

AIDS and the Law: The Hong Kong Experience

By Walter Chan

Introduction

1. The AIDS virus was first diagnosed in the United States in 1981 and since then it has spread to nearly every country in the world. Its impact on society has been profound, affecting nearly every sector of the community. The World Health Organisation estimates that nearly 30 million people have already contracted the virus and that by the end of the century the number could have risen to over 40 million.

2. The rate of infection is still increasing and despite some promising medical progress in the fight against the disease, a cure is still a long way off. The AIDS virus has particular relevance to Hong Kong given that the territory is a major crossroads in the continent experiencing the fastest growth of new AIDS infections - Asia.

3. Although the incidence of AIDS is still relatively low in Hong Kong, the numbers are gradually increasing and the pattern of the disease is changing. It is imperative that the community develop sensible and effective strategies to halt the spread of the disease. The purpose of this paper is to outline how the legal system in Hong Kong has responded to the AIDS epidemic and how the law can help bring the disease under control.

The Current Legislative Situation

4. Unlike many other governments, the Hong Kong authorities have not introduced any specific legislation dealing with AIDS. Existing legislation which impacts upon AIDS includes the *Prevention of the Spread of Infectious Diseases (Amendment) Regulation 1994* (and the *Venereal Disease Ordinance Cap 275*). The first piece of legislation provides for the notification of selected infectious diseases. It does not, however, refer to AIDS specifically. Similarly the *Venereal Disease Ordinance* requires doctors to report suspected sources of venereal disease infection, but does not specifically refer to AIDS. The only piece of legislation which does refer to the disease by name is the *Undesirable Medical Advertisement (Amendment) Ordinance 1988* which forbids the sale of medicine claiming to cure the disease.

5. Some countries have, however, introduced legislation specifically dealing with AIDS. The United Kingdom passed the AIDS (*Control*) Act

1987 whereby periodical reports on the HIV/AIDS situation presented to regional health authorities and to the Secretary of State for Health¹. Australia has gone further by adding AIDS and HIV to a list of other 'infectious' or 'notifiable' diseases subject to legal regime. Some local authorities in Australia have even gone as far as to enact specific legislation whereby AIDS patients can be detained and isolated. Authorities are given powers to impose mandatory testing and the setting up quarantine areas etc.

6. The Hong Kong authorities have decided not to introduce an AIDS specific law for reasons which are outlined below. Those offences which do involve HIV/AIDS patients are dealt with by Common Law. A number of criminal offences could be applied in cases where deliberate attempts have been made to infect a person with the AIDS virus – they range from common assault to attempted murder.

Common Law Cases

7. Over the past few years there have been an increasing number of criminal cases in Hong Kong involving HIV/AIDS patients. These cases have ranged from alleged attempts to deliberately infect another person with AIDS infected blood to defendants seeking a reduction in their prison sentences because of their HIV/AIDS status.

8. There have been about 10 cases in Hong Kong involving HIV/AIDS. One case in August 1994 involved a man prosecuted under the *Undesirable Medical Advertisement Ordinance* for publicising a drug called Retrogen which it was claimed was 'anti-AIDS'. In that case the defendant was found not guilty.

9. There have been 4 cases in the territory **involving the use of syringes (allegedly) containing AIDS contaminated blood**. In one case the charge was dropped because the life expectancy of the defendant was very short (four years) and it was not thought worthwhile pursuing the case. The second case involved a drug addict who threatened a taxi driver with a blood-filled syringe. After being arrested, the defendant claimed he did not have the AIDS virus but had merely said so to frighten the driver. He was subsequently sentenced to three and a half years in prison. The defendant received a relatively short sentence due to his heart condition and guilty plea. The third case concerned another drug addict who injured a three year old girl with a syringe. He was later sentenced to three and a half years imprisonment. The most interesting aspect of this case is that the district court ordered an HIV test to be performed on the girl. The doctor initially refused to disclose the test result, and only did so after being told he would be subpoenaed. The final case involved a drug addict who attacked a policeman. He was subsequently give a very light sentence of 2 months imprisonment.

