The Legal Assistance Centre, being a public interest law centre, strives to make the law more accessible to those with least access, through education, law reform, research, litigation, legal advice, representation and lobbying, with the ultimate aim of creating and maintaining a human rights culture in Namibia.
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HIV/AIDS and the Law in Namibia
HIV and AIDS have inflicted a terrible toll on Namibian society. UNAIDS estimates that about 230,000 Namibians are living with HIV or AIDS. The government realised the urgency of the situation and adopted the National Strategic Plan on HIV/AIDS (Medium Term Plan III) 2004-2009, while the Ministry of Health and Social Services responded with various policies on HIV/AIDS, such as the Guidelines for the Clinical Management of HIV and AIDS, and Policies and Guidelines for HIV/AIDS Prevention and Control – the latter in June 2001. The Ministry of Labour was more proactive and adopted the National Code on HIV/AIDS in Employment back in 1998. The National Policy on HIV/AIDS was adopted in 2007.

Despite these policies, discrimination against and stigmatisation of people living with HIV or AIDS are still very common, with the result that only a handful of Namibians who are living with the virus are willing to make their status known in public. As a result, Namibia is losing a very valuable tool that would help to slow down the spread of the virus – people living with HIV or AIDS themselves. Prevention efforts are much more effective if people are willing to educate others about the effect that the disease has had on their own lives and on the lives of their families.

Fear of stigmatisation prevents many people with HIV or AIDS from taking action, whether legal or otherwise, to address the wrongs that they have suffered as a result of HIV infection. Haindongo Nanditume is a courageous exception. He was willing to stand up for his rights when he was refused enrolment in the Namibian Defence Force solely because of his HIV status. There are other examples, but no other case has received the same publicity as Haindongo’s. We need more people who are willing to stand up for what is just and fair, and who are willing to risk the publicity involved in such a case, because it is only when people are willing to take matters to court that we can hope to obtain a (human) rights-based response to the disease.

This manual is a response to the lack of knowledge of the (human) rights of people living with HIV or AIDS. We hope that this manual will play an important role in ensuring that the rights of persons with HIV or AIDS are upheld. We also hope that it will help to educate people who are not infected about the disease’s effect on and consequences for those who are infected, thus encouraging Namibians to take responsibility for their own lives and sexual activities. HIV and AIDS are transmitted mainly through unprotected sexual intercourse, and responsibility can only follow once people know how to protect themselves and others from infection. Sex education should be mandatory in schools and at all levels of society, even if it goes against conservative cultural traditions.
The situation is critical. We need to protect the citizens of our country – particularly the young and the economically active. The government is under an obligation to provide the necessary education, because without it, the prevention efforts currently underway are doomed to failure.

We have closely modelled our manual on the *South African Manual on HIV/AIDS and the Law* published by the AIDS Law Project of the Centre for Applied Legal Studies at the University of the Witwatersrand. We are very grateful to the AIDS Law Project for allowing us to ‘Namibianise’ their manual.

Throughout this manual, we have emphasised some information under the following headings to further assist the user:

**Important case**
Important court cases on HIV/AIDS and the law.

**Important point**
Important points or lessons to remember.

**Example**
Practical examples to explain laws, policies or issues.

**Guidelines**
Steps or checklists to follow when dealing with problems and difficult situations.
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Module 1

This module explains why people living with HIV are victimised and what can be done to fight discrimination and stigmatisation.

By the end of this module, participants will be able to do the following:

- List reasons why people living with HIV or AIDS are victimised.
- Explain how discrimination against people living with HIV contributes to the spread of HIV.
- Outline different ways of dealing with HIV and AIDS discrimination.
- Give examples of what can be done to fight discrimination and stigmatisation of people living with HIV or AIDS.

1. Introduction

Even though HIV can affect anybody, regardless of race, sex or sexual orientation, people with HIV face prejudice and stigmatisation. This stems from the fact that HIV was first diagnosed among men who have sex with men in the USA, leading to the misunderstanding that HIV was found only among this group of people. Other key populations at higher risk of HIV infection are drug users and sex workers. As a result, many people alleged that HIV mainly affected men who have sex with men and other key populations at higher risk.

2. Reasons for victimisation of people with HIV or AIDS

At the time of independence, Namibia had very few diagnosed cases of HIV. This situation soon changed and Namibia is now one of the world’s worst afflicted countries, with an adult HIV infection rate of 17.8%. These statistics are based on studies among women who visit antenatal clinics. After the initial stages of the epidemic, it became clear that men and women transmit HIV. It is not sexual orientation that matters, but a person’s behaviour that puts him or her at risk of infection.

The following are some of the reasons for people living with HIV being victimised and discriminated against:

- Because HIV was first diagnosed among men who have sex with men, people associated HIV and AIDS with men who have sex with men. Later on, foreigners were blamed for the spread of the disease.
- Families and friends rejected people living with HIV, and many people with HIV lost their jobs. There are many stories of children who have lost their parents to an HIV-related condition and who now have no homes.
- Fear of and ignorance about HIV and AIDS.

Many of these reactions result from misinformation about HIV and AIDS. Only when the facts are known and the human rights of people are respected will we be able to reduce the discrimination and stigmatisation associated with HIV and AIDS.
2.1 Violence against people living with HIV or AIDS

People living with HIV or AIDS often face violence. They are:

- beaten up;
- dismissed from their jobs; or
- kicked out of their homes.

In 1990, Gugu Dlamini, a South African AIDS activist, was murdered by people in her community after she disclosed in public that she was living with HIV.

A South African Appeal Court judge, Edwin Cameron, highlighted the difficulties of disclosing one’s HIV status, saying that he was able to do so only because he had access to treatment, was employed and had the support and care of his family and friends. He explained:

“For millions of South Africans living with HIV or AIDS, these conditions do not exist. They have no jobs, or their jobs would be at risk if they spoke about their HIV. They not only lack community support, but face grave personal danger if they do so. And, most importantly, they do not have access to proper medical care and treatment. For them, in a still hostile climate, the choices are strictly limited.”

**Important point**

Fear and ignorance surrounding HIV and AIDS often lead to discrimination and violence against people living with HIV or AIDS, and their partners and families.

**Examples**

**Common forms of discrimination**

People living with HIV or AIDS often experience the following types of discrimination:

- They are refused employment or membership of employee benefit schemes.
- They lose employment because they are HIV-positive.
- They cannot get life insurance or mortgage bonds to buy a house.
- They are refused proper health care and equal membership of medical aid schemes.
- Children and students who are HIV-positive and children whose parents are HIV-positive are victimised at school.
- People are tested without giving their informed consent.
- People are told about their HIV status without receiving counselling.
- People’s rights to confidentiality are not respected because other people disclose their status without their consent.

Many of the actions listed above are unlawful under the Constitution and other laws such as the Labour Act. However, despite these laws, fear, ignorance and poverty prevent people from standing up for their rights. In Hoffman v South African Airways, the South African Constitutional Court recognised the special vulnerability of people living with HIV:
“Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV-positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society’s response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society.”

3. The link between discrimination and the spread of HIV

Discrimination, stigmatisation and victimisation violate the rights of people living with HIV and contribute to the spread of HIV. People blame men who have sex with men, sex workers and people with multiple sex partners for spreading the virus, without realising that they are also at risk. Some people think that because they are not members of a ‘risk’ group, they are ‘safe’. This is not true. Everybody must be educated about how to protect oneself from infection.

**Ignorance of one’s own HIV status:** Effective HIV prevention and treatment depends on people wanting to know their own HIV status and voluntarily going for HIV tests. Many Namibians living with HIV do not know that they are HIV-positive, as they have not taken the HIV test. This means that many people unknowingly pass on HIV to other people.

**Fear of discrimination and lack of affordable treatments:** Fear of discrimination and lack of affordable treatments jointly and singly deter people from going for an HIV test. If treatment was available for all people diagnosed with HIV, those who suspect that they might be infected would probably be more willing to be tested, as there would be hope for them.

**Stigmatisation:** Effective prevention and treatment depends on the de-stigmatisation of the disease. People should not be afraid to tell their sex partners, friends, family and colleagues at work about their HIV status. When the disease is de-stigmatised, ignorance and misunderstanding of HIV will start to disappear.

**Important point**

Certain forms of sexual behaviour put one at risk of infection, regardless of whether one is gay or straight, black or white.

4. Dealing with HIV and AIDS discrimination

Since 1990, Namibia has moved away from a culture of discrimination towards a culture of rights. We have moved from a time in our history when the legal system was used as a weapon against the majority of the population, to a time when the legal system can be a tool to protect people.

For human rights to work in the best interests of all people, it is important that people are made aware of their rights. People who are not aware of their rights are unable to protect themselves.
Many organisations in Namibia work towards educating people about their rights, and particularly the rights of people living with HIV and AIDS.

**Organisations that advance the rights of people living with HIV and AIDS**

- **Lironga Eparu** - a national association of people living with HIV.
- **Catholic Aids Action** - a faith-based organisation that offers counselling and home-based care to people living with HIV.
- **AIDS Care Trust** - an organisation that provides counselling and home-based care to people living with HIV, and assists with the design and implementation of HIV workplace programmes.
- **AIDS Law Unit** of the Legal Assistance Centre (LAC) - an LAC unit that provides legal advice on HIV/AIDS, helps to formulate policy on HIV/AIDS, advocates a rights-based approach to HIV/AIDS, and publishes materials on HIV/AIDS such as the *Namibian HIV/AIDS Charter of Rights*.
- **Aids Rights Alliance for Southern Africa (ARASA)** - a regional partnership of NGOs working together to promote a human rights approach to HIV/AIDS and TB in Southern Africa through capacity building and advocacy.
- **Yelula-Ukhâi** - an organisation that works with communities, individuals and marginalised groups in rural Namibia to strengthen their resources and support their vision in responding to the HIV and AIDS epidemic and supporting orphans and vulnerable children.

