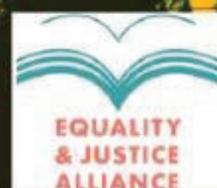
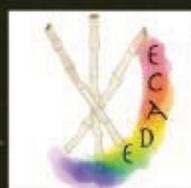


# **EASTERN CARIBBEAN LEGAL LITERACY TRAINER'S MANUAL**

**FOR PERSON'S LIVING WITH HIV &  
INADEQUATELY SERVED  
POPULATIONS**

PREPARED BY WESTMIN R.A. JAMES



This work has been commissioned by the Equality and Justice Alliance and the Eastern Caribbean Alliance for Diversity.

## ABOUT THE EQUALITY & JUSTICE ALLIANCE

The Equality & Justice Alliance is a consortium of international organisations with expertise in advancing equality, addressing the structural causes of discrimination and violence, and increasing protection to enable strong and fair societies for all Commonwealth citizens, regardless of gender, sex, sexual orientation, or gender identity and expression. The members of the Alliance are the Human Dignity Trust, Kaleidoscope Trust, Sisters for Change, and the Royal Commonwealth Society.

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## ABOUT THE KALEIDOSCOPE TRUST

Established in 2011, Kaleidoscope Trust works to uphold the human rights of lesbian, gay, bisexual and transgender (LGBT+) people in countries around the world where they are discriminated against or marginalised due to their sexual orientation, gender identity and/or gender expression. Since 2013, our organisation has hosted the Secretariat of the Commonwealth Equality Network (TCEN), which provides a unique space for LGBT+ advocates to challenge inequality in the Commonwealth, including by advocating for better national and regional policies, laws, and priorities of Commonwealth governments. To date, TCEN consists of 56 member organisations from all five regions of the Commonwealth. Kaleidoscope Trust is also civil society Co-Chair of the Equal Rights Coalition, which works to advance the human rights of LGBT+ people and promote inclusive development of LGBT+ persons globally.

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## ABOUT THE EASTERN CARIBBEAN ALLIANCE FOR DIVERSITY AND EQUALITY (ECADE)

An independent umbrella organisation working with LGBTQ human rights groups to strengthen institutional capacity and provide a platform to strategise and work towards equality with membership spanning twenty-two islands in the Eastern Caribbean.

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### *A Legal Literacy Trainer's Manual for Persons Living with HIV and Inadequately Served Populations in the Eastern Caribbean*

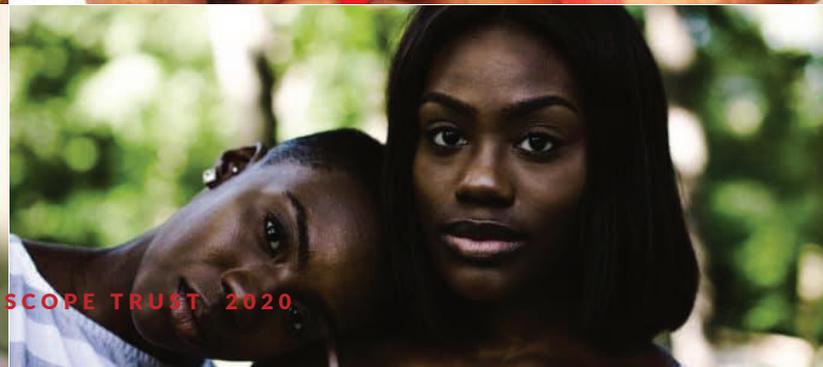
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# **OECS LEGAL LITERACY Trainers' MANUAL**

FOR PERSONS LIVING WITH HIV &  
INADEQUATELY SERVED POPULATIONS

PREPARED BY  
WESTMIN R.A. JAMES  
MARCH 2020



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# INTRODUCTION

## DEVELOPMENT AND PURPOSE

The aim of this manual is to train persons to better inform and interact with persons who may be unaware of the scale and magnitude of their human right. Likewise, it aims to motivate persons to vindicate these rights where necessary. The states in the Organization of Eastern Caribbean States (the “OECS”) have several domestic frameworks which could operate to protect persons living with HIV/AIDS, women, children, men who have sex with men, persons with a disability and other vulnerable groups. However, these frameworks may not be accessed by citizens due to lack of awareness.

The purpose of this manual is also to organize the thoughts of persons who may have an interest in engaging in legal literacy but never really acting on that interest. This manual can be used by different users in different ways. Through its flexible and user-friendly modular structure, it is intend to encourage the critical reading and active understanding by both learners and educators.

## OBJECTIVES AND INTENDED OUTCOMES

This manual seeks to establish a relationship between citizens and the law. It addresses key ideas such as, law and what it seeks to achieve, the sources of law and how the varying pedigrees affect citizens, the role and functions of the arms of government and the relationship between human rights and HIV/AIDS.

## BACKGROUND TO THE OECS

The Organisation of Eastern Caribbean States is an inter-governmental organisation established by the Treaty of Basseterre on 18th June 1981. The objectives of the OECS, laid out in the Treaty, are to promote co-operation among its members; defend their sovereignty, territorial integrity; promote economic integration; assist them in meeting their international obligations and responsibilities; and establish wherever possible, arrangements for joint overseas representation and common services.

The OECS was born out of the effort to deepen relations among a sub-regional group, the then West Indies Associated States Council of Ministers (WISA). The OECS now comprises Member States: **Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines with Anguilla, The British Virgin Islands, Martinique and Guadeloupe** as associate members.

Associate members are ineligible to participate in the broad areas concerned with Foreign Affairs, Defence and Security.

The head in the structure of the OECS is the Authority (Heads of Government) which comprises the Prime Ministers/Chief Ministers from all of the Member States. Supporting the Authority are the Foreign Affairs Committee, the Defence and Security Committee, the Economic Affairs Committee (which oversees the operations of the Eastern Caribbean Common Market) and a Central Secretariat headquartered in St. Lucia, headed by a Director General who is the principal administrative organ of the OECS.

The OECS share a single currency, the EC dollar, overseen by the EC Central Bank except for the British Virgin Islands who uses the US dollar. They also share a common Supreme Court, the Eastern Caribbean Supreme Court which has High Courts in each territory and a roaming Court of Appeal which while based in St. Lucia travels to each jurisdiction and hears appeals. Appeals thereafter goes to the Privy Council or the Caribbean Court of Justice in the case of the Commonwealth of Dominica.[1]

The latest statistics as of April 2020 obtained from the OECS, the population of the Eastern Caribbean is approximately 633,373[2] ranging from 183,627 in St. Lucia to 4,991 in Montserrat and has a combined area of 2,709 km<sup>2</sup> ranging from 750.6 sq km in Dominica to 102 sq km in Montserrat.

# MODULE 0

## PREPARATION FOR TRAINING

### TIPS FOR PREPARATION

Trainers should first familiarize themselves with the Manual and any supporting material. Where trainers will refer to the sources within a Module, it may be best to consult those sources before beginning the Module. Moreover, it may be best to gather the materials which may be used to conduct the sessions. Given the breadth of the content covered, trainers may opt to breakdown sessions into Modules. If such is the case, trainers should consider doing the Modules in the order that they appear.

### BEGINNING OF TRAINING

Participants should feel comfortable. This may have an excellent impact on how receptive they are and how much they are willing to share. For these reasons, trainers should consider:

1. Stating the reasons for the training.
2. Stating briefly the content that will be covered.
3. Encouraging participants to be open about their views.

### RULES OF ENGAGEMENT

Participants should be told the following about the training sessions:

1. **CONFIDENTIAL**- This means that anything which is said within the confines of the training session will not be repeated elsewhere without the consent of the participant. This may make the participants more comfortable in sharing their experiences.
2. **A RESPECTFUL SPACE**- Participants will not be judged for their views. Each person is to be mindful that they share this space with others.
3. **ENGAGING**- It is important that each participant contributes to discussions and is willing to participate in activities.

4. **NO PICTURES OR RECORDING**- Participants may not be able to digitally record the sessions.

5. **FEEL FREE TO ASK QUESTION**- Participants should ask any questions they choose to. No question is ever silly.

## **RULES OF ENGAGEMENT**

These proposed activities can be used as an icebreaker. They will help to create a relaxed environment where participants:

- get to know one another quickly and build rapport among participants in a memorable way;
- where participants share ideas and participate more fully in the training;
- Encourage participants to share ownership for the learning environment;
- Prepare the participants for collaborative group work.

---

## **PARTICIPANT'S ACTIVITY**

### **MY IDENTITY**

1. Write the names of half the participants on white cards and the other half on blue cards (or some other colour).
2. Call out the names of the participants whose names appear on the white cards and let them stand in a semi-circle, each holding the card with their name. The other participants are sitting.
3. Distribute the blue cards with the names of the others, one to each of the standing participants.
4. Ask those who are standing to call out the name on their blue card, one at a time. Ask the sitting participants to join the person who has called out their names, to form pairs.
5. Give the pairs 4 minutes to introduce themselves to each other. The introduction includes: – Name – Nationality – Which office/organization they work for – How long they have been working in human rights – Their favourite hobby.

6. Call everyone back to form a circle.

7. Each pair steps forward and each person presents the identity of the other, as accurately as they can.

8. To enable dynamic exchanges, ask some participants to name participants other than their partners.

**OR**

### TWO TRUTHS & A LIE

You can play with any number of people. Here's how it works:

- Each person in the group gets a turn.
- Each person will tell the group two things about themselves that are true and one thing that is untrue (this is your lie).
- The others will guess which one is the lie.

#### **TIP:**

**THINK THROUGH THE ACTIVITY AHEAD OF TIME AND ADAPT IT ACCORDINGLY. WILL THE SPACE YOU HAVE SUFFICE? DO YOU HAVE ALL NEEDED SUPPLIES? WOULD THE ACTIVITY LEAD TO ISSUES OF CONFIDENTIALITY? DOES THE ACTIVITY ACCOMMODATE VARYING ABILITIES?**

# MODULE 1

## KEY DEFINITIONS

**FOR THE PURPOSES OF THIS LEGAL LITERACY MANUAL:**

### **INADEQUATELY SERVED POPULATIONS (ISP)**

are groups or persons that face a higher HIV risk, mortality and/or morbidity when compared to the general population, and have, at the same time, less access to information and services. ISP include people living with HIV, gay men and other men who have sex with men, people who use drugs, prisoners, sex workers and transgender people. In a number of localities, certain women and girls, youth, migrants and people living in rural areas are be considered ISP.

### **MARGINALIZED YOUTH**

refers to young people between the ages of 10 to 25 who are members of populations such as:

*persons living with HIV; persons who identify as lesbian, gay, bisexual or transgender; people who use drugs; migrant populations, persons living or working on the street; persons being held in detention by the state or in the care of the state.*

### **MEN WHO HAVE SEX WITH MEN (MSM)**

describes males who have sex with males, regardless of whether or not they also have sex with women or who identify as gay or bisexual.

### **PEOPLE WHO USE DRUGS (PWD)**

refers to persons who allow drugs legally classified as dangerous, prohibited or illicit, to enter their bodies. The ways in which the drugs enter the body includes but is not limited to swallowing, injecting, smoking, or using suppositories.

## **TRANS PERSONS**

refers to a person whose gender identity and expression do not conform to the norms and expectations traditionally associated with their assigned sex at birth. Trans persons include individuals who have received gender reassignment surgery, individuals who have received gender-related medical interventions other than surgery (e.g. hormone therapy), individuals who identify as trans and have had no gender-related medical interventions, and individuals who identify as having no gender, multiple genders or alternative genders.

## **SEX WORKERS**

refer to adults over the age of 18 years who regularly or occasionally receive money or goods in exchange for sexual services and consent to doing so. Persons under 18 years involved in sex work are considered to be victims of sexual exploitation, not sex workers.

# MODULE 2

## INTRODUCTION TO LAW

### OBJECTIVES & INTENDED OUTCOMES

The general objective of this module is to introduce participants to what is the law and the main concepts in law.

Specific objectives of this Module includes being able to define the law; and identifying the the sources of law and the interaction of the various sources of law.

### ASSESSING THE AUDIENCE

This portion of the manual is the foundation for future exercises. It is therefore important to lay it properly. For that reason, before you begin, it is important to assess what and how much participants know. In order to do this, a brief exercise to gauge the existing knowledge may be useful. The exercise may include, asking the participants questions or creating a short story to explain how the law functions in the society.

The feedback from this assessment can help you structure your training appropriately or direct participants to supplemental materials that can help them address weaknesses in their existing skills or knowledge.

#### *Suggested Questions*

1. What is 'law' to you?
2. Where do you think 'law' comes from?
3. How do you think 'law' affects you?
4. How are laws enforced?





## MEANING AND PURPOSE OF LAW

Law relates to a system or rules which are designed by what we call a 'sovereign.' Effectively law tells us what we should do or what we should not do. The general view is that a law is not law unless it has a consequence if it is not followed. Examples of these consequences include a fine, imprisonment, community service or in certain circumstances making an apology. However, in our current system, laws don't necessarily have to have a sanction. Examples of such laws are laws that give you rights or laws that provide for the interpretation of laws. We will go on to discuss human rights and obligations imposed on the State. These obligations do not sanction the government however it would be inaccurate to conclude that they are not laws for that reason.

It is important to note that though law is made by the government, it also regulates how the government operates as well as their interaction with citizens. Therefore, the government cannot arbitrarily stop you on the road and search your car unless there is some legal justification for doing so.

## THE LAW AND THE RULE OF LAW

An aspect of law is a concept call the rule of law. The rule of law is premised on the equality of all persons before the law and the right of these persons to due process. Due process is the facet of the rule of law which ensures that persons are treated fairly when the government seeks to apply the law to them.

The law must abide by the rule of law to be just. Therefore, where the government does not observe the rule of law, then both the law and the application of the law are susceptible to being challenged by citizens.

An example of a law being in breach of the rule of law is where it is vague and uncertain so people can not reasonably know what sort of conduct is forbidden under the law. These include laws against vagrancy which restrict activities like "loafing", "strolling", or "wandering around from place to place." These types of laws gave arbitrary power to the police and could potentially criminalize innocent everyday activities.

---

## **PARTICIPANT'S MAY BE ASKED TO REFLECT ON THESE QUESTIONS**

1. Can you think about a law which you do not think is just?
2. Do you have any experiences where you believe you were not being treated fairly by the government?
3. What recommendations would you make to correct that experience?

It is critical for participants to understand that the law is not entirely perfect and there may be instances in which the government did not follow the rule of law. This understanding will help to transition into a discussion on human rights and eventually on how rights may be vindicated.

