

SHARED CONFIDENTIALITY – An Ethical Dilemma in Botswana

1. Introduction

In Botswana one of the first official documents dealing with the HIV/AIDS epidemic was the National HIV/AIDS policy. The policy was developed in 1993, eight years after the first person with AIDS was identified in Botswana. The 1993 policy did not seriously consider human rights issues linked to the HIV/AIDS epidemic and does not protect or promote the rights of care givers, people affected by HIV/AIDS and the persons living with HIV infection. The policy is inadequate and needs urgent revision. As it stands it fails to guide the national HIV/AIDS response.

Unfortunately, the first and only law dealing specifically with HIV/AIDS in Botswana was based on this 1993 National Policy and was promulgated in 1999. This law was conceived to deal with HIV/AIDS specifically and integrates of the concept of “shared confidentiality” into the Laws of Botswana.

In this paper we will argue that with the advent of HIV/AIDS in Botswana in 1985, the principles of privacy and confidentiality, sacred and integral to the healing professions, have been put under severe pressure culminating in yet another negative development, the Amendment of the Botswana Medical Council (Professional Conduct) (Amendment) Regulations **Statutory Instrument Number 77 of 1999**. An Amendment that effectively erodes a patient’s right to life, liberty and security of the person.

2. What does the Amendment entail?

The Botswana Medical Council (Professional Conduct) (Amendment) Regulations, 1999,¹ amends Section 21 of The Botswana Medical Council (Professional Conduct)

¹Statutory Instrument Number 77 of 1999

Regulations, 1988². This Section amends Section 21 of the 1988 regulations by inserting a new sub-regulation, which provides that:

“...a person taking care of, living with or otherwise coming into regular close contact with the patient **shall** be informed about such patients’ medical condition where the said patient is suffering from a communicable disease or has an infection which may be passed to such person if appropriate precautions are not taken.”

These regulations govern all medical doctors and dentists. No Amendment was made to the regulations that govern other health care professionals such as nurses and midwives. Therefore, the rule of strict confidentiality still applies to nurses and midwives.³

3. Confidentiality

In most other countries, confidentiality of the medical status of patients, including that of an HIV-INFECTED person, is preserved by the ethical duty of a health care professional not to disclose to anyone else information that was given to, or obtained by, the professional in the context of the professional relationship.

What the legalised concept of shared confidentiality might achieve in reality is to create the avenue for unlimited forced disclosure of the HIV status of a person and thus pave the way for grave human rights abuses.

The main areas of concern are:

§ The number of persons who fall within the category of “regular close contact” is unlimited and therefore this amendment provides an avenue for abuse.

§ The persons listed in the legislation do not have an obligation of confidentiality to

² Statutory Instrument Number 56 of 1988.

the infected person therefore there is no guarantee that the confidential information disclosed will remain confidential.

- § Lack of informed consent
- § An increasing number of individuals are not seeking medical help because they cannot trust their caregiver.
- § People that are concerned about their health refuse HIV testing for fear of disclosure without their consent.
- § This Amendment might provide a false sense of security. As long as the caregivers are not informed about the HIV status they are at risk for infection if they were to ignore the infection control measures that ought to apply for each and every patient.
- § The Amendment reflects the belief that HIV infected persons are likely to expose others intentionally with the HIV virus.

4. The importance of informed consent

Informed consent has been the foundation of all HIV prevention and health promotion strategies that aim at lasting behavioural change. The Botswana law effectively has no provisions for at least defining when forced disclosure is justified. The HIV-INFECTED person once diagnosed has by Law lost control over the information flow regarding his or her HIV status.

Informed consent is the basis for the trusting relationship between medical officers and the patient. The literature abounds with examples of persons losing their job, their house and being ostracised by their family and friends. Forced disclosure is even more dangerous for women who might have to deal with domestic violence and abandonment by the male partner or husband.

The issue of consent is extremely important in a society such as Botswana that

continues to be challenged by stigmatisation and discrimination of HIV infected persons. This Amendment does not offer any protection and has a result that HIV infected persons are increasingly vulnerable due to the policy of forced disclosure to such a wide range of persons that shall be informed. This forced disclosure has a negative effect on their constitutional right of freedom from discrimination.⁴

5. Ethical considerations

I will not argue here today that confidentiality is absolute, I believe that disclosure maybe justified in certain circumstances. If patients were told of the *only* grounds on which confidentiality would be breached and the *only* people who would be informed the attitude that is now taking root in Botswana that the medical profession cannot be trusted would not occur.

6. Conclusion

It is a fundamental rule of law that the Constitution is the supreme law of the land and any law that is inconsistent with the constitution is null and void. The Botswana Medical Council (Professional Conduct) (Amendment) Regulations, 1999 law has not yet withstood the test of fire by a trial in the Courts of Botswana. When it does, it remains to be seen whether it is regarded to be an infringement of the rights enshrined in the constitution of Botswana and thus null and void.

⁴ Constitution of Botswana, Chapter 1, Section 15