The need to protect and promote the human rights of people living with HIV and AIDS has been widely accepted. The United Nations Human Rights Commission and UNAIDS published the *International Guidelines on HIV/AIDS and Human Rights*, and the issue is addressed in Namibia’s *National Strategic Plan on HIV/AIDS (Medium Term Plan III) for 2004-2009*.

**5. What can we do?**

We have to campaign for the rights of people living with HIV and AIDS, working in these areas:

- Non-discrimination
- Access to affordable, effective treatments
- Prevention of mother-to-child transmission
- Protection of vulnerable children and children orphaned by AIDS
- Better care for people living with HIV
- More funds for prevention campaigns
- Better information
- The rights of marginalised groups such as men who have sex with men, women who have sex with women, sex workers and prisoners

Fear and ignorance are the root causes of discrimination and stigmatisation. Only through education and information can we eliminate fear and ignorance. Information and education campaigns should be directed at communities, workplaces, schools and wherever people face discrimination, and where accurate information will make a difference to people’s lives.

**6. Activity**

- A man who works as a bank manager has a wife who does not have a paid job. His wife depends on him for all her needs. He has an affair with a sex worker and the wife finds out. The wife now
refuses to have sex with him unless he uses a condom. He tells her that he will not use a condom because he is not HIV-positive since the sex worker was HIV-negative. He is very sure of the sex worker’s HIV-negative status because the sex worker was very fat. Discuss.

> Amelia was shortlisted and interviewed for a job. She passed the interview and got the job subject to her completing a three-month probation period with the company. During the probation period, she was asked to go for an HIV test, which she did. The company doctor told her that she was HIV-positive. Thereafter, word spread that she was HIV-positive and her workmates became hostile to her. At the end of the probation period, she received a termination letter with a copy of her test result showing her that she was HIV-positive. Discuss.

> Is there anything that can be done to protect and promote the human rights of people living with HIV and AIDS? If the answer is yes, what can be done and by whom?

### 7. References and resource materials

#### Laws

Constitution of the Republic of Namibia

Labour Act No. 11 of 2007

#### Policy documents

- National Code on HIV/AIDS in Employment (Namibia)
- Namibian HIV/AIDS Charter of Rights, 2000
- National Strategic Plan on HIV/AIDS (Medium Term Plan III) for 2004-2009 (Namibia)

#### Cases

Hoffman v South African Airways 2001 (1) SA 1 (CC) at 16GH.

#### Reports, manuals and other useful materials


AIDS Legal Network: AIDS Legal Quarterly.


UNAIDS: Fact Sheet on Namibia, 2002 Update


#### Websites

- AIDS Consortium: www.aidsconsortium.org.za
- AIDS Law Project: www.hri.ca/partners/alp/
- AIDS Law Unit: www.lac.org.na
- Department of Health resources: www.aidsinfo.co.za
- Human Rights Internet: www.hri.ca
- Treatment Action Campaign: www.tac.org.za
- UNAIDS: www.unaids.org
Module 2
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Module 2

The purpose of this module is to familiarise participants with the legal system governing Namibian society. This module therefore looks at the various sources of and main types of law applied in the country. It also identifies the different types of courts and explains the different court processes, including trials, reviews and appeals. Lastly, this module looks at ‘alternative dispute resolution’, or ways of settling disputes without resorting to court action, including negotiation, arbitration and mediation. The Ombudsman is also discussed as an alternative to court action.

By the end of this module, participants will be able to do the following:
- Define the meaning of the term ‘law’. 
- Outline the various sources of Namibian law. 
- Outline the main kinds of law applied in Namibia. 
- Define what courts are and identify the different types of courts in Namibia. 
- Explain the different court processes. 
- Outline the various ways in which disputes can be settled without involving the courts.

1. Introduction

In this module, we look at the law and the legal system that governs Namibian society.

- The law is the set of rules that tells us how to behave. 
- The law tells us what we may and may not do. 
- The law gives us rights and imposes duties. For example, it is illegal to kill a person. 
- The law prescribes the penalties we face if we break the law, and it also tells us what to do if our rights have been violated.

1.1 Sources of the law

There are five sources of law in Namibia:

- The Constitution 
- Statute law 
- Common law 
- Customary law 
- Court decisions

1.2 The Constitution of Namibia

The Constitution is the supreme or highest law in Namibia. All other laws and State actions must comply with the Constitution. The Constitution sets out the way in which the State is organised, and provides for the separation of powers between the Executive (the President and Cabinet), the Legislature (Parliament, i.e. the National Assembly and National Council) and the Judiciary (the courts of law).

The Constitution also contains a Bill of Rights, which spells out the human rights of all people in Namibia and sets a standard for all laws. Laws that do not comply with the Constitution can be
challenged in the High Court. All the courts must follow the principles in the Bill of Rights when they interpret (give meaning to) the common law or customary law.

The Constitution also says that the general principles of international law and international agreements are binding upon Namibia and form part of the law of Namibia. This means that international human rights treaties such as the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of All Forms of Discrimination Against Women* are part of Namibian law.

### 1.3 Statute law

Statute law is the written law that has been passed by Parliament, the highest law-making body in the country. Statutes are also called “Acts of Parliament” or “legislation”. Parliament consists of two “Houses”, namely the National Assembly and National Council. Once both Houses have approved a draft law, known as a “bill”, the President signs it and it becomes a law.

New statutes can change older statutes as well as common and customary laws. Most issues are covered by statute law. For example, the Labour Act covers matters relating to employment.

In most cases, a Minister in a particular Ministry is given powers to issue further rules under a particular statute or Act. These rules are called *regulations*. Regulations are necessary for implementing the new statute properly. Many statutes, such as the Local Authorities Act, give towns or municipalities the power to make their own *by-laws*. Regulations and by-laws must be in line with the statute under which they are made.

### 1.4 Common law

Common law is law that is not made by Parliament or another law-making body. Our common law comes from Roman-Dutch law and English law. Many general principles of our law come from the common law, such as the crime of murder or the duty of confidentiality.

### 1.5 Customary law

Customary law is the law that develops from the customs of a community. It can be both written and unwritten. For a practice to become part of customary law:

- everyone in the community must generally know it;
- it must be generally followed by everyone in the community; and
- there must be some sort of penalty for not following the custom.

It is difficult to determine what customary law is, because it is mostly unwritten. When written down, the laws may be out of date and no longer practised by the members of the community. Customary law and the common law in existence at the time of independence are valid under the Constitution, as long as they do not conflict with the Constitution or any other statutory law. Customary law and common law can be repealed or changed by an Act of Parliament.
Important case

In *Myburgh v Commercial Bank of Namibia*, the Supreme Court said that the common law on the position of women married in community of property was unconstitutional because the common law treated women who are married in community of property as minors with limited contractual capacity. The court said that this was in conflict with the rights to equality and family life in the Bill of Rights, and therefore unconstitutional. On customary law and common law, the court said:

“...The customary law and common law in force on the date of Independence only survive in so far as they are not in conflict with the Constitution.”

1.6 Court decisions

When people are involved in a dispute (conflict) about the law, or when a person has broken the law, the dispute can go to the courts. The courts look at the facts of the case and the law, and then make a judgement (court decision).

In modern times, new problems can arise all the time. This means that the courts will sometimes apply the law in a new or different way, depending on the facts of the case. When this happens, we say that the court has set a precedent (a case example) which other courts may or must follow in all similar cases in future.

2. Three types of law

There are three main types of law in Namibia:

- Constitutional law
- Criminal law
- Civil law

2.1 Constitutional law

Constitutional law is the law relating to matters which are dealt with in the Constitution, such as the relationships between the Executive, Legislative and Judicial branches of the State, and the Bill of Rights. When a person or an organisation thinks that constitutional law has not been followed, they can take the problem to the High Court or the Ombudsman.

2.1.1 Organisation of the State

The State is divided into three main branches or organs:

- The Legislature, also called Parliament. The Legislature makes the laws.
- The Executive, comprised of the President and the Cabinet. The Executive implements the laws.
- The Judiciary includes the Supreme Court and the High Court. These courts interpret the law and make decisions on legal matters.
2.1.2 Human rights

The Bill of Rights, contained in Chapter 3 of the Constitution, spells out the fundamental (basic) human rights of all people in Namibia. These rights cannot be taken away from any person. The rights to life, privacy and family life are examples of human rights.

If a court decides that a person’s rights have been violated, it can order the other party to stop the violation, and it can order payment of compensation to the person whose rights have been violated to make up for the harm caused.

If the court decides that a law is unconstitutional, it can:
- declare that the law is invalid (has no legal force);
- direct that the law be changed to bring it in line with the Constitution; or
- in certain cases, refer the matter to Parliament to change the law within a set period of time to bring it in line with the Constitution.

2.2 Criminal law

Criminal law is the law that prescribes how a person should behave in society. Criminal law therefore tells us what conduct is criminal or what actions are crimes (offences). It prescribes punishments for people who commit crimes. Any crime, even when done to another person (such as when a person steals your property), is seen as a wrong done to the State. Criminal law comes from both common law and statute law. For example, theft is a common law offence, whereas driving under the influence of alcohol is a statutory offence.

When a crime has been committed, the State (represented by a prosecutor) charges the accused person with the offence in a criminal court. The State calls the complainant (the victim) and his/her witnesses to testify against the accused. The accused and his/her witnesses also get the opportunity to testify in court.

The court will then decide if the accused is guilty or not. If the accused is found guilty, the court will convict and punish him or her, either by ordering him or her to pay a fine or by sending him or her to jail.