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## **SOURCES OF LAW**

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### **WHERE DOES LAW COME FROM AND WHO MAKES IT?**

Earlier we highlighted that laws are usually designed by a sovereign. Where can we find these laws. Every country in the Organization of Eastern Caribbean States ("OECS") adhere to the concept that law must be disclosed to all persons. This is done by ensuring that they are publicly accessible in what is called sources of law. The main sources of law used in each country of the OECS are;

1. the Constitution;
  2. legislation;
  3. case Law; law which is made by the courts;
  4. international law.
-

## THE CONSTITUTION

Each OECS country has its own Constitution. The Constitution is considered to be the supreme law. Though each Constitution is different, there are inherent similarities which are beneficial to each citizen.

The Constitution also outlines how each arm of government is constructed and it imposes restrictions on what each arm of government can do. This is important because when an arm of government does an action which is not within its function, then citizens who are affected may challenge those actions and may have recourse to a remedy. This is called separation of powers.

A common aspect of each constitution is that it outlines citizens' rights. It also gives citizens the ability to hold the government accountable if it breaches these rights. However, amendments to the constitution can be made once the provisions in the constitution for altering the constitution are complied with. In some OECS countries like Grenada and Antigua and Barbuda, some amendments must go through a public referendum before certain changes can be made to the Constitution.

### CAN YOU THINK OF ANY RIGHTS WHICH ARE IN YOUR CONSTITUTION?

## LEGISLATION

Legislation is law which is made by the legislature or Parliament of your country. Other terms for legislation are statutes or Acts of Parliament. The legislature reacts to or anticipates a need in the society and passes legislation to meet these needs. For example, in 2018 the St. Lucian legislature discussed the need for the Child Justice Act in response to the growing issue of child labour and the exploitation of children. Examples of legislation which responded to societal needs include Sexual Offences Act 1995 of Antigua and Barbuda or the St Lucia Criminal Code, 2004.

The powers of the legislature are however limited or constrained by the constitution. This is to ensure that legislation developed by the legislature does not breach the Constitution.

### CAN YOU NAME THREE PIECES OF LEGISLATION THAT AFFECTS YOUR RIGHTS?

## CASE LAW

Case law or sometimes called precedent refers to law which is made by judges ('judge made law'). In our legal system judges have the function of interpreting the constitution and the law which has been passed by Parliament.

It often is the case that the laws passed by Parliament are unclear and as such they require judicial interpretation. These interpretations form part of the body of law known as 'case law' or 'common law'. For example, in the St. Lucian case **Francois v the Attorney General**, the Court in interpreting the Constitution of St Lucia held that the State not only had the obligation to refrain from violating rights but also had a positive duty to protect rights. The court therefore held that there was a positive obligation on the State to protect citizens from domestic violence.

Rulings and decisions made by courts become binding and part of the law. The different courts, especially, the lower courts, are required to follow the previous decisions by a higher court, in similar cases. This means that if the Court of Appeal has stated the law then future lower courts cannot depart from it in a similar case.

### CAN YOU IDENTIFY THE HIERARCHY OF COURTS IN YOUR COUNTRY?

## INTERNATIONAL LAW

International law is a body of law that governs relations between or among states. When a country ratifies or joins on to an international treaty or convention, that country has an obligation under international law to abide by its terms. However, the terms of the treaty do not become local law. In the OECS countries, international law treaties have to be brought in to force by an Act of Parliament before they can be fully enforced locally. Where a treaty have not been passed into local law, they have a limited role in the interpretation of the country's local law.

International law as a legal source is particularly significant with respect to constitutional and human rights. The Courts can use the interpretation of similar provision in international law documents to assist in the interpretation of similar constitutional rights provisions. Further, where there is ambiguity in local law, judges have a duty to interpret that local law in a manner which is consistent with the country's international obligation. Likewise, a country may not accept international obligations which would breach the country's obligation to its citizen. Legislation may also be motivated by what is happening at the international level.

The General Assembly of the United Nations as well as the World Health Organization have put forward multiple initiatives to combat HIV/AIDS and to better care for persons affected by the disease. In 2016, the WHO made a declaration that countries must give better attention to "equity and human rights" if the goals of ending HIV/AIDS as an epidemic was to be met. To this end, we see legislation and even case law which have emphasised this international perspective that lack of human rights and equity contribute to the spread of HIV/AIDS. Another example of international law being helpful in determining what laws should be in force in our day to day lives is how the Convention on the Eradication of all Forms of Discrimination Against Women is used in Caribbean countries to ensure women have better protection against domestic violence.

## CAN YOU LIST THREE MAJOR INTERNATIONAL HUMAN RIGHTS TREATIES THAT YOUR COUNTRY HAS RATIFIED.

### THE INTERPLAY BETWEEN THE SOURCES OF LAW

Sources influence each other and some take precedence over others. Take for instance the Constitution of your country. It may have what we call a "Supreme Law Clause." This would state that any law which is inconsistent with the Constitution is void to the extent of the inconsistency. Therefore, this restricts the types of statutes which are constitutional. Further, where there is statute dealing with a specific area, the courts must apply the statute and not rely on case law. As indicated above a court cannot apply international law treaty unless it is passed in parliament.

#### **Activity:**

*How will the following situations be dealt with in your country?*

1. Legislation which states that "every person who is less than 4 feet tall must go to jail."
2. The highest court of the country has said in another case that "must" should be interpreted as "may" in a criminal statute. How does that apply to the legislation in 1. which is under consideration by a High Court judge in a case.
3. The legislation in 1. is in conflict with an international treaty which your country has ratified but has not passed legislation to bring it into effect domestically.

### THE GOVERNMENT AND THE LAW

The State is composed of three arms: the Legislature, the Judiciary and the Executive. As pertains to the law, each arm is responsible for a specific function. The Legislature makes the laws, the Judiciary interprets the law and the Executive enforces the law. The Legislature or Parliament is responsible for making laws for the 'peace, order and good governance' of the country. The Judiciary is made up of the Chief Justice, Justices of Appeal, Supreme Court Judges, Magistrates and Justices of the Peace. The Executive is large and diverse. It includes, the Governor General or President, the Cabinet, the Director of Public Prosecution, Attorney General, police officers, fire fighters, customs officers among others.

## CAN YOU GIVE EXAMPLES OF SPECIFIC PERSONS WHO ARE A PART OF EACH ARM OF GOVERNMENT?

### JUDICIARY IN MORE DETAIL

Above, it was mentioned that the judiciary interprets the laws. The judiciary is also able to give persons remedies after they have interpreted the laws. These remedies include, injunctions, mandatory orders, compensation, damages or a declaration. While the government is the one that makes the laws, it is important to note that the government is also bound by the laws. This means that the government cannot breach the laws of your country.

---

### PARTICIPANT'S ACTIVITY

The aim of these activities is to ensure that participants have a better understanding of how the Government and the law operate.

Divide the room into three groups. Each group will represent an arm of the state and depict how they believe each arm should operate.

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# MODULE 3

## WHAT ARE HUMAN RIGHTS?

### OBJECTIVES AND INTENDED OUTCOMES

The general objective of this module is to raise the level of awareness and understanding of human rights and on the basic human rights concepts, principles and issues. The protection of human rights is an integral part of the fight against HIV/AIDS. Several fundamental rights are threatened in the context of HIV/AIDS, including the right to non-discrimination, the right to privacy, the right to health and the right to work.

Specific objectives of this Module includes being able to define human rights; and identifying the principles of human rights.

### DEFINING HUMAN RIGHTS

Human rights are entitlements or legal claims that individuals—by virtue of being human—have against the State. Human rights can also be described as certain minimum standards and rules to which those in power should or must adhere to their treatment of people.

Human rights primarily concerns the relationship between state authorities such as governments, police or armed forces and the individual as they are deemed state obligations. They are therefore protective in character designed to protect individuals from random violence and neglect. However, human rights are not only a set of guarantees we have as humans to exist but also guarantees to live with all the necessary conditions which befits a human being.

Human rights are inherent to all human beings.[3] This means that each person has them irrespective of a person's age, gender, race, social class, national origin, HIV status or sexual orientation. While each person has human rights, these rights are not always absolute and they may be limited in certain circumstances.

For example: The Grenadian Constitution provides that a person shall not be deprived of his freedom of movement. However, the Constitution goes further to state that where a person has been put in jail after having committed a crime, this will not be a breach of that right. It will also not be a breach of the right if the restriction on movement is required in the interests of defence, public safety or public order. Therefore, though the right exists, it may be curtailed for specific reasons like a state of emergency or a public health emergency.

## WHAT ARE SOME SITUATIONS IN WHICH THE STATE HAD A LEGITIMATE REASON TO LIMIT YOUR RIGHTS?

### PURPOSE OF HUMAN RIGHTS

Human rights exist so that each person can live their best life that they can live. Human rights are grounded in the recognition of the value and dignity of a human being and the equal worth of each person. The purpose of human rights is tied to the need to protect this value, dignity and equal worth. This is implicit in the Universal Declaration of Human Rights which states that “All human beings are free and equal in dignity and rights.”[4] If every person had the same rights and the same recognition of those rights then many of the issues in society would not exist. At least, this is the thought behind it all.

## ARE THERE ANY OTHER PURPOSES OF HUMAN RIGHTS YOU CAN THINK OF?

### WHAT ARE HUMAN RIGHTS VIOLATIONS?

As with other legal norms, human rights are violated daily in various places, in part, even systematic, ways. Human rights violations occur when a law, policy or practice deliberately contravenes or ignores obligations that bind the State or when the State fails to achieve a required standard of conduct or result.

This could include transgressions of the rights guaranteed by national, regional and international human rights law and acts and omissions directly attributable to the State. Violations also occur when a State withdraws or removes existing human rights protections.

Human rights violations committed by the State can therefore be characterized under three (3) types:

**Omission** – the non-enactment of laws to protect human rights; for example the absence of laws against child labour, sex trafficking, involuntary disappearance, discrimination against people with HIV/AIDS.

**Breach** – violations of laws enacted; for example, allowing extra-judicial and summary executions, arbitrary arrests and detention.

**Arbitrary Derogation** – violations due to the arbitrary suspension of liberty (for example emergency rule, martial law, authoritarian regime/state).

## **WHO IS RESPONSIBLE FOR PROTECTING HUMAN RIGHTS?**

The primary responsibility of protecting human rights falls on the State. The State has a legal obligation to respect, protect, and fulfil human rights. This means that the government not only must not deprive people of their rights or interfere with persons exercising their rights but they are obligated to make sure that human rights are protected by preventing human rights violations against people within their country and provide effective remedies for those whose rights are violated.

Although the primary duty to protect human rights remains with national governments, the Universal Declaration of Human Rights suggests that businesses, civil society, and individuals also have a responsibility to promote and respect human rights in their operations.

## **HOW ARE HUMAN RIGHTS GIVEN MEANING?**

Human Rights are given meaning because, along with them, there is an obligation put on countries to respect, protect and ensure them. The obligation to respect means that your country cannot undermine your human rights. For example, you may have a right to vote. If you choose not to exercise this right, your country has an obligation to respect it and they may not impose any law which may disrespect how you choose to exercise this right.

The obligation to protect involves the state refraining from putting measures in place which negatively impact rights and it involves putting measures in place to protect human rights. For example, women face domestic violence daily. This affects their right to life as well as the protection of the law. Therefore, in order to protect the rights of women, the government should ensure that police officers respond in a timely manner to reports of domestic violence.

The obligation to ensure means that persons can realize their rights. The right to vote may be helpful here. Governments generally ensure that persons have the right to vote by putting voting centres in accessible places. Can you imagine if only one voting station existed on your entire island? Do you think persons would be able to act on that right?

## **WHAT ARE SOME OTHER WAYS A COUNTRY CAN RESPECT, PROTECT AND ENSURE HUMAN RIGHTS?**

## **HUMAN RIGHTS PRINCIPLES**

Some principles of human rights are:

### **Universal and inalienable**

The principle of universality of human rights is the cornerstone of international human rights law. This principle, means that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of where they are or their, political, economic and cultural systems.

Human rights are also inalienable. This means that they cannot arbitrarily be taken away, except in specific situations and according to law. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.

### **Interdependent and Interrelated**

**Human rights are interdependent and interrelated.** This means that each right contributes to a person realizing all their rights. The fulfilment or the realization of one right often times depends, wholly or in part, upon the fulfilment or the realization of others. For instance, fulfilment of the right to health may depend, in certain circumstances, on fulfilment of the right to development, to education or to information.

***This also means that:***

### **All rights are equal**

Equality is a cross-cutting principle in international human rights law. All human beings are equal by virtue of their inherent dignity as a human being. No one, therefore, should suffer discrimination on the basis of race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth, HIV status or other status as established by human rights standards.

### ***It is both a right and an obligation***

Human Rights are given meaning because, along with them is an obligation put on countries to respect, protect and ensure them. The obligation to respect means that your country cannot undermine your human rights. The obligation to protect involves the state refraining from putting measures in place which negatively impact rights and it involves putting measures in place to protect human rights. The obligation to ensure means that persons can realize their rights.

## PROBLEMS WITH HUMAN RIGHTS

The most prominent criticism of human rights is that they are not actually universal but culturally relative. How does this play out in society and how does it affect persons?

If human rights are culturally relative, what that means is that, though they exist, how they are interpreted and the instances in which they may be breached depend on the society in which it takes place.

**For example:** There is a right to life. In Saint Lucia as well as in the American Convention on Human Rights, a person may only be deprived of this right in limited situations. However, in Asian or Middle Eastern countries, they may have more ways that a person can be deprived of this right. So, though the right exists, the nature of the right changes from country to country.

### DO YOU THINK HUMAN RIGHTS SHOULD BE CULTURALLY RELATIVE?

## NATIONAL HUMAN RIGHTS FRAMEWORK

The OECS has a variety of laws and institutions for the protection of human rights in their countries.

### The Constitution

Domestic human rights are guaranteed by the constitution of your state. As discussed earlier we spoke about sources of law and we identified the constitution as the supreme source of law. The Constitution is that document which came into force when the state became independent from the United Kingdom.

The Constitution sets out specific rights that persons have under the domestic law. These rights are contained in the Chapter referred to as the Protection of Fundamental Rights and Freedoms or the “Bill of Rights.” The rights guaranteed and secured by the Bill of Rights are as follows:

1. **Right to life, liberty and security of the person**
2. **Protection of right to life**
3. **Protection for his or her family life, his or her personal privacy, the privacy of his or her home**
4. **Protection of right to personal liberty**
5. **Protection from slavery and forced labour**
6. **Protection from inhuman treatment**
7. **Protection from deprivation of property**
8. **Protection from arbitrary search or entry**
9. **Provisions to secure protection of law**
10. **Protection of freedom of conscience**
11. **Protection of freedom of expression**
12. **Protection of freedom of assembly and association**
13. **Protection of freedom of movement**
14. **Protection from discrimination on the grounds of race, etc**

## **Legislation**

Legislation also assist in promoting human rights. For example, there are Domestic Violence Acts, Child Care and Protection Acts, Disabilities Acts and Inheritance or Succession Acts in the various OECS territories that go towards protecting human rights. You would recall that the government has a duty to protect human rights. These domestic legislation assists in the protection of these rights because they ensure that the rights have a framework in which they can operate.

