) any omission or failure to act under,  
this Act, where the exercise of the powers or the omission or failure to act was done in good faith and without negligence.

(3) Notwithstanding Subsection (2), the protection afforded by that subsection does not extend to a person where it can be shown on a balance of probabilities that the person failed without reasonable excuse to act in accordance with the Infection Control Guidelines.

(4) A certificate, notice or other communication, oral or written, given in good faith and without negligence by a person for the purposes of this Act shall not be made the ground of any legal proceedings, civil or criminal, against the person.

(5) In particular, any communication made in good faith and without negligence in the exercise or supposed exercise of the powers conferred by Section 20 is absolutely privileged.

(6) Where—

(a) an action has been commenced under Part V; or

(b) a submission has been made, a document or information has been provided or evidence has been given in relation to the action,

in good faith and without negligence, a person is not liable to any civil or criminal liability and does not act unlawfully on the grounds only that the action was commenced, the document or information was provided or the evidence was given.

### **33. EVIDENCE OF CERTAIN COMMUNICATIONS.**

(1) Any communication relating to the sexual behaviour of a person made by another person undergoing an HIV test, a surgical or dental procedure or counselling under this Act is not admissible in any proceedings under—

(a) Section 210 or 212 of the *Criminal Code Act* (Chapter 262); or

(b) Section 55 or 56 of the *Summary Offences Act* (Chapter 264).



## *HIV/AIDS Management and Prevention*

(2) Any communication made by a woman who is and is aware that she is infected with HIV relating to the procurement of her miscarriage is not admissible in any proceedings under Section 225 of the *Criminal Code Act* (Chapter 262).

### **34. REGULATIONS.**

The Head of State, acting on advice, may make regulations, not inconsistent with this Act, prescribing all matters that by this Act are required or permitted to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular prescribing matters for and in relation to—

- (a) standards, procedures and guidelines for the performance or conduct of any matter under this Act; and
- (b) the registration or other means of authorisation of persons involved in care or counselling work; and
- (c) the recognition and means of authorisation of persons working without pay in connection with the management and prevention of HIV/AIDS; and
- (d) providing for penalties of fines not exceeding K5,000.00 or imprisonment for terms not exceeding 12 months, or both, for offences against the regulations.

I hereby certify that the above is a fair print of the *HIV/AIDS Management and Prevention Act 2003* which has been made by the National Parliament.

*Clerk of the National Parliament.*

I hereby certify that the *HIV/AIDS Management and Prevention Act 2003* was made by the National Parliament on 2 July 2003.

*Speaker of the National Parliament.*