2.3 Civil law

Civil law prescribes how people must behave in their private relationships, i.e. their relationships with other people. It tells people what their rights and duties are in a particular relationship. For example:
- A marriage is a civil law matter. The law on marriage tells spouses about their property rights and their duties of maintenance towards each other and their children.
- When you buy something, you enter into a purchase contract. This means that you must pay for the item, which the seller must then hand over to you, whereupon you become the owner of the item.
- When you are employed, you enter into an employment agreement, which spells out your duties and rights as an employee, and your employer’s duties and rights. This agreement will cover matters such as your salary and benefits, and penalties for not doing your work.
2.3.1 Civil law disputes

The State does not become a party in a civil law dispute, as in a criminal dispute. The plaintiff (the person who thinks that they have been wronged) brings a case, called a civil claim, against the defendant (the person who the plaintiff thinks has done the wrong). The matter is heard in a civil court. If the plaintiff wins the case, then the following can happen:

- The defendant can be ordered to pay some sort of compensation (usually money) to the plaintiff.
- The court can order the defendant to do something that he/she/it has undertaken to do (e.g. a build a bridge), or it can order the defendant to stop doing something (e.g. a factory can be stopped from polluting the environment).
- The defendant can be ordered to correct the wrong in some other way as agreed between the two parties.

3. The courts

Courts are mechanisms created by the State to settle legal disputes, or to decide whether the law has been broken. A magistrate decides the case in a Magistrate’s Court, while a judge decides a case in the High Court or the Supreme Court. Judges and magistrates are neutral (they do not choose sides, but only interpret the law). Courts let each party give his/her side of the story, and then decide the legal position.

3.1 Magistrates’ Courts

Each magisterial district has a Magistrate’s Court. They hear less serious criminal matters and civil disputes involving monetary amounts under N$50 000. These courts also function as:

- Children’s Courts, for matters relating to the welfare of children;
- Maintenance Courts, for matters relating to the maintenance of spouses and children; and
- District Labour Courts, for matters involving employment disputes.

3.2 Regional Courts

Regional Courts are criminal courts that decide on more serious crimes than those decided by District Courts, such as rape and culpable homicide.

3.3 The High Court

The High Court hears:

- constitutional matters, and serious criminal matters such as murder and treason;
- civil claims involving amounts over N$100 000; and
- appeals from the Magistrates’ Courts.

3.4 The Labour Court

The Labour Court is a division of the High Court. It hears appeals from District Labour Courts and matters which cannot be heard in a District Labour Court.
3.5 The Supreme Court

The Supreme Court is the highest court in the country. It hears appeals from the High Court and can be approached to decide on matters of constitutional validity. The decisions of the Supreme Court are binding on all the courts.

3.6 Community Courts

Some traditional communities have their own court. Traditional courts are called Community Courts. These courts can hear some civil and criminal cases, using customary law.

The Community Courts Bill (2003) clarifies what cases these courts may hear, the processes they must follow and who their justices (judges) will be. The Bill provides for appeals to be taken from Community Courts to Magistrates’ Courts and eventually to the High Court. The Bill has not yet been passed because the structures ( justices, clerks and messengers) are not yet in place.

4. Different court processes

4.1 Trial

A trial is a court hearing in which the court listens to all parties involved in the dispute. In a civil matter, the parties are the complainant and the defendant. In a criminal matter, the parties are the State and the accused. The court hears oral evidence (what the parties say) and looks at physical evidence such as weapons and photographs.

After considering the law and the facts of the case, the court makes a judgement. In a civil case, the court orders the losing party to pay compensation, while in a criminal matter the accused is convicted and sentenced (punished).

4.2 Appeal

If a losing party is unhappy with the result of a trial, he/she/it can take the case to a higher court. This is called an appeal. The appeal court looks at the evidence again. It decides whether the first court was correct in its interpretation of the law and the facts of the case. It can either agree with the first court’s decision or change the first court’s decision.

4.3 Review

In a review, the reviewing court looks at the way in which an official has reached a decision to see if all the evidence was considered and if the decision was reasonable. The court can refer the matter back to the official for a new consideration.

A review court can also review the procedure of a lower court. In this case, the court decides if the lower court followed all the procedural safeguards built into the legal system. The higher court will look at the record of the trial in the lower court to make sure that the trial took place fairly and by the rules. The review court can order the trial to be heard again in the lower court.
5. Settlement of disputes without involving courts

5.1 The Ombudsman

An “ombudsman” is defined as a person appointed by the government to investigate complaints made by citizens or private persons against the government. In Namibia, the Constitution provides for an Ombudsman to watch out for and investigate complaints about:

- human rights violations committed by any government organ or official;
- corruption in government; and
- damage to the country’s environment or natural resources caused either by the State or by private enterprises or individuals.

A person who feels that the government has violated their human rights can approach the Office of the Ombudsman. The Ombudsman will investigate the complaint and try to settle the matter through negotiations. If the negotiations fail, the Ombudsman can refer the matter to the Prosecutor-General for prosecution or bring the matter to court directly to stop the violation.

5.2 Negotiation, arbitration and mediation

It is possible to resolve legal disputes without making use of the courts. This is normally favourable as it is both cheaper and faster than going to court. Negotiation, arbitration and mediation are the ways in which disputes can be resolved outside the courts. The parties agree that they will abide by (accept or follow) the outcome of these processes.

Negotiation is common in disputes between trade unions and employers over wages (referred to as “wage negotiations”), and between companies disputing a contract, where the parties negotiate to reach an agreement on, for example, how to finish a project in a way that satisfies both parties.

Arbitration means referring a dispute to one or more impartial (neutral) persons (i.e. arbitrator/s or arbiter/s). Both parties first agree on who the arbitrator/s will be. The decision of the arbitrator/s is usually (not always) legally binding on the parties. This option is often used to settle disputes between management and workers.

Mediation also means referring a dispute to a neutral third party (i.e. a mediator, such as an expert in a particular field), but normally the disputing parties themselves decide the conditions of the agreement reached rather than accepting something imposed by the mediator, and the outcome of mediation is not legally binding. Mediation is used to resolve many different kinds of disputes - commercial, legal, diplomatic, workplace, community, family, etc.

6. Activity

- Jason is the owner of a night club. He does not want people older than 45 in the club. Simon, who is 50, wants to go into the club, but Jason prevents him from doing so. A fight breaks out and Simon is hit in the face.
- Emma has been fired from her job because she is pregnant.
In these two cases:

- Has a crime been committed?
- Is there a civil law problem?
- Is there a constitutional law problem?

- Matthew borrows N$100 from Mark and promises to return it after two weeks. At the end of the two weeks, Matthew does not return Mark’s money. What do you think Mark should do to get his money back from Matthew?

7. References and resource materials

Laws
Constitution of the Republic of Namibia
High Court Act No. 16 of 1990
Magistrates’ Courts Act No. 32 of 1944
Supreme Court Act No. 15 of 1990
Native Administration Proclamation Act No. 15 of 1928
Traditional Authorities Act No. 25 of 2000
Community Courts Bill

Cases
Myburgh v Commercial Bank of Namibia 2000 NR 255 (SC) at 261 DE

Reports, manuals and other useful materials

Websites
AIDS Law Unit: www.lac.org.na
Legal Assistance Centre: www.lac.org.na
AIDS Law Project: www.hri.ca/partners/alp/
AIDS Legal Network: www.aidslegal.co.za
Ombudsman of Namibia: www.ombudsman.org.na
Module 3
The Bill of Rights in the Constitution

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Module 3

The purpose of this module is to advance the participants’ understanding and appreciation of the Bill of Rights in the Namibian Constitution, the meaning of these rights for people living with HIV and AIDS, and the ways in which these rights can be enforced.

By the end of this module, participants will be able to do the following:

- Define the Bill of Rights as contained in Chapter 3 of the Constitution.
- List the prohibited grounds of discrimination set down in the Bill of Rights.
- Explain what the Namibian law provides with regard to HIV and AIDS.
- Discuss HIV and AIDS in terms of international and foreign law.
- Define socio-economic rights.
- Outline the issues that the government needs to address to improve access to health care for persons living with HIV.
- List important rights of people living with HIV or AIDS.

I. Introduction

The Bill of Rights is contained in Chapter 3 of the Constitution. The Bill of Rights spells out the fundamental (basic) rights and freedoms given by law to every person in Namibia. All people have these rights and freedoms simply because all people are human. These rights and freedoms are inalienable, which means that they cannot be taken away. Parliament, different levels of government, the courts, private organisations (companies, etc.) and individuals must all respect these human rights and freedoms. The Bill of Rights is the foundation of our democracy.

Under the colonial government, most Namibians were excluded from political life and denied human rights. The Constitution aims to prevent this from happening again. The Constitution is so serious about these rights that it states that the Bill of Rights cannot be repealed or amended under this Constitution.

The Bill of Rights grants all Namibians equal political rights (e.g. the right to vote and the right to form associations) and equal civil rights (e.g. the right to equality and to a fair trial).

Apart from political and civil rights, human rights include social, economic and cultural rights. These other rights are important because they create an environment in which Namibians can enjoy their political and civil rights. Without proper living standards, employment, education and health care, it would be difficult to enjoy human dignity, freedom and equality.

Civil and political rights are related to social, economic and cultural rights - we say these rights are indivisible and interdependent. In other words, they cannot be separated from each other. For example, the right to life guaranteed in our Constitution would have no meaning if a person could not have the socio-economic right of health care. The Bill of Rights thus also includes some social and economic rights, such as the right to education and the right to property.