Further, as we discussed earlier all legislation must be in compliance with the Constitution and so if there are laws that infringes the constitution will not be able to stand.

**CAN YOU NAME ANY LEGISLATION WHICH YOU BELIEVE ENSURES THAT HUMAN RIGHTS ARE RESPECTED, PROTECTED OR ENSURED?**

## **Domestic Human Rights Institutions/Actors**

National human rights institutions are central elements of a strong national human rights system. They also “bridge” civil society and governments. National human rights institutions are State bodies with a constitutional and/or legislative mandate to protect and promote human rights. They are part of the State apparatus but are at arm’s length from and are independent of the Government but are funded exclusively or primarily by the Government. They are not NGO’s because they are usually set up by legislation or the constitution and they are neutral fact finders, not advocates for one side or another.

### **Ombudsman**

The Ombudsman is one form of a national human rights institution in the various OECS countries. The Ombudsman Office is set up either by legislation or the Constitution. It is an independent officer who has the power to investigate complaints from aggrieved persons about maladministration by the Government Departments /Agencies and Public Bodies and initiate direct investigation, into issues of potentially wide public interest and concern.

The role of the ombudsman is to protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and maladministration and to improve public administration while making the government’s actions more open and its administration more accountable to the public.

## **INTERNATIONAL HUMAN RIGHTS SYSTEM**

The international system to protect human rights grew out of international revulsion at the atrocities committed during World War II and the establishment of the United Nations in 1945.

In its preamble, the United Nations Charter sets out the international community's determination "to reaffirm faith in fundamental human rights, and in the dignity and worth of the human person." One of the central purposes of the United Nations is to achieve international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction."

Therefore, in accepting the Charter of the United Nations, its member states recognize that non-interference in their internal affairs is a principle that can be overridden where international peace and security are threatened. Institutions and instruments at the international and regional levels help to protect and enforce human rights. The United Nations operates at the international level.

As regards the OECS, the Inter-American Human Rights System also governs the protection of human rights at the regional level.

## Overview of the Principal United Nations Human Rights Agreements

The 'International Bill of Rights' forms the core of the UN human rights system and consists of the **Universal Declaration of Human Rights 1948** ('UDHR'), the **International Covenant on Civil and Political Rights 1966** (ICCPR) and the **International Covenant on Economic, Social and Cultural Rights 1966** (ICESCR). It is the foundation upon which the international system for the protection and promotion of human rights has been developed."<sup>[5]</sup>

The UDHR was the first international document in which universal human rights were articulated. Although it is not legally binding, the UDHR has had a tremendous impact on the development of human rights at the international, regional and national levels and has more than lived up to its stated intent of being "a common standard of achievement for all peoples and all nations."

An emphasis on **equality** and **non-discrimination** runs throughout the document and it begins from the premise that all people are born free and equal in dignity and rights and sets out over thirty rights. Among the rights articulated in the UDHR are: the right to life, liberty and security (Article 3); the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 5); the right to equal protection of the law (Article 7); the right to work (Article 23), the right to a standard of living adequate for the health and well-being of oneself and one's family (Article 25); the right to an education (Article 26) and the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits (Article 27).

Since the UDHR was not legally binding, on the day it was adopted the UDHR, the UN General Assembly requested the Commission on Human Rights to draft a binding covenant on human rights. This ultimately became the two international covenants, the **ICCPR** and **ICESCR**. The two covenants are very similar – they acknowledge states' duty under the UN Charter to promote human rights and reiterate the inter-related and inter-connected nature of human rights. Both covenants equally reflect the principles of equality and non-discrimination.

The principal difference between the two covenants is that the rights contained in the ICCPR are immediately applicable upon ratification while those under the ICESCR recognizing that all states will not necessarily have the resources needed to implement economic, cultural and social rights right away, the state can do so progressively or over time.

Besides the International Bill of Rights, other key United Nations human rights treaties, commonly referred to as the '**core human rights treaties**.' Particularly disadvantaged groups are protected by special conventions with a number of special conventions setting standards for the obligation to prevent particularly serious violations of human rights. These core treaties are:

- **Convention on the Elimination of All Forms of Racial Discrimination 1966** (CERD);
- **Convention on the Elimination of All Forms of Discrimination against Women 1979** (CEDAW) and the 1999 New York Optional Protocol to the CEDAW;
- **Convention on the Rights of the Child 1989** and the 2000 New York Optional Protocol on the Involvement of Children in Armed Conflicts and the 2000 New York Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography;
- **Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984** (CAT)

## The UN Human Rights Implementation and Enforcement Machinery

The UN human rights enforcement machinery falls into two general categories:

- **Charter-based bodies**
  - These would include bodies established directly under the United National Charter (e.g the General Assembly, ECOSOC, the Human Rights Council) as well as bodies established indirectly under the Charter (i.e where one of the Charter-based bodies set up a sub-committee etc. Examples of this are the Commission on the Status of Women and the Office of High Commission for Human Rights).
- **Treaty-based bodies**
  - This refers to the various committees that have been established by the various international human rights treaties e.g. the United Human Rights Committee under ICCPR (CCPR), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination(CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW) and the Committee on the Rights of Persons with Disabilities (CRPD).

## The UN Human Rights Council

The UN Human Rights Council has 47 members, based on equitable geographic distribution, with states elected by an absolute majority of the General Assembly. The Council reviews the human rights record of all UN Members, including members of the Council themselves. Each state is reviewed once every four years. At the end of the review, the Council issues recommendations for implementation by the state in question. The information for the review (and recommendations) comes from the state itself, inter-governmental organizations, national human rights institutions and the recommendations from various human rights treaty bodies.

- **Special procedures**

The special procedures take the form of 'Special Rapporteurs' 'Special Representatives' or 'Independent Experts' who examine human rights violations in a country or a specific human rights issue.

- **Human Rights Council Advisory Committee**

The Advisory Committee is composed of 18 independent experts. It provides advice to the Council on particular subject issues.

- **Complaints procedure**

This involves examination of a human rights situation in a particular country as oppose to a complaint in relation to an individual. The situation in question must involve very serious human rights violations and be substantiated with evidence. The complainant must prove that there have been consistently gross and reliably attested violations of human rights. The Council has set up two working groups to process the communications/complaints: the Working Group on Communications and the Working Group on Situations. These two Working Groups provide recommendations to the Council/Member States on how to deal with the situation under examination. The complaints procedure is confidential; however, the Council can decide to act otherwise if the state in question refuses to cooperate.

### **The Office of High Commissioner for Human Rights (OHCHR)**

The High Commissioner for Human Rights is "the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General." The High Commissioner's functions include:

- (a) to promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights;
- (b) to promote and protect the realization of the right to development and to enhance support from relevant bodies of the United Nations system for this purpose;
- (c) to provide, through the Centre for Human Rights of the Secretariat and other appropriate institutions, advisory services and technical and financial assistance, at the request of the State concerned and, where appropriate, the regional human rights organizations, with a view to supporting actions and programmes in the field of human rights;
- (d) to play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world, as reflected in the Vienna Declaration and Programme of Action;

- (e) to enhance international cooperation for the promotion and protection of all human rights;
- (f) to coordinate the human rights promotion and protection activities throughout the United Nations system;
- (g) to rationalize, adapt, strengthen and streamline the United Nations machinery in the field of human rights with a view to improving its efficiency and effectiveness.

## **REGIONAL HUMAN RIGHTS MECHANISMS**

Besides the United Nations, various regional organisations have also developed the protection of human rights.

For the American region, there is the Inter-American Human Rights System. This system applies to Member States of the Organization of American States (“the OAS”). The Organization of American States is an international organization, headquartered in Washington, D.C., United States. The OAS human rights system provides recourse to people in the Americas who have suffered violations of their rights by the state and who have been unable to find justice in their own country. The pillars of the system are the Inter-American Commission on Human Rights, based in Washington D.C., and the Inter-American Court of Human Rights, located in San José, Costa Rica. These institutions apply the regional law on human rights.

As with the United Nations (UN) human rights system, the Inter-American system features a declaration of principles (the 1948 American Declaration on the Rights and Duties of Man adopted seven months before the Universal Declaration), a legally-binding treaty (the American Convention on Human Rights, which entered into force in 1978), as well as Charter-based and treaty-based implementation mechanisms (the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights respectively). The Charter-based system applies to all member states of the OAS, while the Convention system is legally binding only on the States parties to it.

There are two Inter-American bodies concerned with the protection and enforcement of human rights: the Inter-American Commission on Human Rights (IACHR), headquartered in Washington, DC and the Inter-American Court of Human Rights, located in Costa Rica.

The IACHR was created by the OAS in 1959 as an autonomous organ to ensure respect for human rights. The IACHR:

- a. Receives, analyses and investigates individual petitions which allege human rights violations;
- b. Observes the general human rights situation in the member States and publishes special reports regarding the situation in a specific State, when it considers it appropriate.

- c. Carries out on-site visits to countries to engage in more in-depth analysis of the general situation and/or to investigate a specific situation.
- d. Carries out and publishes studies on specific subjects, such as: the human rights situation of minors and women; and the human rights of indigenous peoples.
- e. Recommends to the member States of the OAS the adoption of measures which would contribute to human rights protection.
- f. Requests States to adopt specific 'precautionary measures' which is like an injunction or a protection order to avoid serious and irreparable harm to human rights in urgent cases or ask the Court to grant one.
- g. Submits cases to the Inter-American Court and appears before the Court in the cases.
- h. Requests advisory opinions from the Inter-American Court regarding questions of interpretation of the American Convention.

The Commission receives individual petitions against member states of the OAS. If the member is not a party to the American Convention, the Commission will judge the matter under the Declaration for the Rights and Duty of Man, but of course cannot give a binding decision. If the member is a party to the Convention then, if there is no amicable settlement, the Commission may refer the matter to the Inter-American Court of Human Rights.

Both inter-state and individual cases can be heard by the Court only if contracting states have made a general or specific agreement that this will happen. In the event of an adverse judgment there is no means of enforcement. None of the OECS Member States are currently signatory to the American Convention of Human Rights nor have they accepted the jurisdiction of the Inter American Court.

In the Caribbean only Barbados and Jamaica are parties to the American Convention of Human Rights with Barbados being the only Caribbean State who has accepted the jurisdiction of the Inter American Court. Trinidad and Tobago while initially a party to the Convention denounced the Treaty in 2012 and so is no longer bound by the Treaty.

Other regional organizations include the European Union and the European Court of Human Rights, the Organization of African Union and African Charter on Human Rights and Association of Southeast Asian Nations and the ASEAN Commission on Human Rights.

## HUMAN RIGHTS BEING INTERCONNECTED

It is clear to see how rights are interconnected. For persons to benefit from rights, all rights must be operating. This was exemplified in the case of Caleb Orozco v AG of Belize. Caleb Orozco, by his own admission, is a gay man. He argued that if he does not have the right to dignity, equality and protection of the law, then he may be unable to actually enjoy other rights like privacy and freedom of expression.

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### ACTIVITY

1. Divide the participants into 4 groups.
2. The facilitator provides each group with two human rights principles, which are listed below.

#### Human rights principles:

|                    |                 |
|--------------------|-----------------|
| Equality           | Indivisibility  |
| Human dignity      | Inalienability  |
| Universality       | Interdependency |
| Non-discrimination | Responsibility  |

- Each group prepares a 5-minute presentation on their principles.
- The participants review the principles and add their own ideas.

## ACTIVITY

### SCENARIO:

Mary has been living with HIV for the past 7 years. She is a teacher at a prominent High School in the southern parts of the island. Because of a mix up with hospital records, everyone in her country knows that she is living with HIV. On her way to work, persons laugh at her and call her disparaging names. Sometimes, when she is on her way to the hospital to do her check-up, even the nurses snicker at her.

Last month, she was fired from her job because the principal was fearful that her status of being HIV positive may bring the school into disrepute.

**Material needed: Pens, flashcards and markers.**

Instructions: Put the group of participants into pairs. Ask them to discuss the scenario and jot down the rights they think overlap.

Ask them to assess how these rights overlap and affect each other:

1. Right to non-discrimination;
2. Right to health care
3. Right to work\*[6]
4. Right to protection before the law
5. Right to dignity
6. Right to equality

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## ASSESSMENT OF MCEWAN

### Facts

On February 6, 2009, McEwan and six others were arrested and charged under the 1893 Summary Jurisdiction (Offences) Act section 153 (1) (xlvii) which makes it an offence being 'a man' and in any public way or public place and for 'any improper purpose', appear in 'female attire'. The arrested persons ('appellants') identified as transgendered women, but were considered 'men' for the purposes of the statute.

When the persons who were charged first appeared before the court, they were told by the Magistrate that they were confused and that they were men, not women and suggested that they go to church.

### **Problems with the Law**

In 2010, four of the persons who were charged and the Society Against Sexual Orientation Discrimination ('SASOD') brought a constitutional action on the ground that section 153 (1) (xlvii) ('The Section') was inconsistent with the Constitution of Guyana. Firstly, it was argued that the section was a breach of the rule of law doctrine seeing that the wording of the statute was quite vague and did not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Secondly, it was argued that the section violated the right to freedom of expression, the right to equality before the law and non-discrimination.

### **The role of Civil Society Organizations**

The High Court and Court of Appeal in 2013 and 2017 respectively, rejected these arguments put forth by the appellants and sought to strike SASOD from the matter as an applicant. The courts took this posture mainly because they were of the mind that the section was within a class of protected, pre-independence laws which enjoyed immunization from constitutional challenge by virtue of the savings law clause.

### **WHAT DID THE COURT OF APPEAL FIND?**

The Court of Appeal held that, expressions of gender identity through garb is not of itself criminal, it only becomes criminal when such expressions are made public for an improper purpose. The ruling was unsatisfactory to the appellants, and a further appeal was made to the Caribbean Court of Justice ('CCJ').