¹ Strategies for AIDS Prevention, Care and Control in Hong Kong, Advisory Council on AIDS, 1994

10. **Other cases have involved defendants who have pleaded for a reduction in sentence due to their HIV/AIDS status.** Two cases in particular are of relevance here. The first case involved a British man who was charged with drug trafficking offences. He was sentenced in June 1995 to seven and a half years in prison. However, **the judge later reduced that sentence to six years because of the defendant's HIV/AIDS status.** The second case involved a Chinese man who had already been sentenced to eight years in prison for being in possession of firearms. **His appeal to have his sentenced shortened because he was an HIV carrier was rejected on the grounds that he was not near or at the terminal stage of his disease.**

11. In the United States, a research survey was recently carried out which examined nearly 300 federal and state legal cases involving HIV or AIDS as material fact². This survey was able to review a broad range of legal issues including mandatory testing, crime of risking transmission of HIV/AIDS sentencing patterns, confidentiality and discrimination. It concluded that 'courts have differed in their approaches to HIV and AIDS related issues, and have at times appeared to ignore objective scientific evidence regarding the transmission of the disease'. The experience of Hong Kong tends to agree with this conclusion – that HIV/AIDS legal actions are dealt with on a case by case basis and that judgements can differ widely. Further, a trend identifying exercise is more difficult in Hong Kong given the relatively low number of criminal cases involving HIV/AIDS in the territory and the fact that the United States is a much more litigative society.

The Role of the Law

12. The Hong Kong government has not, as we have seen in other countries introduced AIDS specific legislation. There are a number of explanations for this.

Firstly; there already exists in Hong Kong a voluntary reporting system for the collection of data on HIV/AIDS. This system has proven to be effective in the past and not in need of serious reform.

Secondly; there is a general belief in Hong Kong that coercive health measures should be avoided given the limited modes of transmission and the risk of discrimination against people who have the disease.

13. These two factors have been widely debated in other countries and are seen as sensible legal responses to the AIDS epidemic. Legislation which penalises certain forms of conduct (such as homosexuality) are seen as barriers to preventing the spread of AIDS. Such laws are not seen as

² The AIDS Litigation Project: A look at HIV/AIDS in the Courts of the 1990s. The project examined over 300 cases in federal and state courts from January 1991 through June 1996.

appropriate responses if they seek to target the conduct of people with HIV/AIDS or activities that give rise to infection risks.

14. In the fight against AIDS, the most important role the law can fulfill is one of anti-discrimination and the protection of confidentiality. These factors are crucial for two very important reasons:

- (a) HIV/AIDS brings with it discrimination and stigma
- (b) Public health strategies require the trust and cooperation of people with the virus.

15. The Hong Kong government recently introduced the *Disability Discrimination Ordinance 1995* which makes it an offence to discriminate on the grounds of disability, including those with the HIV/AIDS virus. The objective of this act is clear – to give respect for such people with HIV/AIDS and to protect them from harmful or undesirable consequences.

16. According to the Equal Opportunities Commission, no HIV/AIDS complaints have been received since its establishment in September 1996. However, this is not to say that discrimination against HIV/AIDS patients does not exist in Hong Kong. One of the more well-known cases which we have witnessed in the territory is the case of the residents of Richland Gardens. These people protested at Health Department's plan to build a clinic near their homes and to use one floor of that clinic to help treat HIV/AIDS patients. The residents took to the streets with banners bearing discriminatory messages and also prevented workmen from entering the site on which the clinic is to be built. When the protests first began the Commission had not been set up and so no action was taken against the residents. Today, the residents still protest but on the grounds of lack of consultation.

17. As regards confidentiality, the *Hong Kong Bill of Rights Ordinance* provides that a person's privacy shall not be interfered with and the Common Law recognises the legal duty of confidentiality between patient and doctor. Various governments departments and professional bodies have adopted ethical codes of conduct and practice enforcing strict compliance with the rule of confidentiality.

18. According to the AIDS Litigation Project, it is also commonly accepted in the US that an individual's decision to inform others he has AIDS ought to be one that he makes himself. There are cases of unauthorized disclosures suits having been filed against hospitals, schools, law enforcement officials etc.

19. However, the report stresses that the 'right to know' **requires the balancing of confidentiality against the need of the individual requesting the information.** 'Right to know' claims have been brought against HIV-infected health care professionals, sexual partners, and hospitals that failed to inform morticians that a deceased individual was HIV-positive.

Conclusion

20. The impact of HIV/AIDS in Hong Kong has not been as great as in other countries. Nevertheless, the geographical location of Hong Kong, the transient nature of some sectors of the population and exposure to the virus from outside sources (China) means that effective strategies have to be formulated to halt the spread of the disease. The law has a significant part to play in the process by encouraging anti-discrimination and the confidentiality of HIV/AIDS patients.