

## HIV/AIDS: The Labour Market Implications of Compulsory Testing

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### ABSTRACT

**Objective:** It is intended in this brief paper to outline the policy direction that ought to be followed regarding the phenomenon of HIV/AIDS and the workplace. In essence, this is a viewpoint instructed by data and research and not anecdotal evidence.

**Methods:** This is not primary research as it utilizes secondary material from existing literature as well as data from government sources. The method is a strict narrative regarding the data and frequencies and there are no sophisticated statistical packages used for data analysis.

**Results:** On examining the data, it is clear that young women are disproportionately represented in the HIV and unemployment data.

**Conclusion:** It is therefore likely that if testing for the purposes of employment is allowed to continue, it will create a disincentive to seek employment and thus will help to drive the infection underground.

**Keywords:** HIV/AIDS, labour market, testing

## VIH/SIDA: Implicaciones de las Pruebas Obligatorias para el Mercado de Trabajo

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### RESUMEN

**Objetivo:** Este breve artículo intenta delinear la dirección de las políticas que deberían seguirse en relación con el fenómeno del VIH/SIDA y el puesto de trabajo. En esencia, se trata de un punto de vista indicado por los datos y la investigación, y no por evidencia anecdótica.

**Métodos:** Esta no es una investigación primaria ya que utiliza material secundario tomado de la literatura existente, así como datos de fuentes gubernamentales. El método consiste en una narrativa estricta de datos y frecuencias, y no se utilizan paquetes estadísticos sofisticados para el análisis de los datos.

**Resultados:** Al examinar los datos, es evidente que las mujeres jóvenes están desproporcionadamente representadas en los datos de VIH y desempleo.

**Conclusión:** Por lo tanto, es probable que si se permite que continúen las pruebas para fines de empleo, se produzca una falta de incentivo para buscar empleos, contribuyendo así a que la infección se sumerja en un desarrollo clandestino.

**Palabras claves:** VIH/SIDA, mercado laboral, pruebas

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### INTRODUCTION

In as much as HIV/AIDS is perhaps the greatest medical and biological challenge to the country, it is a major issue for the Jamaican labour force and requires a strident and unambiguous approach by government and other policy-makers. The argument is simple: if the Government does not quickly

put in place regulations relating to the world of work, then discrimination in the workplace will exacerbate the unemployment situation, prevent access to treatment, and likely drive the disease underground. Most worryingly, it will disproportionately affect women.

This paper begins with the International Labour Organisation's (ILO) perspective and expertise, because not only does it incorporate the salient features for an approach to HIV/AIDS and the world of work, but according to the United Nations (UN) special envoy on HIV/AIDS to Africa, Stephen Lewis, the ILO is "*The best single document on HIV/AIDS the UN has produced*" (1). The ILO recognizes that "*Discrimination and stigmatization against both women and men living with HIV threaten fundamental principles and rights at work, and undermine efforts to provide prevention, treatment, care and support*" (2). Discrimination occurs in several forms. However, gender based discrimination is a perhaps unwitting manifestation of the pandemic in Jamaica. Epitomized in the words of Naveen Kumar, a person living with HIV, in New Delhi, India, and cited by the ILO: "*If you take away our jobs, you will kill us faster than the HIV virus*" (1).

At present, many of the workplace practices in this country are instructed by anecdotes, prejudices and ignorance and not enough by research. Indeed, the Jamaica Employers' Federation (JEF), a member of the ILO, officially commits to "*...adopting policy, prevention and treatment strategies in the workplace...to develop a Jamaican business culture where people infected and affected by HIV/AIDS are treated with respect and afforded the opportunity to work once they are able to and to encourage sustainable workplace prevention strategies*" (3). Yet, paradoxically, it defends one of the fundamental violations in the ILO policy: non-mandatory testing for the purposes of employment. In 2006, a position which has not been changed, the JEF argued that its members should reserve the right to test, conceding only that, however, "*... if at all they do test, then it should remain confidential*" (4). The consistent pattern among employers who test is that they do not offer employment once the applicant is HIV positive, irrespective of health status or other qualifications.