### **WHAT DID THE CCJ FIND?**

The CCJ had to assess these issues

- (i) Whether the section violated the appellants' right to equality and non-discrimination guaranteed to them under Article 149 of the Constitution;
- (ii) Whether the section violated the appellants' right to freedom of expression guaranteed to them under Article 146 of the Constitution;

- (iii) Whether the section offended the rule of law given the vagueness of the use of the terms “improper purpose”, “male attire” and “female attire”;
- (iv) Whether SASOD is a necessary and proper party to the proceedings; and
- (v) Whether the remarks of the Magistrate were appropriate and, if they were not, what consequence, if any, should follow.

## EQUALITY AND DISCRIMINATION

Section 2 of the Guyanese Constitution states that the people of Guyana celebrate diversities and strengthen unity by **eliminating any and every form of discrimination**; this is echoed in Article 149 (1)[7] of the Constitution which protects the people of Guyana from discrimination. Additionally, section 149 D states that the state should not deny any person equality before the law.[8]

The court acknowledged the strife of the LGBTI community in the Caribbean and found that section 153 (1) (xlvii) has a disproportionately adverse impact on transgendered women. They also held that the law stunted their inherent dignity and invalidated their entitlement to personal autonomy which are tenets at the core of equality and non-discrimination. They held that the section was therefore in breach of Articles 149 (1) and D of the Constitution.

## FREEDOM OF EXPRESSION

It was found that how one chooses to dress is inextricably linked to the expression of their gender identity which is integral to their right to freedom of expression. There was no evidence put forth by the prosecution that section 153 (1) (xlvii) was justifiable in a free and democratic society and consequently, was a breach of the appellants’ freedom of expression.

## VAGUENESS OF SECTION 153 (1) (XLVII)

The words ‘improper purpose’ and ‘male/female attire’ had no definitive definition either at law or custom and this therefore opened the section to a wide, subjective interpretation by law enforcers.

(Due to this vagueness, the court found that the section did not reach the threshold of a proper penal statute as it did not provide fair notice to citizens of the prohibited conduct. The section was deemed unconstitutionally vague and contrary to the rule of law doctrine. Additionally, Rajnauth-Lee, JCCJ went further to state that the vagueness of the section had rendered it a violation of the appellants' right to the protection of the law guaranteed to them by Articles 40[9] and 144 of the Constitution.

### QUESTIONS PARTICIPANTS SHOULD ASK THEMSELVES ABOUT MCEWAN

- How would they react if they were in the accused persons' situation?
- What steps would they try to take after the fact?
- What is the role of civil society in protecting the rights of minority groups?

### CAN YOU IDENTIFY ANY OTHER LAWS THAT ARE TOO VAGUE?

### TRAINING EXERCISE:

#### *Guide for Trainers*

1. This module can be delivered by role playing the facts of the case. It may be best to write a script or dialogue to show the interaction between McEwan and the police and McEwan and the Court.

#### *Participant's Activity*

The aim is for the participants to get a better appreciation of how they may vindicate their rights. At the end of this Module, participants should be able to understand that in their daily lives, they can assert any right which they believe is owing to them.

#### **After the role playing, participants may be directed to:**

1. Speak about their character and how their character functioned in the story;
2. What human rights they believe were examined;
3. The purpose of those human rights to McEwan;
4. What courts did McEwan bring his issues to?
5. Why did McEwan bring his issues to the courts as opposed to anywhere else?
6. What remedies were given to McEwan?
7. Assess if and what they would have done differently if they were in McEwan's situation.

# MODULE 4

## HIV AND HUMAN RIGHTS: INTERNATIONAL HUMAN RIGHTS STANDARDS

### OBJECTIVES AND INTENDED OUTCOMES

This module aims to promote awareness of the relationship between Human Rights and HIV/AIDS. In earlier parts of this manual, mention was made to HIV related issues and rights generally. However, this module takes a closer look at international human rights standards and the obligation of countries to their citizens.

We will examine:

1. The relationship between human rights and HIV;
2. HIV related legal issues.

### DEFINING HUMAN RIGHTS

It is important to assess what and how much participants know. In order to do this, a brief exercise to gauge the existing knowledge may be useful. Begin by asking each participant:

1. How they believe human rights play a part in HIV issues;
2. Can there be a proper fight against the spread of HIV without safeguarding human rights?

### RELATIONSHIP BETWEEN HIV AND HUMAN RIGHTS

The promotion and protection of human rights constitute an essential component in preventing the transmission of HIV and reducing the impact of HIV and AIDS. The 2001 Declaration of Commitment on HIV/AIDS and the 2006 Political Declaration on HIV/AIDS both underscore that human rights and a rights-based approach is key in national responses to HIV.

This approach is justified by both the realization by Governments that human rights must be protected if HIV is to be eradicated and their commitment to achieving concrete, time-bound targets. In 2018, it was recorded that 781 persons were living with HIV.[10] In fact, this number was an increase from 2017 as by 2018 there were 44 new cases of HIV/AIDS. [11]

Where human rights are promoted, that is reduced stigma and discrimination, better access to health care and the normalizing of receiving treatment by patients, it is expected that the transmission of HIV will decrease.

While there is no international treaty or covenant that specifically addresses HIV, there are a number of provisions from international human rights treaties and declarations that we have been referred to already that have significant implications for the effectiveness of the HIV/AIDS response.

## WHAT ARE SOME RIGHTS ASSOCIATED WITH HIV/AIDS?

### HEALTH

Article 12 of The International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. As part of this obligation, States must take steps to prevent, treat and control epidemic diseases. The right to the highest attainable standard of health, the prevention, treatment and control of epidemic, endemic, occupational and other diseases have been interpreted to “requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity.

### NON-DISCRIMINATION AND EQUALITY

Both international and domestic laws provide for non-discrimination and equality. Article 14 and 26 of the International Covenant on Civil and Political Rights provides for these rights. At the domestic level, the Preamble and section 13 of St. Vincent and the Grenadines also provide for this. In Antigua, section 14 provides for non-discrimination. Furthermore, St Lucia’s constitution provides for equality before the law in section 1.

How does this impact persons living with HIV/AIDS?

Equality and non-discrimination has a large influence on HIV/AIDS because, if citizens have equal access to resources and if persons living with HIV/AIDS are treated equally to those who do not, then one may find that persons affected with HIV/AIDS may be able to get the help that they need.

## **HOW ARE THESE PROVISIONS UNHELPFUL FOR PERSONS LIVING WITH HIV/AIDS?**

If you examine the sections in the OECS Constitutions which speak to non-discrimination, they have specific categories. For example, there should be no discrimination on the grounds of race, sex, political opinion, place of origin or creed. These categories can be considered a closed list. HIV/AIDS is not a listed category. For that reason, though many countries have non-discrimination provisions, where they address discrimination, the provisions can be said to be unhelpful to persons living with HIV/AIDS. In any event, as was noted in the Orozco case, provisions which guarantee equality are to be given real weight.

## **HUMAN RIGHTS OF WOMEN**

Women are disproportionately affected by HIV/AIDS when compared to men. This was seen in Antigua and Barbuda where the Global AIDS Response Progress Report of 2014 noted that women were seen as the property of men and very often could not control with whom and under what circumstances they had sex with men. The Report concluded that when the autonomy and agency of women are promoted, the transmission of HIV/AIDS to women decreases.

Laws and policies can be an important source of empowerment for women in the context of HIV, but they can also be equally discriminatory. Laws can create barriers for women to access health services or HIV treatment itself and to protect themselves from HIV infection. The State has a duty to women under the Convention on the Elimination of Discrimination Against Women to ensure that all forms gender-based discrimination in law, policy and practice as outlined above are eliminated.

## **HUMAN RIGHTS OF CHILDREN**

In some instances, where mothers do not go for their prenatal check-ups to screen for HIV, and the mother has the virus, it can be passed on to the child. Additionally, where mothers breast feed their babies and are infected this can also transmit the virus to the babies. Therefore, we see that the HIV status of children are largely dependent on the actions of their parents. Children who are born with HIV in many instances tend to be subsequently orphaned. HIV therefore has gross ramifications on the future that a child may have.

At the teenage level, children are not exposed to information which sensitize them of the consequences of being sexually active.

While education takes place in schools, it is generally seasonal and touch 'safe' information. In order to adequately combat HIV/AIDS children should have access to all types of HIV preventative information, educational services. Children under the Convention of the Right of the Child children are also entitled to special protection. The State must therefore ensure they provide care and support for vulnerable children, including and especially orphans and children living in HIV/AIDS-affected families.

## **RIGHT TO PRIVACY**

The right to privacy involves the government respecting the rights of each person. Therefore, the government cannot test you without consent or release the confidential information of persons. Likewise, the right to privacy may promote more tolerance within society.

The right to privacy also protects consensual sexual intimacy and so the right to privacy is violated by laws that criminalize homosexual acts between consenting adults. These laws have the result of driving underground many of the people at risk of infection of HIV/AIDS. It has been considered that such laws also run counter to the implementation of effective education programmes in respect of the HIV and AIDS prevention.[12]

## **FREEDOM OF EXPRESSION AND INFORMATION**

Citizens have the right to seek, receive and disseminate information.[13] As such, they have the right to access information on HIV/AIDS from all available sources. Furthermore, citizens have the right to share their own information on HIV/AIDS. This may be more applicable to NGOs and civil society organizations. In *McEwan v Attorney General of Guyana*, the court found that these organizations can enjoy the right to expression.

Freedom of expression also means adequate measures to address HIV/AIDS must be undertaken if the rights of children and adolescents are to be fully respected. The most relevant rights in this regard, is the right to access information and material aimed at the promotion of their social, spiritual and moral well being and physical and mental health. [14]

## **FREEDOM OF ASSEMBLY AND ASSOCIATION**

Much like the right to freedom of expression, the right to freedom of assembly and association operates so as to make information on HIV/AIDS accessible in order to support those persons living with HIV/AIDS. This right also operates in deterring the spread of HIV/AIDS.

## **EXAMPLES OF THESE KINDS OF ORGANIZATION INCLUDE:**

1. Saint Lucia: Housing for People Living with HIV/AIDS
2. National HIV and AIDS Response Programme[15]

### **THE RIGHT TO FREEDOM OF MOVEMENT**

Persons living with HIV/AIDS are sometimes asked to live in a particular place or restricted from going into certain places because of their HIV status. Not only would that be discriminatory, but it would breach the person's right to freedom of movement.

### **THE RIGHT TO ADEQUATE STANDARD OF LIVING AND SOCIAL SECURITY**

Citizens living with HIV/AIDS require an adequate standard of living so as to maintain a balanced diet, afford medication and afford check-ups where necessary. As regards social security, persons living with HIV/AIDS must have proper sanitation. Therefore, social amenities such as clean water, garbage disposal must be available to them.

### **THE RIGHT TO PARTICIPATION IN POLITICAL AND CULTURAL LIFE**

Adequate political representation is key for an insufficiently represented community. It is important for the unrepresented population to elect to government persons who they believe can represent their interests. Where they are able to exercise that right, the underrepresented population may have real solution to their issues.

### **THE RIGHT TO SEEK AND ENJOY REFUGEE STATUS**

Strictly speaking, there is no right to asylum. Under the 1951 Refugee Convention, a country cannot return a person to a state in which they may be persecuted or tortured. One's status as an HIV positive person who is susceptible to persecution for falling into this category may benefit from refugee status in another country. For example, Dominica has acceded to the 1951 Convention relating to the Status of the Refugee.[16] According to the United Nations High Commission for Refugees, Dominica has not implemented legislation on refugee status. Notwithstanding, the accession to the treaty may provide Dominicans with the right to refugee status in other countries.

## **FREEDOM FROM CRUEL INHUMANE DEGRADING TREATMENT AND PUNISHMENT**

It may be considered cruel, inhumane degrading treatment or punishment for persons to not have access to the most basic form of HIV medication. This may include anti-retroviral drugs.

### **TRAINING EXERCISE**

#### *Method of Delivery*

1. This module can be delivered using PowerPoint presentation and/or with a flip chart.
2. Material needed: computer, projector, flip chart, markers, handouts for participants, pens.

#### *Activity*

1. Split the group of participants into equal groups of 11. Assign each sub-group one of the above-mentioned rights.
2. Ask the groups to explain in their own words the rights which are afforded to them. The participants may include how they believe the government or the international community can do to play a part pertaining to these rights.

**THIS EXERCISE SHOULD BE A PRESENTATION.**

**COMPARING RIGHTS UNDER INTERNATIONAL HUMAN RIGHTS LAW AND DOMESTIC LAW.**

| Rights under International Law   | Rights in your Constitution |
|--|-----------------------------|
| Rights to the highest attainable standard of living  |                             |
| Right to non-discrimination and equality before the law  |                             |
| Rights of women (including sexual and reproductive rights)-protection from discrimination on the basis of sex or gender etc, right to determine the number and spacing of children |                             |
| Human rights of children   |                             |
| Right to marry and found a family  |                             |
| Right to privacy   |                             |
| Right to education   |                             |
| Right to freedom of expression and information   |                             |
| Right to assembly and association  |                             |
| Right to work  |                             |
| Right to enjoy the benefit of scientific progress  |                             |
| Right to freedom of movement   |                             |
| Right to participate in political and cultural life  |                             |
| Right to adequate standard of living and social security   |                             |
| The right to seek asylum   |                             |
| The right to seek refugee status   |                             |
| The right to liberty and security of the person  |                             |
| Freedom from cruelty, inhuman or degrading treatment or punishment   |                             |

# MODULE 5

## HIV & THE RIGHT TO HEALTH

### OBJECTIVES AND INTENDED OUTCOMES

The general objective of this module is to raise the level of awareness and understanding of HIV and the right to health. Specific objectives of this Module includes being able to identify the right to health in international human rights law; and identifying the principles surrounding the right to health.

### THE RIGHT TO HEALTH IN INTERNATIONAL LAW

The right to health is the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, as enshrined in the 1966 International Covenant on Economic, Social and Cultural Rights. This includes the right of everyone, including people living with and affected by HIV, to the prevention and treatment of ill health, to make decisions about one's own health and to be treated with respect and dignity and without discrimination.

Everyone, regardless of who they are or where they live, has a right to health, which is also dependent on adequate sanitation and housing, nutritious food, healthy working conditions and access to justice. The right to health is supported by, and linked to, a wider set of rights. Without the conditions to ensure access to justice, the right to a clean environment, the right to be free from violence or the right to education, for example, we cannot fulfil our right to health.

As part of this obligation, States must take steps to prevent, treat and control epidemic diseases. This requires the State to establish prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations.

The right to health includes four interrelated elements:

- Availability— the State must ensure the availability of functioning public health and health-care facilities, goods and services, which should also include clean drinking water, adequate sanitation, medical facilities and trained staff;
- Accessibility—health facilities, goods and services have to be accessible to everyone without discrimination;
- Acceptability—the facilities, goods and services must respect medical ethics and be culturally appropriate; and
- Quality —health facilities, goods and services must be medically and scientifically appropriate and of good quality.