Social and economic rights are listed mainly in Chapter 11 of the Constitution, headed Principles of State Policy. This chapter requires the State to "... actively promote and maintain the welfare of the people by adopting, inter alia, policies ..." that improve the position of all Namibians.
The Constitution also provides that these rights may only be limited under certain specified circumstances, such as during an emergency that threatens the nation, without doing away with the essential content of the right.

Any person or organisation may go to court to claim or defend these rights.

2. The right to equality

One of the most important rights in the Bill of Rights is the right to equality. Equality means that everyone has the same fundamental rights and freedoms.

Article 10 of the Constitution reads as follows:

1. All persons shall be equal before the law.
2. No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Important case

“... The recognition of the equal worth of all human beings is at the root of the provisions [of the Namibian Constitution].”

Muller v President of the Republic of Namibia and Another 1999 NR 190 (SC) at 202BC

Many people living with HIV live in poverty and are prevented from enjoying equal rights due to discrimination and stigmatisation. Examples of such discrimination and stigmatisation include the following:

- Workplace policies that unfairly discriminate against people living with HIV.
- Medical aid schemes that deny effective treatment and care to people living with HIV.
- Insurance companies which refuse to offer life insurance to people living with HIV.
- Communities that stigmatise and isolate people living with HIV.

2.1 Fair and unfair discrimination

Discrimination can be fair (and therefore valid) or unfair. Unfair discrimination is unconstitutional. If two people apply for a job as a driver, it would not be unfair discrimination to employ the only applicant who has a driver's licence. It would be unfair discrimination not to employ somebody as a driver just because the applicant who has a driver’s licence. It would be unfair discrimination not to employ somebody as a driver just because the applicant is a woman.

Important case

“It is only unfair discrimination which is constitutionally impermissible, and which will infringe Art 10 of the Namibian Constitution.”

The Chairperson of the Immigration Selection Board v Frank and Another 2001 NR 107 [NmSC]
2.2 The prohibited grounds of discrimination

Our Constitution prohibits discrimination on eight grounds:

- Sex
- Race
- Colour
- Ethnic origin
- Religion
- Creed
- Social status
- Economic status

The fact that these grounds have been mentioned does not mean that they are the ONLY grounds on which discrimination is not allowed. The first paragraph of Article 10 specifically states that “All persons shall be equal before the law.” This includes people who belong to categories that are not listed in the second paragraph, such as people living with HIV, or men who have sex with men and women who have sex with women. Article 10 therefore prohibits unfair discrimination in general, while mentioning only a few grounds in particular.

Article 10 therefore also protects people with HIV. For example, if a new law is made which says that no person living with HIV may buy a car, the group of people discriminated against would be the group living with HIV. This group can go to court to claim that their right to equality has been violated.

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**Important case**

In *Muller v President of the Republic of Namibia*, the Supreme Court said the following about the grounds of non-discrimination mentioned in Article 10(2):

“The grounds in Art 10(2), namely sex, race, colour, ethnic origin, religion, creed, or social or economic status, are all grounds which, historically, were singled out for discriminatory practices exclusively based on stereotypical application of presumed group or personal characteristics. Once it is determined that a differentiation amounts to discrimination based on one of these grounds, a finding of unconstitutionality must follow.”

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3. The law with regard to HIV

Our law does not deal specifically with HIV or with the need to protect people living with HIV. We have to rely on the Constitution and existing general laws, such as the Labour Act, to protect people living with HIV.

The Constitution guarantees all people the right to equality. This includes people living with HIV. It also states that the dignity of all persons shall be inviolable, which means that the State and its organs must always respect the dignity of all people. When dealing with people, and when sentencing people in the courts, the State may not treat any person in an inhuman or cruel way.
For example, if the State were to say that all HIV-positive people should go and live in the Namib Desert, this would be inhuman treatment and in conflict with the right to dignity.

The fact that HIV is not listed as a prohibited ground for discrimination does not mean that the equality provision does not protect people living with HIV. The prohibited grounds of discrimination form a special group of rights within the right to equality, but the right to equality is wider than the listed grounds of discrimination, and discrimination on the basis of HIV would be in conflict with the right to equality.

In some countries, such as the United States of America, HIV is regarded as a “disability”. In such countries, disability laws are used to protect people living with HIV from discrimination.

3.1 HIV as a disability

Many people argue that HIV should be regarded as a disability because this would give added protection to people living with HIV. They would then be in a position to claim disability benefits under the appropriate legislation, or to rely on disability protection to prevent discrimination.

There is a difference between a disability and incapacity. Incapacity means that a person is unable to function, while disability means that a person is able to function (e.g. to work), but some condition makes it difficult for the person to function. Society may make it difficult for a person with a disability to do a particular job, or other workers may refuse to work with the person who has the disability. For example, very few offices provide ramps to make access easy for people in wheelchairs, which effectively excludes them from working in most offices.

People living with HIV face the same challenges. They want to work, but society makes it difficult for them to do so for a variety of reasons. Employers do not want to give them the opportunity, or co-workers refuse to work with them.

For these reasons, the United States Supreme Court decided in Bragdon v Abbott (1998) that HIV is a protected disability and that people living with HIV have a right to anti-discrimination protections under the Americans with Disabilities Act of 1990.

Article 10 of the Constitution does not mention disability as a prohibited ground of discrimination, but we have seen that the right to equality covers the rights of people living with HIV.

3.1.1 Prohibited ground of discrimination in terms of the Labour Act 11 of 2007

With regard to employees living with HIV, we need to look to the Labour Act, which prohibits discrimination on various grounds, including disability. In Nanditume v Minister of Defence, the Labour Court found that the Namibian Defence Force discriminated unfairly against Nanditume by excluding him from service solely on the basis of his HIV status. The Court found that the test to be applied is whether a person is fit to perform the job for which he/she applies. As HIV status alone is not an indication of fitness, the court held that to exclude a person from employment solely on the basis of their HIV status constitutes unfair discrimination. The Court did not, however, specifically decide on whether or not our law should treat HIV as a disability. Namibia’s new Labour Act specifically prohibits discrimination on the basis of HIV.
Important point

Whether HIV status is listed separately as a ground for prohibited discrimination or treated as a disability, there is little doubt that people living with HIV are disabled by a condition or illness which leads to their facing the same kinds of barriers and discrimination that people with other disabilities face.

4. HIV and AIDS under international and foreign law

International law refers to the laws that regulate the conduct of all countries in the international arena. These laws come from international customary law and international treaties (agreements) such as the Convention on the Rights of the Child.

Foreign law refers to the judgements and statutes of other countries. For Namibia, the above-mentioned Americans with Disabilities Act of 1990 is an example of foreign law.

When interpreting Namibia’s Bill of Rights, the court must give effect to international law, as this forms part of Namibian law.

4.1 International law

Probably the most important right in international human rights law is the right to equality. International human rights treaties provide for equal protection of all people by law, and freedom from discrimination on any grounds, such as race, sex, religion and “other status”. The following are examples of international human rights treaties:

- International Covenant on Civil and Political Rights.
- Convention on the Elimination of All Forms of Discrimination Against Women.

None of these treaties specifically mentions HIV or AIDS as prohibited grounds of discrimination, but clearly, the rights to equality and non-discrimination will also protect people living with HIV.

The United Nations (UN) is very active in efforts to stop the spread of HIV and AIDS. The UN has recognised that protecting and respecting the rights people living with HIV is the best way to address the epidemic. UN guidelines advise countries on how to incorporate human rights into their national strategies to address HIV and AIDS. The UN International Guidelines on HIV/AIDS and Human Rights states:

“General anti-discrimination laws should be enacted or revised to cover people living with asymptomatic HIV infection, people living with AIDS and those merely suspected of HIV or AIDS. Such laws should also protect groups made more vulnerable to HIV/AIDS due to the discrimination they face. Disability laws should also be enacted or revised to include HIV/AIDS in the definition of disability.”
Disability is defined in the UN Standard Rules on the Equalisation of Opportunities for People with Disabilities as follows:

“The term disability summarises a great number of functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.”

The UN General Assembly held a Special Session on HIV and AIDS in 2001. Following this meeting, the General Assembly adopted the Declaration of Commitment on HIV/AIDS, also known as the UNGASS Declaration (UNGASS stands for United Nations General Assembly Special Session), in which all UN Member States agreed to work together to stop the HIV/AIDS epidemic. This Declaration recognises that respecting the human rights and fundamental freedoms of people is essential to reduce vulnerability to HIV. In terms of this Declaration, the UN Member States have agreed to do the following:

“By 2003, enact, strengthen or enforce, as appropriate, legislation regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups, in particular to ensure their access to, inter alia, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic.”

4.2 Foreign law

Various countries regard HIV as a disability under their disability laws, thereby protecting people living with HIV against discrimination.

- In *Bragdon v Abbott*, the United States Supreme Court decided that the non-discrimination sections of the Americans with Disabilities Act protect people living with HIV.
- Canada protects people from discrimination on the basis of disability with its Charter of Rights and Freedoms. In *Canada v Thwaites*, the court said that discrimination on the basis of a person’s HIV-positive status violates both the Charter and the Canadian Human Rights Act.
- In Australia, the Disability Discrimination Act recognises HIV infection, or even the belief that a person has HIV infection, as a disability. In *X v Commonwealth*, the High Court of Australia confirmed the decision of the Australian Human Rights and Equal Opportunity Commission that the dismissal of employees on the basis of their HIV-positive status is prohibited by the Disability Discrimination Act.
- Hong Kong, the Philippines and New Zealand have similar laws.

5. Social and economic rights

Human rights can be divided into the following categories of rights:

- **Civil rights**, such as the right to equality and the right to a fair trial.
- **Political rights**, such as the right to vote.
- **Social rights**, such as the right to freedom of association.
- **Economic rights**, such as the right to own property and to access health care services.
- **Cultural rights**, such as the right to exercise one’s culture and speak one’s mother tongue.
As with civil rights and political rights, there is a strong link between social rights and economic rights. Therefore, social and economic rights are often discussed together and referred to as socio-economic rights.