Nonetheless, this paper stands with Figueroa, who recognizes that "*Locally conducted research has played a critical role in guiding the response to the human immunodeficiency virus (HIV) epidemic in Jamaica*" (5). The research has had major impact in the medical realm, but unfortunately, there is a major knowledge and policy gap in the world of work. It is the intention here to add some substance to the required response in the workplace.

### **ILO and HIV/AIDS**

Discrimination, especially in the workplace, has the greatest potential of totally thwarting the efforts to combat the spread of the virus. It has implications for the economic well-being of individuals, and using a pseudo-Marxist argument, it is the

ability of individuals to take care of their material needs upon which all other elements of their lives are structured. It is work which defines the individual. Thus, one's occupation is the label which gives one social prestige as well. It is the very essence of man.

In 2001, the ILO adopted and published its Code of Practice on HIV/AIDS and the World of Work (1), recognizing that "*The epidemic and its impact strike hardest at vulnerable groups including women and children, thereby increasing existing gender inequalities and exacerbating the problem of child labour*" (1). Along with its core fundamental human rights standards which have to do with i) freedom of association and the right to collective bargaining, ii) freedom from forced labour, iii) freedom from child labour and most important for this paper, iv) freedom from discrimination in employment and occupation, the ILO published 10 core principles regarding HIV/AIDS. These are: i) HIV/AIDS is a workplace issue, ii) non-discrimination, iii) gender equality, iv) healthy work environment, v) social dialogue, vi) non-screening for purpose of exclusion from employment and work processes, vii) confidentiality, viii) continuation of employment, ix) prevention and x) care and support.

Jamaica has a relatively long history of labour democracy and many of the 10 are already in place. These include the constitutionally entrenched freedom from discrimination and gender equality. Furthermore, there are statutory and common law obligations regarding working environment and contractual and other imperatives regarding confidentiality. However, the most problematic is number vi) and to a lesser, but important extent, number vii).

### **Government's response**

To its credit, the Jamaican Government has taken policy though not legislative action to give full effect to the phenomenon. A National Workplace Policy on HIV/AIDS evolved to a Green Paper arising out of the National Strategic Plan 2002–2006. A number of initiatives have taken place and at present draft statute is being examined.

### **The face of HIV/AIDS in Jamaica**

According to Duncan *et al*, "*steady increase in women diagnosed with HIV was observed as women accounted for 37.2% of persons with AIDS and 32.5% of persons with HIV non-AIDS from 1988–1994 compared to 44.4% and 61.4% of persons with AIDS and HIV non-AIDS, respectively between 2004 and June 2008*" (6). Doubtless, the pandemic does have a gendered face and this is another of the myriad demographic variables which are skewed against women. At the end of 2011, the Ministry of Health revealed that of the 6980 females who have been tested as HIV positive, 1841 or 26% were females under the age of 30 years (7). This is singularly the largest concentration of cases in that sex.

It is also significant, as Duncan *et al* observed, that in the HIV cases, the majority were unemployed/unknown

occupation (41.1%) or skilled labour (30.9%). These two factors are also gendered (6).

### **The Jamaican labour force**

Within the labour market, females have a distinct economic disadvantage and this is particularly so for young women. Since the beginning of the 1990s, labour force participation has been diminishing. From 69% in 1990, it has fallen to below 63%. Female labour force participation has fallen from 62.4% in 1990 to 55.3% in 2012 (8).

This decrease is due partly to the fact that young people are spending more time in school. True, between 2000 and 2007, the mean years of education grew from 8.6 to around 9.6 in 2011 compared with the beginning of 1990 when the figure was 6.4. In fact, going back to 1985, the same year when the first local case of HIV was detected, the figure was 5.8 years (9).

Consistent with the antecedent era, both males' and females' participation rates fell; however, females' figures dropped faster. Nevertheless, although young women are taking advantage of educational opportunities, they were also dropping out of the labour market and not seeking jobs due to limited economic opportunities and frustration. Some 29.3% of young persons between ages 20 and 24 years were unemployed in 2012. For females, the figure is notably higher at 37% and in the 14 to 19 year group, 53% are unemployed (8).