The obligations of the State include the provision of appropriate HIV-related information, education and support, access to the means of prevention (such as condoms and clean injection equipment), to voluntary counselling and testing, as well as access to safe blood supplies, to adequate treatment and to medication. States may have to take special measures to ensure that all groups in society, particularly members of marginalized populations, have equal access to HIV-related prevention, treatment, care and support.

## **ADDRESSING HIV-RELATED STIGMA AND DISCRIMINATION**

Stigma and discrimination have been identified as the main obstacles to effective responses to HIV. They not only violate the human rights of those that suffer them, but also obstruct public health efforts to prevent new HIV infections and reduce the impact of the epidemic on individuals, families, communities and countries. Stigma and discrimination can be experienced as both a cause and a consequence of HIV infection.

### *Discrimination*

Discrimination results from individuals being treated less favourably than others on account of some feature or quality. Broadly, it operates in two distinct ways in the HIV epidemic: discrimination that increases vulnerability to infection and discrimination that relates to HIV status itself. Often, multiple forms of discrimination are suffered by the same individual, for example a women living with HIV who may experience discrimination both in relation to her HIV status and on account of her sex.

Discrimination related to a persons actual or the belief that they are HIV-positive increases the impact of the epidemic on people living with, and affected by, HIV. For instance, it may lead individuals and families into increased poverty and marginalization.

Discrimination on account of HIV or health status can take several forms, for example HIV-positive people being denied treatment, HIV-positive people being fired from their jobs, HIV-infected or affected children being denied education. There can also be indirect forms of discrimination, for example changes in job requirements that appear neutral on their face (i.e., based on the “needs of the organization”) but are directed towards people living with HIV or people perceived to be HIV-positive, and impossible to fulfil.

Discrimination may influence the dynamics of the epidemic, for example people do not seek HIV testing as they fear the consequences of being found to be HIV-positive.

Similar fears may keep people from using prevention methods to protect their partners from infection. Members of some population groups are more vulnerable to discrimination, both within and outside the context of the epidemic. The effects of this discrimination also deepen the impact of HIV. These groups include women, migrants, refugees, prisoners, internally displaced people, ethnic minorities, the poor and young people. In some countries, members of some groups are legally and socially marginalized because of their behaviour, such as sex workers, people who use drugs and men who have sex with men.

Discrimination often prevents them from having access to HIV prevention information, modalities (condoms and clean injecting equipment) and services (for sexually transmitted infections and tuberculosis). This, as well as risk-taking behaviour, makes them highly vulnerable to HIV infection.

### *Stigma*

Stigma can be understood as a ‘significantly discrediting’ attribute possessed by a person with an ‘undesired difference.’ Stigma is often associated with misinformation and inadequate knowledge about HIV and modes of transmission or with moral judgements about how someone became infected. Individuals or groups of people are singled out as “responsible” for the epidemic (e.g., sex workers or gay men) or “responsible” for their own infection. They are ostracized, harassed, isolated, become the subject of gossip and may be driven from their homes or villages.

Where there is stigma, people living with HIV may be more likely to refrain from informing close friends and relatives about their status, and may find it difficult to take steps to protect their partners. People who suspect that they are HIV-positive may avoid seeking testing, treatment and care. Action to reduce HIV-related stigma and discrimination is an entry point for national institutions to initiate or expand work on HIV. Dialogue and consultation with those most affected is essential to formulate an effective programme of action. Tools exist for measuring and addressing HIV-related stigma and discrimination.

### *Discrimination and Employment*

Discrimination in the workplace may present a substantial obstacle to persons living with HIV securing and maintaining employment. Few countries in the OECS unlike the St Lucia Labour Code prohibits discrimination on the basis of HIV status, therefore discrimination based upon HIV status continues to occur in the workplace.

Some employers harbor misconceptions about the routes of HIV transmission and fear increased HIV transmission within their workplace, while others fear increased costs, including health care and insurance costs and expenses to accommodate employees living with HIV. Most persons living with HIV can work normally or with minimal accommodations. Yet, many employers insist on using HIV testing requirements to screen potential employees during the hiring process and to eliminate HIV-infected employees from their workforce. In addition to denial of employment, employees living with HIV are often subjected to differential treatment in the workplace by their employers, co-workers, unions, or clients. Employers discriminate against HIV-positive employees by providing them less opportunities within the workplace—for increased wages, promotions, assignments, insurance, pensions, health benefits, etc.—compared with other employees.

### *Insurance and Discrimination*

Without adequate legal protection, persons often experience difficulty in obtaining health or life insurance. Without anti-discrimination laws, legislation and regulations applicable to specific industries such as the insurance industry, they can discriminate against persons living with HIV/AIDS. It is necessary for government to develop a legislative framework which protects the rights of those vulnerable to HIV by reviewing and or amending existing policies and laws relating to the provision of insurance and HIV and STI related services.

### *Confidentiality*

Disclosing information about a person's HIV status can reveal intimate details about an individual's health status and other personal information that an individual may wish to keep private. These disclosures of a person's HIV status can damage the privacy of persons living with HIV/AIDS and have other negative consequences such as stigma, discrimination, violence, and social isolation as discussed above. Disclosure may also lead to serious economic harm, including loss of employment, insurance, or housing. On the other hand, disclosure of information about a person's HIV status may be required for providing the appropriate medical care, and for certain non-health related purposes such as law enforcement or insurance. Hence, countries need to develop laws and policies that balance the need for disclosure of HIV information with the protection of the privacy and autonomy of individuals with respect to their HIV status.

### *Mandatory Testing*

The World Health Organization recommends that scaling up access to HIV testing is critical to ending the AIDS epidemic, offering everyone the right to know their HIV status through high-quality national HIV testing programmes that respect every individual's dignity and human rights. In a 2011 Antigua and Barbuda study approximately sixty-five percent (65%) of the respondents had never done an HIV test in the past and of those who took the test, forty-five percent (45%) did so because it was mandatory. In twenty-seven percent (27%) of the cases the tests were required for medical purposes.[17] WHO and UNAIDS do not recommend mandatory, compulsory or coerced HIV testing of individuals on public health grounds.



# MODULE 6

## ACCESS TO JUSTICE AND HUMAN RIGHTS

### OBJECTIVES AND INTENDED OUTCOMES

The general objective of this module is to examine the domestic and international forums which can be utilized in advocacy and for redress to address violations of human rights as applicable to the OECS. Specific objectives of this Module includes being able to identify the domestic and international remedies; and avenues to achieve those remedies.

### DOMESTIC REMEDIES

#### *The OECS Court system*

The Eastern Caribbean Supreme Court (ECSC) was established in 1967 and incorporated into the laws of each of the OECS territories. The ECSC, headquartered in St. Lucia, is a superior court for the six independent OECS states: Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines and three British Overseas Territories-Anguilla, British Virgin Islands, and Montserrat. The Supreme Court consists of the Court of Appeal and High Court of Justice. The Court of Appeal is comprised of the Chief Justice and the Justices of Appeal; and the High Court is comprised of the Chief Justice and such number of High Court Judges as provided for by law.

The Court of Appeal travels to each Member State and Territory, where it sits at various specified dates during the year to hear appeals from the decisions of the High Court and Magistrates Courts in Member States in both civil and criminal matters. Each Member Territory has its own High Court which hears cases. The Chief Justice assigns a High Court Judge to each State who shall reside in that State.

#### *Criminal prosecutions related to human rights abuses*

The State can bring criminal prosecutions in national courts against those suspected of involvement in human rights violations. Examples will include prosecution of police officers for unlawful killings or police brutality. Although cases mostly involve violations of the right to life committed by State agents, the obligation to investigate and prosecute human rights violations extends to all abuses of a criminal (non-civil or -administrative) nature, such as violations of the right to physical integrity (rape or torture) or liberty (enslavement, arbitrary detention or kidnapping), including those committed by private persons.

### *Judicial Review*

Judicial review is an effective tool in the protection of citizens' rights. Judicial review may be defined as "the jurisdiction of the superior courts to review laws, decisions, acts, and omissions of public authorities in order to ensure that they act within their given powers." It is one of the most powerful means by which a citizen can seek protection from abuse of state power.

Judicial Review applies to 'public authorities' which are persons or entities after looking at their "duties, powers and functions under the law..." exercises governmental functions. It must also be noted that a public authorities include "any individual officer who exercises executive functions of a public nature."

The grounds for judicial review are "illegality", "irrationality", and "procedural impropriety."

*"Illegality" means "the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it."*

*"Irrationality" is when a decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*

*"Procedural impropriety" is the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. It also means a "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred..."*

Judicial review is concerned, not with the decision, but with the decision making process. This means the Court in Judicial Review proceedings is not concerned with the merits of the decision of the body or tribunal but is to ensure that the body or tribunal has acted properly or within the power it has in arriving at its decision.

An example of its use was seen in the United Kingdom. In a legal challenge, a charity brought judicial review proceedings against the National Health Services challenging their decision not to fund preventative treatment for HIV, Prep. They argued there was no distinction between Prep and another HIV prevention drug treatment known as PEP (post-exposure prophylaxis) which is funded by the NHS. The Court set aside the decision of the NHS not to fund the drug.

### *Constitutional Redress*

As stated previously the Constitution is the supreme law of the land. OECS cConstitutions contain supreme law clauses. For example in the Grenadian Constitution, the supreme law is representative of other such clauses in OECS Constitutions.

It provides that:” This Constitution is the supreme law of Grenada and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

The Constitution of OECS countries grants power to the courts to grant remedies for breaches of the rights guaranteed under the Constitution. Section 16(1) of Grenada Constitution states ”If any person alleges that any of the provisions of sections 2 to 15 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”

In the case of *Jennifer Gairy v the Attorney-General of Grenada*, the Privy Council stated that this provision means that the court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right.

#### *Who can apply*

A person bringing a claim has to have standing. The courts adopt a very generous approach in affording standing to individuals and entities. The court believes that It is in the public’s interest to ensure that the Constitution is properly interpreted and applied. They have linked this approach to vindicating the rule of law.

#### *Remedies*

The power granted to the courts to provide redress for constitutional infractions give the Court a broad discretion to fashion effective remedies to secure the enforcement of constitutional rights. The Court has the ability to give compensation, mandatory orders, damages for breach of constitutional rights, strike down legislation, sever unconstitutional parts.

**Hoffman v South African Airlines**[18] was a constitutional case utilizing the constitution to protect the rights of a person with HIV. Hoffmann who was HIV-positive applied to work as a cabin attendant with South African Airways (“SAA”). He successfully completed the required four-stage selection process, and the required pre-employment medical examination found him to be clinically fit and suitable for employment. However, the routine blood test revealed that he was HIV-positive. As a result, the airline rejected his application.

Hoffman challenged this rejection, arguing that the denial of employment based on HIV status violates the constitutionally protected rights to equality, human dignity, and fair labor practices. The airline argued that its action was based on public health concerns, stating that because he was unable to receive a yellow fever vaccination due to his HIV-positive status, he posed risks to customers.

The airline also argued that the short life expectancy of HIV-positive persons and the high cost of training made hiring such persons uneconomical. The airline further argued that employing an HIV-positive person would adversely impact the efficient operation of the airline and the public perception of the airline's efficient operation.

The Constitutional Court of South Africa rejected the arguments by the airline. The airline conceded after all the medical experts including their own experts concluded that HIV-positive people could be vaccinated against yellow fever. The airline also conceded that its employment practice was unfair. The Court held that the airline had infringed Mr Hoffman's constitutional rights not to be unfairly discriminated against. The Court also held that, while legitimate commercial requirements are important, they cannot serve to disguise stereotyping and prejudice. It also held that people with HIV, as one of the most disadvantaged groups in society, deserve special protection from the law. The Supreme Court ordered the airline to make an offer of employment immediately to Mr Hoffman and to pay his legal costs.

## **COMPLAINTS UNDER THE INTERNATIONAL HUMAN RIGHTS TREATIES**

Individuals may make complaints that their country has violated their rights under the ICCPR. As indicated before there is a committee of independent experts (called a "Human Rights Committee") responsible for monitoring implementation of State Party obligations. The treaty bodies may also consider individual complaints.

### **Individual Communications under ICCPR**

One of the most important functions of the HRC is its competence to receive and consider individual communications (this is the name given to a complaint lodged by an individual under the ICCPR) alleging violations of the ICCPR by that party. Only St Vincent and the Grenadines of the OECS independent States has acceded to the Optional Protocol for the ICCPR which allows persons to bring a case before the Human Rights Committee.

### **Filing a complaint**

The procedure is not an appeal from domestic proceedings in the country where the dispute originated. For a complaint to be considered by the Committee, the following criteria must be met:

- The applicant must be a natural person
- The applicant must be an alleged victim of a violation of a right guaranteed by the Covenant. However, a third party may submit a complaint on behalf of someone else:
  - When the victim appoints someone else to act on his/her behalf

- When the alleged victim is not able to submit the communication, whether because s/he was killed, is kept incommunicado or as a result of mistreatment is physically or mentally unable to authorize the submission of a communication. In these cases, the applicant must show that there is a sufficient connection between him and the alleged victim (e.g. normally a member of a family) to justify the presumption that the alleged victim would consent to submission of a complaint on his behalf by the person concerned:
  - The event generating the complaint must have occurred after the entry into force of Optional Protocol for the country. However, this rule does not apply if a violation which had begun before the date of entry into force continues thereafter.
  - The event generating the complaint must have taken place within the jurisdiction of a contracting State. However, the alleged victim does not have to be a national of the State as the Covenant applies to all individuals, regardless of nationality, who are in the territory of a State or is subject to its jurisdiction.
  - The subject matter of the complaint must not be under concurrent consideration by a similar international body.
  - All available domestic remedies must be exhausted. However, the applicant is not required to exhaust remedies which are useless, unreasonably prolonged and in some circumstances too costly.

### **Procedures**

- Registration: listed for consideration if all the formal requirements are met.
- Case is then transmitted to the State concerned to comment. The State is usually given a time frame.
- Once a State replies the author is given a chance to comment. If the State does not reply, even after a reminder, the Committee proceeds on the basis of the original complaint.
- The Committee will consider if the case is admissibility i.e. they are able to hear the case and if so will then consider the merits.

The committee in question may, at any stage before the case is considered, issue a request to the State party for what are known as "interim measures" in order to prevent any irreparable harm. Typically, such requests are issued to prevent actions that cannot later be undone, for example the execution of a death sentence or the deportation of an individual facing a risk of torture.