Socio-economic rights are important in terms of improving everyday living conditions for people living with HIV, because these rights relate to people’s access to basic services.

Where different types of rights are strongly linked, it is not possible for people to enjoy one type if effect is not given to the other.

### Important case

The link between different types of rights was considered in the South African case of *The Government of the Republic of South Africa and Others v Grootboom and Others*. The Constitutional Court said:

“Our Constitution entrenches both civil and political rights, and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 (which contains the Bill of Rights). The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.”

### 5.1 Socio-economic rights in the Namibian Constitution

The Bill of Rights contains a few socio-economic rights that are enforceable. One of them is the right to education.

Socio-economic rights in the Namibian Constitution are found mainly in Chapter 11 which is headed *Principles of State Policy*. The rights listed in this chapter are not directly enforceable in a court of law, but this does not mean that the State can ignore them. The government must be guided by these principles in making and applying laws to give effect to the principles. Courts may also consider these principles when interpreting laws dealing with the same issues.

Rights that are of particular importance for persons living with HIV are as follows:

- The right to enjoy just and favourable conditions of work, including just remuneration and safe and healthy living conditions (Article 7).
- The right to join trade unions (Article 8).
- The right to social security, including social insurance (Article 9).
- The right to protection of and assistance for the family, and especially pregnant women and children (Article 10).
- The right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions (Article 11).
The right to enjoy the highest attainable standard of physical and mental health. This right particularly includes:

- the reduction of the still-birth rate and infant mortality, and efforts to promote the healthy development of children;
- the prevention, treatment and control of epidemics and endemic, occupational and other diseases;
- the creation of conditions that ensure all people medical attention and medical service in the event of sickness (Article 12).

The International Covenant on Economic, Social and Cultural Rights requires States, including Namibia, to report regularly to the Committee on Economic, Social and Cultural Rights on the implementation of this Covenant. This helps to ensure that each State meets its obligations under international law. Such international mechanisms are not as strong as rights contained in a State’s enforceable Bill of Rights, but they are not meaningless. In Namibia we can lobby the government to fulfil its obligations under both the Principles of State Policy in our Constitution and under the International Covenant on Economic, Social and Cultural Rights. In appropriate cases, if it is clear that the government is not meeting its obligations, we can take the government to court.

6. Access to health care for people living with HIV

We have seen that one of Namibia’s Principles of State Policy is to plan consistently for raising and maintaining an acceptable level of nutrition and standard of living for Namibians, and to improve public health. Access to health care for all, including people living with HIV, is covered by this provision. The right to equality prohibits unfair discrimination in access to health care.

The National Strategic Plan on HIV/AIDS (Medium Term Plan II) has as one of its objectives the duty to ensure that all Namibians living with HIV and their families have access to high-quality services that are affordable and responsive to their needs.

Despite these provisions, people living with HIV receive different standards of treatment depending on where they go for treatment. Rural hospitals and clinics are usually less well equipped than hospitals in Windhoek, and their staff may not be as well trained as hospital staff in Windhoek.

**Important point**

The government could do the following to improve access to health care for persons living with HIV:

- Prevent discrimination against people living with HIV with regard to available health care services.
- Implement and monitor the Guidelines for the Clinical Management of HIV and AIDS to ensure standard treatment at all government hospitals and clinics.
- Explore ways to make medical treatment available for people living with HIV. This could include negotiations with drug companies, compulsory licensing and parallel importation of anti-retroviral drugs (including more affordable generic drugs).
- Research new medical treatments and their cost-effectiveness and conduct pilot studies.
7. **Important rights for people living with HIV or AIDS**

This table explains some of the rights in the Bill of Rights and what they mean for people with HIV:

<table>
<thead>
<tr>
<th>Article in the Bill of Rights</th>
<th>Right</th>
<th>What this means for people with HIV</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Life</td>
<td>Access to medication and information.</td>
</tr>
<tr>
<td>7</td>
<td>Personal liberty</td>
<td>A person living with HIV cannot be locked up for no reason other than his/her HIV-positive status.</td>
</tr>
<tr>
<td>8</td>
<td>Human dignity</td>
<td>Hospitals or institutions may not damage a person's dignity or self-respect by words or actions.</td>
</tr>
<tr>
<td>10</td>
<td>Equality and discrimination</td>
<td>Equal treatment and freedom from discrimination.</td>
</tr>
<tr>
<td>11</td>
<td>Arrest and detention</td>
<td>Prisoners cannot be treated differently or in an undignified way just because of their HIV status.</td>
</tr>
<tr>
<td>13</td>
<td>Privacy</td>
<td>People living with HIV have the right to keep that fact to themselves. An employer or a hospital cannot force people to tell them their HIV status, or force people to have a blood test to find out their status, because this is private information.</td>
</tr>
<tr>
<td>15</td>
<td>Children's rights</td>
<td>A child cannot be forced to work (economic exploitation of children is against the law), especially if this interferes with the child's education.</td>
</tr>
<tr>
<td>17</td>
<td>Political activity</td>
<td>A person living with HIV may advocate and lobby for better treatment.</td>
</tr>
<tr>
<td>18</td>
<td>Administrative justice</td>
<td>A person living with HIV is entitled to fair and reasonable treatment by officials.</td>
</tr>
<tr>
<td>20</td>
<td>Education</td>
<td>A person living with HIV has the same rights as others to education. Schools cannot refuse to accept a child on the grounds of HIV status.</td>
</tr>
<tr>
<td>21(1)(a)</td>
<td>Freedom of speech and expression</td>
<td>People are allowed to criticise policies and decisions that negatively affect persons living with HIV, and to discuss HIV prevention campaigns in schools and prisons.</td>
</tr>
<tr>
<td>21(1)(d)</td>
<td>Peaceful assembly</td>
<td>Persons living with HIV can organise meetings or rallies.</td>
</tr>
<tr>
<td>21(1)(e)</td>
<td>Freedom of association</td>
<td>Persons living with HIV may join organisations working to improve their situation.</td>
</tr>
<tr>
<td>21(1)(g) and (h)</td>
<td>Freedom of movement, residence</td>
<td>A person living with HIV cannot be forced to live anywhere against his/her wishes.</td>
</tr>
<tr>
<td>21(1)(i)</td>
<td>Freedom to leave and return to Namibia</td>
<td>A person living with HIV cannot be prevented from travelling to other countries and returning to Namibia.</td>
</tr>
<tr>
<td>21(1)(j)</td>
<td>Freedom to practise any profession or carry on any trade, occupation or business</td>
<td>A person living with HIV can work in any profession or follow any career path of their choice.</td>
</tr>
</tbody>
</table>
8. Limitations on human rights

The Constitution recognises that some human rights may be limited. A limited right does not have full effect due to one or more factors, such as the rights of other people. When a right is limited, the legislation that provides for the limitation must:

- apply to all people;
- not negate the essential content of the right;
- not be aimed at a particular individual; and
- specify the extent of the limitation (Article 22).

In the case of a national emergency or war, some rights, such as the right to privacy, may be suspended. Other rights, such as the rights to life and respect for human dignity, may not be suspended under any circumstances.

9. Conclusion

The Bill of Rights contains important rights that can be invoked (used) to end discrimination against people living with HIV, and to improve their socio-economic living conditions.

Everyone must work together to ensure enforcement of these rights. We cannot rely only on the government to give effect to the Bill of Rights. Every individual, association, organisation, company and government body has a duty to respect the rights of others and help to ensure that other people’s rights are not violated.

All of us have a duty to learn about rights, enforce them when they are violated and promote the rights of others. Only then can we say that our culture is one that respects human rights.

10. Activity

- When is discrimination referred to as unfair discrimination? Give examples.
- What can we do to improve the delivery of socio-economic rights in Namibia?

11. References and resource materials

Laws
Constitution of the Republic of Namibia
Americans with Disabilities Act No. 42 of 1990

Policy documents
Universal Declaration of Human Rights, 1948
Declaration of Commitment on HIV/AIDS, UNGASS, 27 June 2001
International Covenant on Economic, Social and Cultural Rights, 1966
Convention on the Rights of the Child, 1989
Ministry of Health and Social Services: Guidelines for the Clinical Management of HIV and AIDS (Namibia)
UN Standard Rules on the Equalisation of Opportunities for People with Disabilities, 1993

Cases
The Chairperson of the Immigration Selection Board v Frank and Another Namibian Supreme Court, Case No SA 8/99 (unreported) at p81
Muller v President of the Republic of Namibia and Another 1999 NR 190 (SC) at 199HJ
Nanditume v Minister of Defence 2000 NR 103 (LC)
Bragdon v Abbott 524 US 624.
Canada (Attorney-General) v Thwaites 1994 3FC 38.
Government of the RSA and Others v Grootboom and Others 2001 (1) SA 46 (CC)
Hoffman v South African Airways 2001 (1) SA 1 (CC)
National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs 2000 (2) SA 1 (CC)
Soobramoney v Minister of Health 1998 (1) SA 765 (CC)
X v Commonwealth (1999) 167 ALR 529

Reports, manuals and other useful materials

Websites
AIDS Law Unit: www.lac.org.na
AIDS Law Project: www.hri.ca/partners/alp/
AIDS Legal Network: www.aidslegal.co.za
UNAIDS: www.unaids.org
Module 4
Health rights

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Module 4

The purpose of this module is to outline the rights of people making use of public and private health services. This module also looks at some of the questions commonly asked about confidentiality. Lastly, it introduces participants to some of the issues relating to HIV testing and exceptions to the requirement of informed consent.