Where there is low and decreasing labour force participation among youth and especially among young females, the last thing that is needed is increasing the disincentives toward entering the labour market. This is precisely what the testing requirement for employment purposes is likely to do.

### **CONCLUSIONS**

Any regimen which allows for employers to test for employment purposes will disproportionately affect women and in particular, young women. Young women are the largest unemployed group and also the largest group at risk. There is a direct relationship between women's economic status and their susceptibility to myriad negative outcomes, including HIV infection. Women, therefore, are at double risk if forced to test for employment.

First, young women are simply more likely to be jobless than any other demographic group. Second, young unemployed women have disproportionately higher infection rates than other groups. Therefore, the probability will be higher than they might be detected and rejected. Employers do not test and then employ because of a perceived higher economic cost of employing them. Thus ultimately, they are barred from the means of managing their lives.

Unemployed women even with free access to antiretroviral (ARV) and other treatments are less able to meet their nutritional and other requirements for the successful combatting of the virus. Furthermore, the risk of being exposed and leaving one's health status in the hands of a total stranger

who is not legally bound to employ or otherwise assist will push seropositive unemployed women's infection underground.

In short, compulsory testing in the labour market will ultimately be counterproductive.

### **STEPS TO TAKE**

Anchored on the 1975 Labour Relations and Industrial Disputes Act (LRIDA), Jamaica has a mature industrial relations system already equipped to handle all matters arising from the contract of employment. The existing three-tiered system peaks with an Industrial Disputes Tribunal (IDT). The Charter of Rights under the Constitution is not applicable to many of the current issues regarding the problem of HIV and AIDS at the workplace as it does not explicitly include within its ambit the matter of HIV status.

Nevertheless, this does not have to be a constitutional provision. Rather, an amendment to the LRIDA could incorporate within Section 2, matters related to testing for the virus. Yet, despite any legislative restriction on testing for the purpose of employment which may be passed, there would still be a major gap in the labour relations system regarding its enforcement.

The LRIDA was amended in 2010 to allow the single aggrieved worker, assuming that he can afford the representation, to take his case to the IDT. This could include any matter to do with compulsory testing. Indeed, a worker who does not have an explicit provision in his contract of employment cannot be normally forced to take a medical examination, which incorporates an HIV test. Where his employer either orders him to do so or takes punitive action against him for not submitting to be examined, this is grounds for breach of contract and thus, is tantamount to a constructive dismissal. Such an aggrieved or dismissed worker could possibly obtain justice from the IDT.

Nevertheless, a worker who is unable to fulfil his contract due to his infection progressing to AIDS has no right or obligation different from any other worker who has any other chronic or terminal illness. In labour law, there is what is called the 'frustration of the contract'. Simply put, if an individual for any reason, including acts of God, becomes incapable of doing the work for which he is contracted, the employer can bring the contract to an end, assuming that all contractual discretion such as sick leave are exhausted. In this regard, therefore, a worker who develops AIDS will face no positive discrimination or privileging due to the specifics of his illness. To give to a person with AIDS more rights than an individual who is otherwise chronically or morbidly ill, is in fact discriminatory and would violate the constitutional provisions of equality.

Yet, while there is possible redress for the currently employed worker who might suffer discrimination due to his HIV status or his refusal to be tested, no such protection exists for persons seeking to be employed. In this regard, government must pass legislation swiftly to make compul-

sory testing illegal. Furthermore, given that unemployed prospective workers might not find the wherewithal to litigate, the Government must then push knowledge of the 'no-test' law to the public.

Nonetheless, the labour inspectorate of the Ministry of Labour is legally empowered to act based on complaints in a similar fashion as the Consumers Affairs Commission. However, given that complaints to that division have increased from under 800 in 1991 to more than 8600 in 2012, the Ministry will have to increase its staff complement (10).

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