On the basis of information submitted by the individual and the State in question the HRC, at a closed meeting, considers the matter and then issues its "views" on the merits of the case. The views of the HRC are not legally binding although they are issued "in a judicial spirit".

In this respect it must be remembered that the HRC is not a judicial body but its high moral authority is often sufficient to ensure compliance. However, if a contracting party refuses to comply the only sanction is bad publicity as the HRC notes a State's refusal to comply in its annual report.

### **COMPLAINTS UNDER SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL**

Complaints may also be made to the Special Procedures of the UN Human Rights Council. These Independent Experts, Special Rapporteurs, and Working Groups have mandates related to specific countries or specific issues, such as violence against women, arbitrary detention, freedom of opinion and expression, and torture. Individuals or groups may send an individual complaint or concerns about broader, structural patterns of human rights violations to the appropriate mandate-holder. The Special Procedures may respond to complaints by sending communications to States, such as urgent appeals or requests for information.

### **PETITIONS TO THE INTER AMERICAN COMMISSION OF HUMAN RIGHTS**

Individuals and groups in any of the OECS states may also choose to make a complaint /petition to the Inter-American Commission on Human Rights (IACHR). An individual or group may submit petitions concerning alleged violations of a human right recognized in the American Declaration of the Rights and Duties of Man. The IACHR requires that petitions all adequate and effective domestic remedies have been exhausted.

The IACHR will first consider the admissibility of the petition. The IACHR may also choose to issue a non-binding request for "precautionary measures" to prevent irreparable harm. If it deems the petition admissible, the IACHR will consider the merits of the case. The IACHR will request that the State provide its views in response to the petition (called a "final report on the merits"). The Government of State will respond on its behalf or on behalf of the provincial/territorial government implicated.

A complainant could request that the IACHR use only your initials in its final report. If the IACHR considers that your government has violated your rights, then it may choose to recommend a remedy. The country will be asked to supply information on steps it has taken to give effect to the final report, requests or recommendations. The IACHR will request the government provide its response within a given time frame. Canada normally replies expressing agreement or disagreement with the IACHR's views.

The IACHR's final report on the merits is final. There is no possibility of appeal as the OECS States are not parties to the American Convention on Human Rights or accepted the jurisdiction of the Inter American Court of Human Rights.

Like the report of the Human Rights Committee, the views, requests and recommendations of the IACHR are not legally binding that is, the government is not legally obligated to implement them.

## CASE STUDIES

*Vandom v. Republic of Korea*, Communication No. 2273/2013 – heard by the UN Human Rights Committee.

The applicant, Andrea Vandom, is an American national who was hired in 2006 to teach English at a university in Anseong, a city in the Republic of Korea. Vandom entered the Republic of Korea on an E-2 visa, which is a visa specifically for foreign language teachers. See *id.* at para. 2.2. However, in 2007, after Vandom had taught at the university for more than a year, the Korean Ministry of Justice implemented a policy that require all E-2 visa holders to submit health records from a government-designated hospital showing that the visa-holder is drug-free and HIV/AIDS-negative.

Those who failed the HIV/AIDS or drug tests lost their visas and faced deportation from the country. Vandom, an E-2 visa-holder, refused to submit to the testing on the grounds that she found the test discriminatory and an invasion of her privacy. Immigration officials refused to renew Vandom's visa, at which point Vandom left the country. After unsuccessfully challenging the mandatory testing policy in domestic courts, Vandom submitted a complaint to the Human Rights Committee, alleging that the Republic of Korea's mandatory testing policy constituted a violation of her right to non-discriminatory treatment, right to privacy, and right to equal protection under the ICCPR.

The Committee found that the Republic of Korea's mandatory testing requirements amount to a difference in treatment on the basis of nationality and ethnicity in violation of [Article 26](#) (right to equal protection of the laws). The Committee found that there are no objective and reasonable grounds for requiring HIV and drug testing based on individuals' ethnicity or nationality.

The Committee further considered whether the mandatory drug and HIV/AIDS testing policy violates the right to privacy under [Article 17](#) of the ICCPR. The Committee first determined that mandatory testing constitutes an interference with Vandom's privacy, before holding that the interference is unlawful. The Committee found that (1) because the policy requires Vandom to disclose her HIV status to the State, (2) because the testing constitutes a search of Vandom's body, and (3) because the State threatened to revoke Vandom's visa if she did not comply, the testing policy constituted an interference with Vandom's privacy. The Committee, however, found that the policy is not necessary and proportionate to achieve the State's purported interest in maintaining public health and public order.

The Committee thus concluded that the mandatory testing policy violates the right to privacy under Article 17 of the Covenant.

***T.B. and S.H. v Jamaica Report No 240/19 Case 13.095*** OEA/Ser.L/V/II doc 268  
December 5 2019 – heard by the Inter American Commission on human rights.

The petitioners T.B. and S.H filed a petition before the Inter American Commission for human rights alleging the State of Jamaica violated the American Convention on Human Rights in maintaining the buggery law in Jamaica. One of the petitioners was a Jamaican currently under refugee protection in Canada. He is a prominent advocate for the rights of LGBT people. In Jamaica he was subjected to serious abuse, discrimination and persecution because of his homosexuality and activism. From a young age he was forced to move home several times to escape the violence he was subjected to. He has been beaten, harassed, subjected to verbal abuse, had stones thrown at him and witnessed attacks on numerous other LGBT people, including close friends, some of which have been fatal.

He experienced an attack while participating in HIV and AIDS awareness activities. On occasion police officers themselves have been involved in attacks; because of the constant abuse, which culminated in a death threat, the applicant was forced to leave Jamaica in January 2008. He was granted asylum by Canada in June 2008. His mother was also forced to flee Jamaica and join him in April 2008, followed by his sister and her young family in March 2013. They have all been granted asylum by Canada.

The other petitioners who after years of discrimination, isolation and abuse as a lesbian woman was shot twice in anti-gay violence along with two of her brothers, one of whom is gay. She survived the shooting but had to have surgery to remove parts of her internal organs. The known perpetrators were never prosecuted and remain in the community. She finally escaped the homophobic environment in Jamaica, in fear of both her life and that of her young daughter, and obtained asylum in the Netherlands where they are now both safe from anti-LGBT human rights abuses. The petitioner argued that Jamaica's anti-gay laws and lack of State protection have a direct impact on everyone in the LGBT community, contrary to international law binding on Jamaica.

The Inter American Commission found that State violated the right to humane treatments, right to privacy, freedom of movement and residence, right to equal protection, right to judicial protection, the right to health under the American Convention of Human Rights in conjunction with Article 1.1 and 2.

They recommended that the State of Jamaica repeal the buggery law in so far as it applies to consensual sexual activity between adults and sexual conduct between men who have sex with men. They also recommended that the State of Jamaica adopt a legal framework or modify the existing legislation with a view of prohibiting and punishing discrimination on the basis of sexual orientation, gender identify or expression.

They also recommended that the State of Jamaica carry out the collection and analysis of data regarding the prevalence and nature of violence and discrimination on the basis of sexual orientation and gender identity. The finally recommended that the State of Jamaica adopt the necessary measures to effective access to health services to LGBTI persons without discrimination.

# MODULE 7

## SEX WORKERS

### OBJECTIVES AND INTENDED OUTCOMES

At the beginning of the manual we mentioned different groups of persons who fall within the category of vulnerable groups. One such group is Sex Workers. This Module is geared towards the exploration of the law's impact on sex workers. Moreover, it provides not only a critique of the legal structure, but also how persons who fall within such a category may better cope.

At the end of this Module, participants should be aware:

1. Of the laws affecting sex workers;
2. Of how sex workers are affected by these laws;
3. The standards which govern the interaction between the police officers and sex workers.

### EXERCISE

1. Use the Case Brief on McEwan In one of the previous Modules in the Manual to identify how laws operate to the detriment of sex workers.
2. State any recommendations, if any, which can be made to the laws so that they can protect sex workers.

### CONTEXT

In 2013, the Daily Observer, a newspaper in Antigua and Barbuda explored brief details of the life of a sex worker.[19] By interviewing sex workers, the newspaper highlighted how persons have benefited from sex work. The manual aims to examine many aspects of sex work.

### LAW RELATING TO SEX WORKERS

The laws relating to sex work cover a range of activities including prostitution, soliciting, living off earnings, loitering and wandering in public places; procuring for the purposes of prostitution; use of premises as a brothel; laws sanctioning idle and disorderly persons, rogues, vagabonds and vagrants; procuring of minors.

It is worth mentioning that sex workers are recognised in many legislations as "prostitutes." While sex workers may not identify as prostitutes, they may not escape the definition because of how broadly prostitution may be interpreted. **Section 22 of The Antigua and Barbuda Sexual Offences Act 1995** makes it illegal to knowingly live off the earning of a prostitute and to manage or act or assist in the management of a brothel which includes being the tenant or occupier who knowingly permits the premises to be used for the purposes of prostitution. This is a very expansive scope and affects not only sex workers but the families of sex workers. The act specifically criminalizes those persons who "live off the earning of a prostitute."

## IMPACT OF LAWS ON SEX WORKERS

Laws which criminalise sex work have the propensity to push sex work underground. The UNAIDS Guidance Note on HIV and Sex Work had this to say:

*"In many countries, laws, policies, discriminatory practices, and stigmatising social attitudes drive sex work underground, impeding efforts to reach sex workers and their clients with HIV prevention, treatment, care and support programmes...Stigma and discrimination must be effectively addressed; violence and abuse of sex workers must be reduced; and legal barriers to participation should be revised. Achieving the changes in social and legal conditions that limit access to [HIV] services will take time, but it is critical to implement needed legal and policy reforms now"[20]*

- 1. DO YOU AGREE WITH THIS STATEMENT?**
- 2. DO YOU HAVE ANY EXPERIENCE WHICH COULD MAKE THIS STATEMENT MORE ALIVE?**

Sex workers are not only affected by the laws, they are also negatively impacted by law enforcement officers. Sex workers are regularly abused by law enforcement officers. Even where sex workers are not abused directly by law enforcement officers, sex workers are unable to access a remedy from law enforcement officers. Therefore, the rights of sex workers are directly impacted. Sex workers are often unable to have the right to due process, equality before the law and the right to dignity.

For further consideration are the lack of prospects for reproductive and health services for sex workers. The stigmatization that sex workers face makes it very difficult for sex workers to negotiate the use of contraception in their practices. This has the effect of causing the spread of sexually transmitted diseases and infections. In the case of women, there is the heightened prospect of unwarranted pregnancies. The discrimination faced by sex workers prevents them from seeking help for both mental and physical health issues.

Laws affect sex workers because the laws which seek to criminalise such practices are uncertain. The uncertainty is disadvantageous to sex workers because sex workers would not know before hand, the scope of the prohibited activity. As such, they would not know what actions are prohibited.

### **USE MCEWAN AS A STUDY FOR THIS POINT**

#### **SOME KEY POINTS**

- Sex workers are 13 times more at risk of HIV compared with the general population, due to an increased likelihood of being economically vulnerable, unable to negotiate consistent condom use, and experiencing violence, criminalisation and marginalisation.
- Where HIV prevention programmes are available they are generally well received, however sex workers often face many barriers in accessing them.

# MODULE 8

## PEOPLE WHO USE DRUGS

### OBJECTIVES AND INTENDED OUTCOMES

At the beginning of the manual we mentioned different groups of persons who fall within the category of vulnerable groups. One such group is People Who Use Drugs (PWD). This Module is geared towards the exploration of the law's impact on PWD. Moreover, it provides not only a critique of the legal structure, but also how persons who fall within such a category may better cope.

At the end of this Module, participants should be aware:

1. Of the laws affecting PWD;
2. Of how PWD are affected by these laws in particular to HIV/AIDS;
3. The human rights approach to the issues.

### CONTEXT

St. Kitts and Nevis' Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act outlines the general posture of laws relating to drugs.

Unlike jurisdictions such as Jamaica, the OECS states have not all rallied around the idea of decriminalizing marijuana. In 2019, there were talks of decriminalizing marijuana in St. Lucia. However, that is an instance of intent which has not been realised.[21] On the other hand, the Eastern Caribbean Supreme Court ruled that adults will be able to legally use marijuana in the privacy of their homes. Additionally, the ruling makes it legal for adults in the Rastafarian religion to use marijuana for religious purposes. This decision is a milestone in the OECS because it underscored the importance of "drugs" in society.

### POSSESSION

The abovementioned legislation makes it unlawful for a person to have a controlled substance in his possession. Now, possession does not mean on his person, for example in his pocket or hands. It means subject to the person's control. As such it could be outside of your person yet be in your control.

## SMOKING

Smoking (of lawful substances) in public spaces is not strictly prohibited in the OECS. This is unlike Jamaica where smoking of cigarettes in public spaces is an offence. However, in 2018, St. Lucia indicated an intention to ban smoking in public places. This is in order to comply with the World Health Organization Framework and Convention. While smoking is not generally prohibited in public, public spaces may specifically regulate their compound to exclude persons who smoke. This may be seen for gas station or government ministries.

## VULNERABILITY OF PWD

Drugs may be highly addictive. This is one of the reasons why persons who use drugs are unable to stop doing drugs. Even were a conscious effort is made by drug users to do so, they face the issue of relapsing. Therefore, people who use drugs are in an unfortunate position.

## SEXUALLY TRANSMITTED DISEASES

HIV/AIDS and other sexually transmitted diseases may be transmitted through hypodermic needles. Those who use drugs have a high potential of coming into contact with more hypodermic needles than persons who do not use drugs. These needles may be shared among drug users. This in turn has the potential to spread sexually transmitted diseases and infections to and from persons who use drugs. Where persons are drug users, not only are they exposed to diseases through the needles but because of the drugs operating on their minds. This may lead to unsafe sex practices and inconsistency in taking medication.

## HEALTH CARE

Persons who take drugs may be discriminated against when they seek medical attention. This discrimination may come from, family, religious groups or medical staff. This may be because persons may generally be of the view that persons who use drugs deserve whatever results befall them. Persons who use drugs have the same rights to health care as other citizens.

## GENERAL PRACTICE

In 2017, the Ministry of Health did a certification of 33 persons to combat the impact of drugs in homes and the wider society. It focused on assessing how to tackle drug abuse in teenagers and to train persons to better deal with persons who use drugs. In Dominica, there is an intention to move to lower levels of incarceration for those who use drugs. Where this has been implemented we may see drug users being able to be rehabilitated instead of facing undue custodial sentences for drug offences.

### **GUIDE FOR TRAINERS:**

Trainers should ensure that participants understand how this Module relates to previous Modules. These Modules include, Access to Health Care and the Module on Human Rights.

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### **PARTICIPANT'S ACTIVITY**

Participants should form groups of 2-3 in which they will discuss the answers to these questions and be in a position to present to the collective.