By the end of this module, participants will be able to do the following:

- Define the right to health care and explain what it entails.
- Explain the importance of the right to confidentiality in the context of HIV and AIDS.
- Identify and discuss some of the commonly asked questions about confidentiality.
- Discuss some of the issues relating to HIV testing.
- Outline exceptions to the requirement of informed consent to HIV testing.

1. Introduction

One often hears of people living with HIV who have been sent away from a clinic or hospital by health workers after being told, "You know what's wrong with you and there's nothing we can do for you."

Many people complain that confidentiality about their HIV status was not respected, or that they were tested for HIV without their informed consent. Many were never even told that they may have to consent to a test, and many had no idea that they had already been tested.

In this module we will discuss the rights of patients in hospitals and clinics, and the rights of people making use of public and private health services.

Health rights come from:

- the Constitution;
- statute law; and
- common law.

There are also official policies that protect the rights of patients. The Ministry of Health and Social Services has issued The Patient Charter of Namibia, and professional bodies such as the Medical and Dental Board and the Nursing Association of Namibia have also issued ethical guidelines.

We will also focus on some key rights of patients which are especially important in respect of HIV testing and treatment.

2. The right to health care and medical treatment

Our Constitution does not guarantee the right to health. However, the State is obliged to actively promote the well-being of all Namibians. This means that the government must promote health by providing hospitals, clinics, medicine and staff to ensure health care services for everyone in Namibia. The constitutional right to equality entitles all people, including people living with HIV, to receive treatment in hospitals and clinics.
Hospitals and clinics may not refuse to treat a person because that person has HIV or AIDS. This would be unfair discrimination. If a hospital or clinic refuses treatment because of HIV or AIDS, the matter must be reported to:

- the Ministry of Health and Social Services;
- the Office of the Ombudsman; or
- the AIDS Law Unit of the Legal Assistance Centre (for legal advice).

It is stated in *Policies and Guidelines for HIV/AIDS Prevention and Control* that no health care worker should refuse to treat an HIV-positive person as there are virtually no risks to the health care worker if universal infection control precautions are taken. In fact, these patients should not be treated any differently from HIV-negative patients.

However, these *Guidelines* also say that health care workers who are subject to or experiencing certain infections or conditions such as pregnancy or an immune-compromised status may be required to avoid treating HIV-positive patients.

### 2.1 Public health care services

People living with HIV have a right to access any health care service available. The State has a duty to promote every person's right of access to health care services, and also to improve the range of health care services and treatments available to people living with HIV.

In order to improve medical diagnoses and treatment of HIV-related complications, the Ministry of Health and Social Services issued *Guidelines for the Clinical Management of HIV and AIDS*. These guidelines include Protocols on anti-retroviral therapies, which every patient living with HIV or AIDS has the right to receive as recommended in the *Guidelines*.

### 2.2 Private health care services

In the past, many medical aid schemes discriminated against people living with HIV and AIDS, either by not allowing them to become members or by excluding HIV-related treatments, including anti-retroviral treatment. This situation has improved, with many medical aid schemes now offering benefits to people living with HIV, including provision of treatment for opportunistic infections and anti-retroviral therapy.

### 2.3 The Patient Charter of Namibia

The Ministry of Health and Social Services published *The Patient Charter of Namibia* in July 1998. This Charter spells out the rights, duties and responsibilities of patients.

The Charter is not a law, but it provides guidelines which health workers have to follow. Many of the rights contained in the Charter, such as the right to confidentiality and privacy, form part of our common law. When these rights are violated, the matter can be taken to court.

Patients have the following rights:
The right of access to services, based on need. These services include:
- emergency services;
- examination and treatment as soon as is reasonably possible; and
- referral to the next level of care.

The right to be treated with integrity and dignity, including the right to:
- respectful and courteous treatment;
- privacy during consultation, physical examination and treatment;
- confidentiality; and
- detailed information on treatment and intervention, and consultation on options.

The right of access to information, including information on:
- available health and social services;
- one’s own personal files; and
- the identity of the health care worker

Patients are responsible for:
- knowing the contents of this Charter;
- keeping his/her own health passport safe and with her/him;
- asking for assistance and information;
- accepting that emergency cases receive priority;
- giving correct information when requested;
- respecting health care workers and their property;
- maintaining personal hygiene;
- signing a Refusal for Hospital Treatment form when refusing services and treatment, and then leaving the facility; and
- keeping facilities clean.

3. The right to confidentiality

Health care workers (doctors, nurses, psychologists, dentists, etc.) must keep all patient information confidential. This means that medical information can only be given to another person with the patient’s consent. This right to confidentiality is an ethical requirement and a legal requirement.

Confidentiality is very important in relation to HIV and AIDS. People who suspect that they may be infected with HIV must be encouraged to go for voluntary counselling and testing. Knowing that the result will be kept confidential encourages a person to go through this process. Similarly, confidentiality encourages those who know that they are HIV-positive to seek medical assistance without fear.

The Ministry of Health and Social Services recognises the importance of upholding the right to confidentiality. In its Policies and Guidelines for HIV/AIDS Prevention and Control published in June 2001, the Ministry states:

“Confidentiality of any health information is important. It is particularly so in the case of personal information related to HIV infection, including information about sexual behaviour and other practices. It is the duty of every health professional entrusted with such information to ensure that breaches of confidentiality do not occur.”
Professional bodies such as the Health Professions Council have introduced guidelines to regulate the conduct of their members. Ethical guidelines are not like laws made by Parliament in that they do not have the force of law. However, when these guidelines are not followed and the result is misconduct or improper conduct, the professional body can investigate the matter and take disciplinary steps against the person involved.

**Medical and Dental Council:** Established by the Medical and Dental Act 10 of 2004 to control the training, registration and conduct of health practitioners, this Council may undertake an inquiry into alleged improper conduct or misconduct, and take disciplinary steps against a person found guilty of these acts. The Council can caution, reprimand or suspend a person from practice for a specified period, and remove the person’s name from the list of registered professionals.

**Nursing Council of Namibia:** Established by the Nursing Act 8 of 2004 to control the training, registration and practices of nurses and midwives, who must be registered before they can practise in Namibia, this Council issues rules regarding the conduct of its members and can investigate cases of alleged improper conduct. The Council has the power to caution, reprimand or suspend nurses and midwives, or remove their names from the professional register.

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**Example**

The *Rules Relating to the Acts or Omissions by Registered Nurses or Enrolled Persons Constituting Improper Conduct or Misconduct* prohibit nurses from disclosing a patient’s medical information to anyone other than the patient, except where:

- the patient has consented to this in writing;
- a court has ordered the nurse to disclose this information; or
- disclosure is in the interests of a patient who is unable to give permission.

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**Important point**

All health care workers must be members of a professional body. They must respect the confidentiality of their patients’ medical information. Patients have a legal right to expect that health care workers follow the ethical guidelines of their professional bodies.

Confidentiality is not only an ethical requirement; it is also a **legal right** that will be upheld in a court of law.

Confidential information about a patient can only be given to another person if:

- the patient has consented to this;
- in the case of a patient who is a child, the child’s parent or guardian has consented; or
- the patient has died and his/her next-of-kin (closest family member) has consented.

To **control the epidemic**, confidentiality regarding HIV status is extremely important. People who need or want to know their status must be tested/diagnosed, and if necessary counselled and treated. Confidentiality encourages people to undertake this process. Most people will not
approach health care workers if they think that their medical information will be made public. Most will fear being tested and seeking treatment and other services. Those who have already tested HIV-positive face discrimination and stigmatisation, and fear of disclosure adds to their stress.

**Important case**

In *Jansen van Vuuren and Another v Kruger*, the South African Appellate Division decided that doctors have a legal duty to keep patients’ medical information confidential.

In this case, a certain McGeary applied for life assurance. He was tested for HIV and it turned out that he was HIV-positive. The results were sent to his doctor (Dr Kruger). The doctor told his friends, a dentist and another doctor about McGeary’s HIV status without McGeary’s permission. This information became public knowledge.

McGeary sued his doctor for infringing his legal and ethical rights to confidentiality. McGeary died of an AIDS-related illness during the trial. Despite his death, the executor of his estate proceeded with the case. The court found that Dr Kruger had not respected McGeary’s right to confidentiality and ordered him to pay damages in the amount of R5 000 for breaching this right.

The court said:

“AIDS is a dangerous condition. That on its own does not detract from the right of privacy of the afflicted person, especially if that right is founded in the doctor-patient relationship. A patient has the right to expect due compliance by the practitioner with his professional ethical standards. The [other doctor and dentist] had not, objectively speaking, been at risk and there was no reason to assume that they had to fear a prospective exposure.”

**Important point**

This case is important as it discusses the common law position regarding confidentiality. Namibia and South Africa have the same common law, therefore Namibia’s courts will most likely come to the same conclusion in a similar matter.

4. **Common questions about confidentiality**

4.1 **Can a health care worker tell another health care worker about your HIV status?**

- You must consent before a health care worker can give your medical information to another health care worker - even when you are being treated by more than one person in a hospital.
- If the health care worker explains why other doctors and nurses need to know about your HIV status, and if it is clear to you that this would be in your best interests as it would give you the treatment that you need, you will probably consent to this information being given out.
Other health care workers may need to know your HIV status if you need special treatment for an HIV-related infection.

If you refuse to consent to this information being given to other health care workers, your health care worker must respect your decision. But your health care worker must warn you if this may lead to your receiving unsuitable medical treatment or if it could endanger your health in any way. If you still refuse to consent in such a situation, your health care worker has the right to refer you to another doctor.