1. Where your country has not decriminalised drugs in small doses, do you think it is a good idea for it to move in that direction?
2. What other areas do you believe people who use drugs are impacted by laws and the society generally?
3. What lower forms of sanctions would you recommend for drug offences and why?
4. A pregnant woman has been caught using cocaine. She does not deny that she was using it, she however contends that she cannot help it. What course of action would you recommend?

# MODULE 9

## MEN WHO HAVE SEX WITH MEN

### OBJECTIVES AND INTENDED OUTCOMES

This Module is geared towards the exploration of the law's impact on Men who Have Sex with Men (MSM).

At the end of this Module, participants should be aware:

1. Of the law which governs men who have sex with men.
2. Of how these laws impact the human rights of men who have sex with men.
3. Of how these laws are viewed by international human rights bodies.
4. Of the recommendations for improving the human rights situation of men who have sex with men.

### LAW GOVERNING MEN WHO HAVE SEX WITH MEN

"Homosexuality" is not a crime in the OECS but laws criminalize same-sex conduct. The laws vary in language, the types of acts prohibited, and the punishments imposed. Whatever the various incarnations they are often referred to as "sodomy" or "buggery" laws. Many times buggery and sodomy are used interchangeably.

Laws criminalizing consensual adult same-sex sexual conduct currently exist in all the independent OECS countries in the English-speaking Caribbean. Antigua and Barbuda, Barbados, Dominica, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines have the crime of 'buggery.' In 2000, the UK issued an order repealing sodomy laws in its Overseas Territories of Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos islands in order to comply with its obligations as a Council of Europe member. In 2016, the Antigua and Barbuda cabinet stated that the buggery law would remain unchanged. Buggery is recognised as anal sex between men and also between men and women. It is a criminal offence even if committed with consent.

The act of "buggery" was defined in Antigua & Barbuda and Dominica as anal intercourse by: "a male person with a male person" or "a male person with a female person". In St. Lucia buggery is limited to anal intercourse by a male person with another male person.

In St. Kitts and Nevis and St. Vincent and the Grenadines buggery was not legislatively defined, the courts have interpreted it to include anal or oral intercourse by a man with a man or woman; or vaginal intercourse by either a man or a woman with an animal. In Grenada 'unnatural' connection', or 'carnal knowledge against the order of nature' have been interpreted by the courts to include anal intercourse between consenting adults male or female, but also includes any 'non-natural' sexual intercourse between any two people, heterosexual couples included regardless of the orifice(s) used.

There are currently a number of cases before the Eastern Caribbean Supreme Court, which challenges the constitutionality of the buggery law. The Case in St. Vincent and Grenadines allege that the law which penalizes buggery breaches the right to privacy of the home, the right to personal liberty, freedom of conscience, freedom of expression and protection from discrimination.[22] These cases brought are similar in nature to the case of Caleb Orozco against the Attorney General in Belize.

### HOW MEN WHO HAVE SEX WITH MEN ARE IMPACTED BY THE BUGGERY LAW

Men who have sex with men (MSM) are at high risk of contracting HIV, but their opportunities for protection from infection may be reduced by societal discrimination. MSM may hide their sexual orientation, fearing discrimination from their community, government, employers, insurers, and others. As a result, they are less likely to seek HIV prevention, diagnosis, and treatment services. Improving protections from discrimination on the basis of sexual orientation may alleviate the need for secrecy and make it easier to reach the MSM population with HIV prevention efforts.

This was acknowledged in the case of ***Caleb Orozco v AG of Belize*** where the Chief Justice held that in relation to the sodomy law in Belize that it was more likely than not that the retention of the law so far as it relates to MSM hinders rather than advances the testing for and treatment of HIV as a matter of public health.

### HUMAN RIGHTS OF MSM AFFECTED

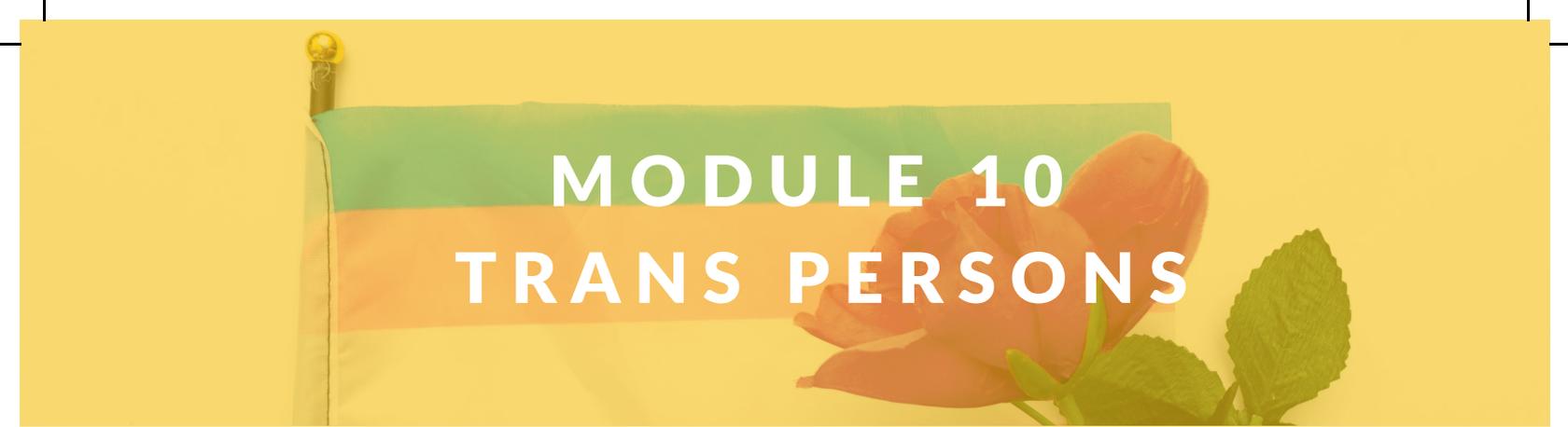
The human rights of MSM are affected in a number of ways:

1. The *right to non-discrimination and to be free from violence and harassment*. These rights are infringed as buggery laws are mostly applied to gay men. These rights are also denied when sexual orientation is omitted from anti-discrimination laws, constitutional provisions or their enforcement.

2. The *right to be free from torture or cruel, inhuman or degrading treatment*. This is infringed upon by police practices, in investigations or in detention of MSM.
3. *Arbitrary arrest*. This occurs where individuals suspected of having a homo/bisexual identity.
4. The *right to a fair trial*. This is often infringed by the prejudices of judges and other law enforcement officials.
5. The *right to privacy*. The existence of the these 'sodomy laws' in so far as they apply to MSM relations between consenting adults in private.
6. The *rights to free expression and free association*. This can be denied where laws prohibit association of MSM or prohibit dress or they may not enjoy them because of the homophobic climate in which they live.
7. The *right to work*. This right is infringed when MSMs are fired because of their sexual orientation or discriminated in employment policies and practices.
8. The *rights to social security, assistance and benefits*. This affects the standard of living for MSM and their ability to obtain social services.
9. The *right to physical and mental health*. These rights are breached due to the homophobia of some physicians,' the lack of adequate training for health care personnel in relation to MSM as well as laws like the sodomy and discriminatory policies and practices.
10. The *right to form a family*. These rights are denied by governments in not-recognizing MSM relationships. It also affected when MSMs or homosexual couples are not allowed to adopt a child.

In ***Caleb Orozco v AG of Belize***, such a law was found to breach the right to human dignity, privacy, freedom of expression, equality before the law and the right against non-discrimination. The law was considered not be justified either as being necessary for public morality or public health. The Court held that prevailing majority views or what is popularly accepted as moral is not what the Constitution envisioned; instead, the Court said, there must be evidence that demonstrates that some harm will be caused by not regulating the conduct. The Chief Justice in that case concluded that there was no evidence presented that there is the real likelihood of any such harm.

### **CASE STUDY: EVALUATE THE CASE OF CALEB OROZCO V AG OF BELIZE AND JASON JONES V AG OF TRINIDAD AND TOBAGO**



# MODULE 10

# TRANS PERSONS

## OBJECTIVES AND INTENDED OUTCOMES

This Module is geared towards the exploration of the law's impact on trans persons. Moreover, it provides not only a critique of the legal structure, but also how persons who fall within such a category are affected by HIV/AIDS.

At the end of this Module, participants should be aware:

1. Of the laws affecting trans persons;
2. Of how trans persons are affected by these laws in relation to HIV/AIDS;
3. The international human rights position.

## CONTEXT

Transgender people in the OECS experience gender-based violence throughout their lives, which impedes their effective access to health services and contributes to poor health outcomes and quality of life. Unfortunately, in the Caribbean trans people experience economic, physical, sexual violence, and other human rights violations based on their gender identity and expression just by expressing their identity and living openly as who they are. Trans people are denied not only fundamental rights to equality, dignity, health and security of being, but their very personhood. Trans people experience grave marginalization, discrimination and violence.

In the OECS there are no legal recognition of transgender people's gender identity on their personal documents. Trans persons may be able to change their name on some documents but not their gender marker. This results in exclusion; violence, harassment, and high stigmatization levels, limited access to legal protection, justice and redress, and inadequate provision of healthcare services. This exclusion and discrimination makes it difficult for them to have access to the healthcare systems and formal work.

The lack of access to adequate healthcare services is linked to the high rates of HIV prevalence among transgender persons in the OECS. Estimates show that HIV prevalence for transgender women in the Caribbean are higher than other LGBTI+ persons and there are very few HIV care programmes that address their specific needs.

Gender identity is a constituent element of the identity of the people. Consequently, its recognition by the State is crucial to guarantee the full enjoyment of rights including the right to health, education, employment, housing, access to social security, as well as the right to freedom of expression, and association. United Caribbean Trans Network (UCTRANS) emphasize that the legal identity recognition is one of the means that facilitate the exercise of the rights of juridical personality, to name, nationality, among others, recognized at the national level in the different countries of the Caribbean.

But also, that are also included on international instruments such as the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights. Trans persons in the Caribbean cannot exercise all their rights openly and normally participate in the daily activities of the society because they do not exist as who they are.

## **LAWS THAT AFFECT TRANS PEOPLE**

Separate from recognition of identity and the lack of formal work a number of trans people are in particular affected that the laws governing sex work, vagrancy and loitering. The wide discretion that is given to police under vagrancy and loitering law make trans persons especially those who are homeless or members of the other categories discussed (Sex Workers, Persons who use Drugs, engage in anal sex) make them vulnerable to detention. Within this context, they may be subjected to violence and deprived of their due process rights.

## **NATIONAL AND INTERNATIONAL POSITION**

The constitutions of the OECS countries, while lacking specific provisions related to trans people, guarantee equality of all persons and protection and respect of human dignity. International Law like the ICCPR are based on fundamental notions of dignity, equality and security of personhood. The key international conventions that govern human rights articulate important rights-based claims that are applicable to all human beings, including trans people.

The United Nations Human Rights Council resolution on sexual orientation and gender identity in 2011 (updated in 2014) brought focus to violence and discrimination based on sexual orientation and gender identity. A 2011 report by the UN High Commissioner for Human Rights (also updated in 2014) called on UN member states to repeal discriminatory policies, enact anti-discrimination laws, and ensure protection for sexual minorities. A second report by the high commissioner was issued in 2015. The 2015 WHO publication Sexual health, human rights and the law addresses the particular vulnerabilities of trans people.

In the Inter American Human Rights system, the Inter American Court of Human Rights in an Advisory Opinion Advisory Opinion 24/17 stated that gender identity is a core part of every individual's personality. That being so, it is vital that States fully recognize gender diversity in order to guarantee full exercise of all the human rights of everyone, including trans and gender diverse persons, including protection against violence and unfettered access to health care, education, employment, and housing.

The Inter American Commission have stated that recognizing the right to have identification documents aligned with a person's self-defined gender identity is a major step forward on the path toward respect and full guarantees for the rights of trans persons.

### **CASE STUDY: EVALUATE THE CASE OF MCEWAN V AG OF GUYANA**



# MODULE 11 YOUTH

## OBJECTIVES AND INTENDED OUTCOMES

This Module is geared towards the exploration of the law's impact on young persons or the youth.

At the end of this Module, participants should be aware:

1. Of the laws affecting young people;
2. Of how young persons are affected by these laws and make them more vulnerable to HIV/AIDS;
3. The international human rights approach to addressing these issues.

## YOUNG PERSONS AND THE LAW

The United Nations defines youth as persons between the ages of 15 and 24. The majority of the global population becomes sexually active during their adolescent phase. The median age of sexual initiation in the Caribbean is the second earliest in the world,[23] second only to Sub-Saharan Africa with over 60 per cent of respondents to a KAPB survey reporting that their age of sexual initiation was 12 or younger.[24] In another study it was reported that 20% of Dominicans reported having their first penetrative sex by age 12, increasing to 70% by age 15.[25] In St. Vincent and the Grenadines, the average age for sexual debut was 13.[26]

Young people face an exponential risk to HIV/AIDS for numerous mostly-related reasons. Their age, physical, emotional, financial and psychological dependence mean they have less control over their bodies. This is created by the legislative policy, and socio-cultural environment which facilitates 1) lack of information, 2) lack of access to modern contraceptive information and services, 3) extremely early ages of sexual initiation, 4) the high occurrence of sexual violence against adolescents and 5) inability to negotiate safe sex with their partners who are often times older puts adolescents in particular danger. Adolescents are therefore unable to protect themselves from pregnancy, HIV and other sexually transmitted diseases.

These early ages of sexual initiation represent a major public-health and human rights concern given the correlation of a high incidence of non-consensual sexual encounters with early initiation as compared to greater reported levels of consensual encounters when the age of sexual initiation is delayed.

This Module is geared towards the exploration of the law's impact on young persons or the youth. Moreover, these sexual encounters are less likely to be protected against pregnancy and sexually transmitted diseases through condomisation and further reduces the likelihood of appropriate condom-usage in later sexual encounters. Additionally, early ages of initiation have correlated with a larger lifetime number of sexual partners.[27] These factors have tremendous societal impacts particularly when viewed against the context of the sheer size of this demographic segment within the OECS and the age of consent therefore is important in this regard.

## AGE OF CONSENT

The legal minimum age at which adolescents can engage in sexual intercourse can be seen as an important tool in protecting adolescents from individuals who may seek to take advantage of them. The involvement of older men with younger girls was considered to be widespread in the Eastern Caribbean and even acceptable especially for boys with older women.[28]

The age of consent for sexual intercourse slightly varies among OECS Member States. The minimum age for consent is 16 in all the Member States except St. Vincent and the Grenadines in which case it is 15. As an exception to the minimum age of consent, the legislation in all Member States provides an "Honest Belief Defence" where an individual would not be convicted of having sexual intercourse with a minor between the ages 14-16 and 13-15 in the case of St. Vincent and the Grenadines, if in certain circumstances the offender was under the reasonable belief that the minor had reached the age of 16 years or 15 respectively and was not previously charged with a similar offence.

In Anguilla, the British Virgin Islands and St. Vincent and the Grenadines the defence is only limited to males while in Antigua and Barbuda, Dominica, St. Lucia the defence is also available to a woman. In Anguilla, Antigua and Barbuda, the British Virgin Islands, Dominica and St. Lucia limit the honest belief defence to persons who are under 21 and in the case of Antigua - where the male person is not more than 3 years older. The Penal Code of Montserrat limits the defence to persons under the age of 24. In the case of Grenada, there is no limitation.

## MINIMUM AGE OF CONSENT FOR MARRIAGE

Another law that has impact on voluntary adolescent sexual and reproductive rights is the minimum age for marriage. Low minimum age for marriage disproportionately affects women and girls. It affects the pursuit of their education, the ability to fully develop their personalities and their physiological maturity which are promoted under the Convention on the Rights of the Child.

Early marriage and early marital sexual activity also present tremendous reproductive health risks for young women. The minimum age for marriage in the OECS varies greatly. For persons to get married without parental consent the ages range from 16 in St. Kitts and Nevis and 21 in Grenada but most have a consensual age of 18. Likewise, the minimum age for marriage with parental consent ranges from 15 in St. Vincent and the Grenadines (female only), Anguilla, Antigua and Barbuda, Montserrat, 16 in BVI, Dominica, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines (boys).

As a result of the definitional limitation of sexual offences as sexual intercourse outside of marriage, the age of marital consent may effectively serve to lower the age of sexual consent in territories where the age of sexual and marital consent are not synchronous. For example, Montserrat makes exceptions for persons who have sexual intercourse with a person under 16 for persons in a marriage, an otherwise indictable offence. This can be considered as between the cracks in the legislative framework whereby children may fall between the cracks and be subject to various forms of abuse particularly in circumstances where the possibility for arranged/non-consensual marriages exist.

## **SEX EDUCATION & SERVICES**

Access to adolescent sexual and reproductive health education and services is an essential component in combating HIV/AIDS. Access to sexual and reproductive education and services can delay the age of the sexual initiation of adolescents, lead to fewer partners, proper and frequent use of contraception and reduce teenage pregnancy, unsafe abortions and the spread of sexually transmitted diseases. A comprehensive and accurate age appropriate sexual and reproductive rights education in school as part of the curriculum is needed in the OECS as a means of giving effect to the right of the child.

One of the major barriers for adolescents in accessing sexual and reproductive health education and services especially contraception is the need for parental consent. In Anguilla a minor may not consent to medical treatment without his parent's agreement. In Antigua and Barbuda, Dominica, Grenada, Montserrat, St Kitts and Nevis the laws are silent on the issue of whether a child can seek medical advice or treatment including contraceptive information without parental consent. In the BVI, St Lucia and St Vincent and the Grenadines, the age at which a minor may consent to medical without parental consent is 16.

## **EVOLVING CAPACITY**

The concept of evolving capacity is therefore a critical policy tool for countries that require adolescents below the age of consent to obtain parental consent in order to obtain medical treatment or medical advice.

Legislative enactments which preclude the access to safe treatment and prudent informed advice expose this demographic group to sexual infections and may delay detection and treatment of HIV.

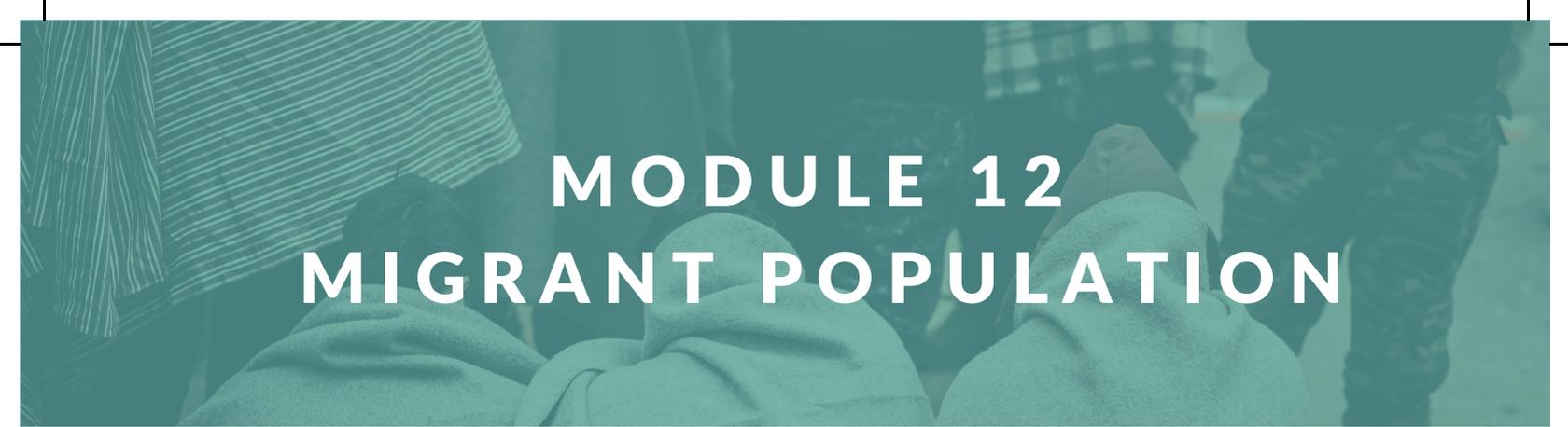
The United Kingdom has adopted a test to determine whether children under sixteen years can consent to their own medical treatment without their parents' consent or even their knowledge. This would remove the rigidity in the law that prevents these adolescents the fullness of their sexual and reproductive rights. The test often referred to as the "Gillick competency" test recognised that parental rights must yield to the child's right to make his/her own decisions when that child reaches a sufficient understanding and intelligence to be capable of making up their own mind on the matter requiring decision.

A doctor would be able to give advice and treatment to a person under 16 without parental consent if

*he is satisfied that "(1) the girl (although under 16 years of age) will understand the advice; (2) that he cannot persuade her to inform her parents or to allow him to inform the parents that she is seeking contraceptive advice; (3) she is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment; (4) unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer; and (5) her best interests require him to give her contraceptive advice, treatment or both without the parental consent."*

Once a minor is found to be competent under this test not only is parental consent not necessary but the minor is entitled to confidentiality and so the medical records of the child cannot be disclosed to the parents. The Gillick competency test is a part of the common law of the Caribbean and can be relied on by doctors and the Courts in the OECS in allowing access to medical treatment for individuals below the age of consent.

## **WHAT RIGHT DOES A YOUNG PERSON HAVE TO BE EDUCATED ABOUT HIV/AIDS IN SCHOOL?**



# MODULE 12

## MIGRANT POPULATION

### OBJECTIVES AND INTENDED OUTCOMES

This Module is geared towards the exploration of the law's impact on migrant population.

By the end of this module you will be aware of:

1. The vulnerability of the migrant population to HIV/AIDS.
2. The immigration restrictions that affect migrant populations.
3. The law surrounding seeking asylum.

### BACKGROUND

Regionally, the Commonwealth Caribbean is confronted with an increasingly complex phenomenon of mixed migration. that includes asylum-seekers, refugees, victims of human trafficking and stateless persons. Several countries in the Commonwealth Caribbean are hosting increasing numbers of Venezuelans. Following global and regional trends, the number of migrants into the Commonwealth Caribbean has significantly increased. The highly mobile Caribbean region is affected as stated before not only by regular migration but also by irregular migrant flows, including human smuggling and trafficking.

### VULNERABILITY OF MIGRANT POPULATION TO HIV

Given the high level of population movement and the high prevalence of HIV infection in the region, the link between mobility and the spread of HIV/AIDS is an important dimension of the Caribbean epidemic. In the Caribbean context, the possible link between sex work related to tourism and the spread of HIV/AIDS is also a factor.

Migrant populations are at a higher risk than the overall population for poor health in general and HIV infection in particular. There are several reasons for these phenomena. HIV prevalence can be higher among migrants, especially for people originating from countries where the primary contributor to the scale of the epidemic is heterosexual transmission and the unequal vulnerability and risk of adolescent girls and young women to HIV, or among migrants in a key population, such as sex workers, MSM and people who use drugs. Migrants may acquire HIV in their country of destination or while in transit and often face a specific vulnerability to HIV related to their status as a migrant.

Other reasons include the fact that migrants often cannot access HIV services—either for prevention if they are HIV-negative or for treatment, care and support if they are living with HIV. Migrants rarely have the same entitlements as citizens to insurance schemes that make health care affordable, particularly if they are undocumented. In terms of these factors, HIV/AIDS is not different than other problems, but it is further complicated by the stigma and sense of “otherness” attached to those infected with the virus that it has made it more difficult to provide health services to migrants.

Female migrants are especially susceptible to exploitation and/or physical and sexual violence. Female migrants in transit may be forced to engage in transactional and unprotected sex to facilitate their border crossing. Once in the destination country, they may face sexual harassment, abuse and rape including from their employers.

## **IMMIGRATION**

For entry and short-term stays, there are generally no restrictions for people living with HIV across the OECS states. St. Kitts & Nevis and St. Vincent & the Grenadines however have restrictions on long-term stays. In St Kitts in order to get a work permit, the application is made by completing and submitting to the Ministry of National Security the requisite form together with among other documents, the applicant and his/her spouse and minor children, results of HIV, VDRL and tuberculosis tests and chest x-ray. In St Vincent and the Grenadines work permits may not be renewed in case of a positive HIV test result. HIV-positive foreigners have no access to treatment and services.

## **SEEKING ASYLUM**

In the 1951 UN Refugee Convention the term "refugee" applies to any person who have a real fear of being persecuted because of their race, religion, nationality, membership of a particular social group like HIV or political opinion, is outside his country and is unable, or unwilling to return because of that fear. One of the most fundamental principles of asylum and international refugee protection is the principle of non-refoulement. Countries that are party to the 1951 Refugee Convention prohibits contracting states from expelling or returning a refugee in any manner to their country.

Antigua and Barbuda, Dominica and St Vincent and the Grenadines are parties to the UN Convention relating to the Status of Refugees and its Protocol which removed the time limits on the Convention and applied to refugees "without any geographic limitation. Saint Kitts and Nevis is only party to the 1951 Convention but not the protocol. None of the countries in the OECS have domestic legislation which brings the UN Convention into force in their countries national law.

As explained previously. The countries in the OECS are what are called dualist states, meaning treaties do not automatically become part of national law. Further steps are needed to incorporate these international treaties into national law. Unlike monist legal systems, where international law is incorporated directly into the national law, in the OECS, the state normally needs to pass domestic legislation to change the domestic law to reflect the rules of law in the treaty. However, there are cases that have established that even if an international convention is not expressly incorporated into domestic law, its provisions of that treaty that the state has ratified can have an impact in national law.

This was explained in the case of **Maurice Tomlinson v the State of Belize and Trinidad and Tobago**. In this regard, the Refugee Convention can be used to construe the constitutional provisions or legislation regarding asylum and immigration and to review the policy and individual decisions of the immigration officials. Generally speaking, 'illegal immigrants' are people who enter a country without meeting the legal requirements for entry, for example entering without a valid visa. However, under *Article 14* of the 1948 Universal Declaration of human rights, everyone has the right to seek asylum and the 1951 Refugee Convention prohibits states from imposing penalties on those entering 'illegally' who come directly from a territory where their life or freedom is threatened.

However, a person who has a well-founded fear of persecution should be viewed as a refugee and not be labelled an 'illegal immigrant' as the very nature of persecution means that their only means of escape may be via illegal entry and/or the use of false documentation. Without legislation to protect persons seeking asylum, they are usually arrested and charged for illegal entry or overstaying their time. Due to this uncertainty about their legal status in the countries of the OECS it makes persons seeking asylum very vulnerable.

## WHAT CONSTITUTIONAL RIGHTS CAN A PERSON SEEKING ASSYLUM RELY ON?









# FOOTNOTES

[1] OECS, <http://www.oecs.org/about-the-oecs/structure-of-the-oecs> accessed 8th April 2020.

[2] Antigua and Barbuda (96,134); The Commonwealth of Dominica (71,945); Grenada (112,523); Montserrat (4,991); St. Kitts and Nevis (53,112); St. Lucia (183,627); St. Vincent and the Grenadines (110,940).

[3] United Nations Human Rights office of the High Commissioner Handbook for Parliamentarians [https://www.ohchr.org/Documents/Publications/ Handbook Parliamentarians.pdf](https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf)

[4] <https://www.un.org/en/universal-declaration-human-rights/>

[5] OHCHR, Fact Sheet No 22 p. 2 accessible at:

<http://www.ohchr.org/Documents/Publications/FactSheet22en.pdf>

[6] There may not necessarily be a right to work. Comment on how the ability to work is affected.

[7] Subject to the provisions of this article— (a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

[8] Subject to the provisions of this article— (a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

[9] Every person in Guyana is entitled to the basic right to a happy, creative and productive life, free from hunger, ignorance and want. That right includes the fundamental rights and freedoms of the individual.

[10] <https://www.stlucianewsonline.com/781-persons-living-with-hiv-in-saint-lucia/>

[11] [http://www.jamaicaobserver.com/news/st-lucia-records-44-new-cases-of-hiv-aids\\_144774](http://www.jamaicaobserver.com/news/st-lucia-records-44-new-cases-of-hiv-aids_144774)

[12] *Toonen v. Australia*, CCPR/C/50/D/488/1992 (March 31, 1994).

[13] Article 19 of the Universal Declaration of Human Rights.

[14] Committee on the Convention on the Rights of the Child, General Comment 3 of 2003 para 6.



# FOOTNOTES

[15] In Dominica [https://cpdcngo.org/ngo-resource-directory/ngo-listing?zoom=15&is\\_mile=0&directory\\_radius=0&keywords=HIV&category=0](https://cpdcngo.org/ngo-resource-directory/ngo-listing?zoom=15&is_mile=0&directory_radius=0&keywords=HIV&category=0)

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[17] HEALTH ECONOMICS UNIT (HEU), Centre for Health Economics, UWI: FINAL REPORT: Knowledge, Attitudes, Beliefs and Practices (KAPB) Surveys on HIV/AIDS in four OECS Member States (Antigua and Barbuda) July, 2011.

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