The Policies and Guidelines for HIV/AIDS Prevention and Control recognise that despite the duty of confidentiality, there may be circumstances in which health care workers have to share health information with other health care workers on a need-to-know basis. The Policies and Guidelines document states:

- Every effort should be made to obtain the informed consent of the patient.
- Counselling is very important and the patient’s informed consent usually results.”

4.2 Can a health care worker tell your sexual partner about your HIV status?

- A health care worker can only inform your sexual partner of your HIV status with your consent. Normally, counselling will help you to realise the need to inform your sexual partner/s, and to protect yourself and your partner/s.
- The Policy on HIV/AIDS Confidentiality, Notification, Reporting and Surveillance provides for involuntary partner notification (i.e. without the HIV-positive partner’s consent) by a health care worker only in the following circumstances:
  - Where the HIV-positive person has been thoroughly counselled about the need to tell his/her partner but has refused to do so or to allow the health care worker to do so.
  - Where there is a real risk of HIV transmission to an identifiable partner but the HIV-positive person refuses to share this information with his/her partner.
  - Where the HIV-positive person has refused to tell his/her partner and the health care worker gives reasonable advance notice of his/her own intention to inform the partner.
  - Where follow-up support will be provided to the people involved.

**Important point**

There may be circumstances in which the health care worker has a duty to breach confidentiality in order to inform an identifiable sexual partner of the risk of HIV transmission.

**Guidelines**

**Steps to take before deciding to inform a patient’s sexual partner**

We recommend that health care workers take these minimum steps before informing a patient’s known sexual partner of the patient’s HIV-positive status:

1. Provide in-depth counselling on why it is important to inform a sexual partner. If you are unable to provide this counselling, then refer the patient for HIV and AIDS counselling at a local counselling centre or another suitable place.
2. Explain your duty as a health care worker to warn sexual partners at risk of HIV infection.
3. Tell the patient that you may have to breach his/her right to confidentiality in the circumstances, and then offer the patient the opportunity to inform his/her sexual partner with or without your help.
4. Make the decision as to whether or not it is necessary to tell the sexual partner that your patient is living with HIV.

4.3 **Can a health care worker be sued for not informing a sexual partner that they are at risk of HIV infection?**

- The sexual partner of an HIV-positive person can sue a health care worker if the health care worker did not tell him/her that he/she is at risk of HIV infection.
- A health care worker has the duty to protect a sexual partner from possible infection only if:
  - the health care worker knows that the sexual partner is in danger (i.e. the person with HIV has refused to tell the partner or to use condoms during sex); and
  - the health care worker has followed the steps recommended above in trying to deal with the situation.
- A health care worker must believe a HIV-positive patient who says that his/her partner is not at risk of infection because they are practising safer sex, unless it is very clear that the patient not telling the truth. The doctor-patient relationship is so important that it can only be breached in very serious circumstances.
- To protect themselves, health care workers should keep written records of all discussions with patients.

4.4 **Informing a person’s family or caregivers of HIV status**

- A person living with HIV has to decide which family members or caregivers to inform. To make this decision, he/she may need counselling or advice from the health care worker.
- Unlike the legal duty to inform a sexual partner at risk, the health care worker has no legal duty to inform family members.

4.5 **Health care workers giving evidence on confidential medical information in court**

- A court can order a health care worker to disclose confidential medical information.
- The health care worker should inform the court that this breach of the confidential relationship is due only to the court having ordered it.

4.6 **Lay counsellors’ obligations with regard to confidentiality**

- A lay counsellor must also respect a person’s rights to privacy and medical confidentiality, even if there is no professional body for lay counsellors.
- Lay counsellors should follow the same ethical rules as doctors and nurses with regard to confidentiality.
- Lay counsellors may not tell other people what was discussed during a counselling session.
Most of the training for lay counsellors in Namibia is provided by organisations such as Catholic AIDS Action and the Philippi Trust of Namibia. These organisations have tried to standardise their training for lay counsellors, but this standardisation has not been finalised.

**Important point**

Lay counsellors should be guided by the following:

- The accepted guidelines of professional bodies such as the Nursing Council and the Medical Board.
- Constitutional and common law rules on privacy.

### 4.7 HIV status and medical certificates for employers

- An employee has to give his/her employer a medical certificate when booked off sick for more than two days.
- The Labour Act requires that information on the **nature and duration** of the specific illness be provided on the medical certificate, but this does not mean that the doctor has to write “HIV” or “AIDS”.
- As a medical certificate gives **confidential medical information** to an employer, an employee should discuss the matter with the doctor, asking for private information to be left out.
- It is **unethical and illegal** to give false information on a medical certificate.

### 4.8 HIV/AIDS and death certificates

- The right to confidentiality and privacy extends beyond death. People with HIV or AIDS have the right to have their confidentiality and privacy protected, even after they have died.
- The death certificate states the **cause of death**. The death certificate need only state “natural” or “unnatural”. A natural death occurs when a person dies of illness or old age, whereas an unnatural death could be the result of a car accident or murder. People do not die of AIDS. They die as the result of an illness.

### 4.9 HIV and AIDS reporting and confidentiality

Notification is important only if a person can contract a disease merely through social contact. Tuberculosis and Congo fever are examples of such diseases. It is important to notify people who could have been in contact with an infected person to prevent the spread of the disease.

With AIDS, the situation is different. People cannot become infected through ordinary social contact. A further problem is that of prevention. People living with HIV who need help may avoid medical assistance, fearing that health care workers will notify their families. This could result in rejection and even violence. If people living with HIV or AIDS do not seek medical care, this seriously affects prevention efforts.
The Policy on HIV/AIDS Confidentiality, Notification, Reporting and Surveillance allows reporting only for statistical purposes, on an anonymous basis.

Doctors report diagnosed HIV cases to the Ministry of Health and Social Services.

AIDS is a Class B notifiable disease. This means that doctors have to notify the Ministry of Health and Social Services of AIDS diagnoses on a monthly basis, but without identifying the persons concerned.

4.10 Remedies in the event that a health care worker breaches a person’s right to confidentiality

The HIV-positive person can claim damages from the health care worker, as in the Janse van Vuuren case.

The matter can be reported to the relevant professional body. These bodies can take disciplinary action against members who breach the right to confidentiality.

Important point
A civil claim must be instituted within the following periods:

- A claim against a government hospital or doctor/nurse: 12 months.
- A claim against a private hospital or doctors and nurses: 3 years
- A complaint must be made to the governing council/board within the time frame specified in the applicable Act.

5. Issues regarding HIV testing

The Constitution and the common law protect every person’s rights to privacy, dignity, autonomy and bodily integrity. These rights give every person the right to make decisions about his/her own body, including decisions about medical treatment and HIV antibody tests. This means that a person must consent to any medical treatment or testing. By implication, the person may refuse to consent to either treatment or testing.

Important case
In Stoffberg v Elliot (1923), the Supreme Court said:

“By entering a hospital, (a man) does not submit himself to such surgical treatment as the doctors in attendance upon him may think necessary ... By going into hospital, he does not waive or give up his right of absolute security of person, he cannot be treated as a mere specimen ... he remains a human being, and he retains his rights of control and disposal of his own body; he still has the right to say what operation he will submit to, and unless his consent to an operation is expressly obtained, any operation performed upon him without his consent is an unlawful interference with his right of security and control of his own body ...”
Important points

- **Consenting to medical treatment:** A person must be informed about the treatment, its nature and possible consequences, and must consent to undergoing the examination, testing, operation or other form of treatment before it starts.
- **Express permission:** There must be a clear indication of a person having consented to a specific medical treatment. This can be verbal or in writing.

Many people use the term “informed consent”. For consent to be “informed”, a person must have received all the relevant information prior to making a decision.

On informed consent, the *Policies and Guidelines for HIV/AIDS Prevention and Control* state:

> “Testing or screening (for HIV) should, with few exceptions, be undertaken only with the informed consent of the individuals or groups concerned and with appropriate guarantees of confidentiality. The notion of informed consent should be practical and not merely theoretical. It should thus be ensured by skilled, professional pre-test counselling so that the significance and possible implications of testing are fully grasped.”

There is a useful description in the *Guidelines of the Health Professions Council of South Africa* on what information is needed before it can be said that a person has given informed consent to an HIV test:

> “The patient should be given information regarding the purpose of the laboratory test; what advantages or disadvantages testing may hold for him or her as patient; why the surgeon or physician wants this information; what influence the result of such a test will have on his or her treatment; and how his or her medical protocol will be altered by this information. The psychosocial impact of a positive test result should also be addressed.”

**Example**

Nangula went to the doctor, complaining about headaches. The doctor examined her and found that she had a brain tumour. The doctor told her that the tumour could be removed with an operation. He told her that this was a difficult operation, with uncertain results. She could die during the operation, or the operation could leave her incapacitated. There was also a possibility that she would recover completely. Her alternative was to live with the tumour, in which case she would become blind within a few months and eventually die.

Nangula had to make a decision after receiving this information.

**Important points**

- Consent = Information + Permission.
- Consent can be verbal or in writing.
- A person may not be forced or tricked into consenting to testing or treatment.
5.1 Who may consent to an HIV test?

The person who will be tested must consent to an HIV test. Only in exceptional cases can another person consent, such as the parents of a child to be tested.

**Adults:** All adults with [legal capacity](#) and of [sound and sober mind](#) can give valid consent to treatment. Adults without legal capacity, such as a mentally ill person, cannot give consent without the assistance of a curator or guardian.

**Children and youths:** For [medical treatment](#) such as an HIV test, a person must be 14 years or older to consent. The parents or legal guardians of younger children must consent on the child’s behalf. For [operations](#), a person must be at least 18 years of age to consent.

5.2 Pre- and post-test counselling

A person who wants to have an HIV test should undergo pre- and post-test counselling.

- **Pre-test counselling** is conducted before the test. It helps a person to consider the effects of the test and the implications of the test results on them, their family and their lifestyle.
- **Post-test counselling** is conducted after a person has received the results of the HIV test. It helps a person to adjust to the results of the test, whether positive or negative.

The Policies and Guidelines for HIV/AIDS Prevention and Control recognise the importance of pre- and post-test counselling:

“[Pre-test counselling should help a person to] grasp the significance and possible implications of testing, [while post-test counselling] is an essential component of care and management of those who are infected. It is also a key element of prevention programmes by encouraging and sustaining behaviour change among those who are negative.”

**Important point**

Post-test counselling has two functions:

1. The care and management of people who have HIV.
2. It forms part of the prevention strategy in that it encourages behaviour change.

5.3 Deciding to test for HIV

- People can only be tested with their [informed consent](#), when they want to go for a test, i.e. when they go voluntarily.
- If a doctor thinks that an HIV test is necessary for diagnosis or treatment, the doctor must first discuss this with the patient as the patient’s consent is still required.
- In the case of a workplace injury, the person whose HIV status needs to be determined must consent to a test.
- People can be tested for HIV research purposes, but the researchers have to follow ethical guidelines.
5.4 **HIV testing that is unlawful**

- HIV testing without consent.
- HIV testing for employment purposes, unless allowed by law.
- HIV testing without a person's knowledge. A person must agree to each type of test. For example, he/she must agree to a cholesterol test and an HIV test and not just to blood tests.

5.5 **HIV testing when a health care worker has been accidentally cut or pricked**

- The patient cannot be forced to go for an HIV test.
- A test can be done only with the patient's informed consent.
- If the patient has already given blood and there is a sample available, that sample can be tested even without the patient's consent.

6. **Exceptions to the requirement of informed consent**

Informed consent for HIV testing is not needed in these cases:

- Emergencies.
- Testing done on blood and organ donations.
- Anonymous, unlinked testing.
- If a law allows for testing without informed consent.

We will look at each of these examples in more detail.

6.1 **Emergencies**

In an emergency, a doctor or hospital does not need a patient's consent before carrying out essential or life-saving treatments.

When the patient is unconscious, the doctor must try to get permission for the treatment from the patient's relatives. The treatment must be in the best interests of the patient, but also, treatment must not be contrary to a person's wishes or beliefs. For example, Jehovah's Witnesses are not in favour of blood transfusions.

In an emergency, health care workers can perform an HIV test only if the test is necessary to save the patient's life. It is very unlikely that an HIV test would ever be part of emergency life-saving medical treatment.

6.2 **Testing of blood and organ donations**

All donated blood must be tested for HIV and other blood-related diseases. When donating blood, people are required to complete a form which poses questions to determine whether they have any viruses or infections. The blood donor will be informed if HIV (or another disease) is found after screening. Blood that is not accepted is destroyed.
6.3 Anonymous, unlinked testing

Researchers use anonymous, unlinked HIV testing to see how HIV is spreading in the population. This research is done on an anonymous basis, meaning that no one is named, and it is unlinked, meaning that the person tested cannot be traced afterwards. In Namibia this kind of research is carried out with pregnant women who go to clinics for checkups.

6.4 Testing without consent

Testing can take place without consent if the law allows it. Namibia does not have any such laws. An example would be a law allowing for testing alleged rapists for HIV.

6.5 Mentally ill patients

A mentally ill person can be tested for HIV only if this is necessary for medical treatment. The results may not be used to discriminate against the patient. Under the Mental Health Act, the following persons can consent to testing or treatment on behalf of a mentally ill patient if the patient does not have the mental capacity to do so:

- The patient’s curator (the person appointed by a court to look after the mentally ill person).
- The patient’s spouse.
- The patient’s parent.
- The patient’s child, if the child is at least 21 years of age.
- The patient’s sibling (brother or sister).
- The medical superintendent of the institution caring for the patient if no next-of-kin can be found.

6.6 Refusing to undergo an HIV test

If a person refuses an HIV test when a health care worker thinks this necessary for a proper diagnosis, the health care worker should ask the person to get a second opinion. If the person still refuses, the health care worker may end the professional relationship, but must refer the person to another health care worker for care.

Important cases

C v Minister of Correctional Services

Prison authorities tested C for HIV without providing pre-and post-test counselling, and without obtaining his informed consent. The court awarded damages to C for the injury suffered by the taking of his blood without consent.

A v South African Airways

A applied for a position with South African Airways (SAA) as a cabin attendant. He was tested for HIV without his informed consent. Although he signed a consent form, the HIV test was not explained to him, and no pre- or post-test counselling was provided. During the trial, SAA admitted they should have obtained his informed consent and should have provided counselling. The matter was settled with R100 000 being awarded to A.
7. Activity

- Do you think that confidentiality is necessary in countering the HIV and AIDS epidemic?
- When do you think it may be in a patient's best interests to disclose his/her HIV status?
- Under what circumstances can HIV testing be conducted without the person's consent?

8. References and resource materials

Laws
Medical and Dental Professions Act No. 21 of 1993
Nursing Professions Act No. 30 of 1993
Labour Act No. 6 of 1992
Births, Marriages and Deaths Registration Act No. 81 of 1963
Children's Act No. 33 of 1960
Public Health Act No. 36 of 1919
Anatomical Donations and Post-Mortem Examinations Ordinance 12 of 1977
Medical Aid Funds Act No. 23 of 1995
Mental Health Act No. 18 of 1973

Policy documents
Ministry of Health and Social Services: The Patient Charter of Namibia, July 1998
Namibian HIV/AIDS Charter of Rights, 2000

Cases
Nanditume v Minister of Defence 2000 NR 103 (LC)
Jansen van Vuuren and Another NNO v Kruger 1993 (4) SA 842 (A) at 856EG
Stoffberg v Elliot 1923 CPD 148 at 149
C v Minister of Correctional Services 1996 (4) SA 292 (T)

Reports, manuals and other useful materials
AIDS Legal Network: AIDS Legal Quarterly.
Department of Health: Patients’ Rights - your right to dignity (pamphlet), 1999.
Websites
AIDS Law Unit, Legal Assistance Centre: www.lac.org.na
AIDS Law Project: www.hri.ca/partners/alp/
AIDS Legal Network: www.aidslegal.co.za
Treatment Action Campaign: www.tac.org.za
UNAIDS: www.unaids.org
World Health Organisation: www.who.org
Ministry of Health and Social Services: www.healthforall.net/grnmhss/
Module 5
The rights of employees

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Module 5

The purpose of this module is to familiarise participants with what the law says about discrimination and confidentiality in the workplace, and how the concept of human rights can help employers and employees cope with the challenges posed by HIV and AIDS in the workplace.

By the end of this module, participants will be able to do the following:

- List some of the key human rights relating to HIV and the workplace.
- Explain what the law says about discrimination in the workplace.
- Explain how people with HIV or AIDS can stand up for their rights at work.
- List the options available to anyone who feels that their rights in the workplace have been violated.
- Explain how confidentiality applies in the workplace.
- Explain why an employee can or cannot be fired due to being HIV-positive, taking too many sick-leave days or being incapacitated.
- Explain why pre- or post-employment HIV testing is or is not allowed, and in what circumstances this testing is or is not allowed.
- Explain how to develop an HIV and AIDS policy for the workplace.

1. **Introduction**

It often happens that people with HIV or AIDS are discriminated against at work, whether by their employers, their co-workers or both. Discrimination may take the form of a person being fired when his/her HIV status is found out. Or a person with HIV may be excluded from benefits such as medical aid or housing loans.

In this module, we will study what the law says about discrimination in the workplace, and discuss how people with HIV or AIDS can stand up for their rights at work.

2. **The laws dealing with HIV and AIDS at work**

The most important laws dealing with HIV, AIDS and employment are the Constitution and the Labour Act. Court decisions are also important, as they interpret the law and set precedents that have to be followed by other courts.

2.1 **The Constitution**

The Constitution gives all people in Namibia the right to equality and the right to protection against discrimination. The right to equality means that employees living with HIV may not be treated any differently from employees not living with HIV. This applies to both the public and private sectors.

Article 10 states:

“All persons shall be equal before the law. No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.”
The Constitution also protects the rights to dignity and privacy. This means that people living with HIV should be treated with respect, and any medical information that happens to be in the possession of the employer should be treated confidentially.

Article 8 states:

“The dignity of all persons shall be inviolable.”

**Important case**

In *Hoffman v South African Airways*, after considering medical evidence, the South African Constitutional Court found that SAA had unfairly discriminated against Hoffman by not employing him as a cabin attendant after he tested positive for HIV. The refusal of employment due to an HIV-positive status also violated his dignity.

### 2.2 The Labour Act

The Labour Act regulates relations between employers and employees. The Act lays down the basic conditions of employment, such as working hours, annual leave and sick leave. It deals with the termination of contracts of employment and unfair disciplinary practices. The formation and membership of trade unions and the relationships between trade unions and employers are also regulated by the Act.

The Act creates Labour Inspectors and Labour Courts to oversee the implementation of the Act, and to resolve disputes between employers and employees. The Act includes provisions dealing with the health and safety of employees at work.

For our purposes, the most important aspect of the Labour Act is Part XIII which deals with unfair discrimination or harassment in employment.

#### 2.2.1 Which employees fall under the Labour Act?

The Labour Act covers all employees and employers in the country except the members of the Namibian Defence Force (NDF) and the Namibian Police. But the provisions of Part XIII, dealing with unfair discrimination or harassment in the workplace, do apply to the NDF and the Namibian Police. This means that any employee who feels that an employer has discriminated against him/her can take the matter to the Labour Court.

In *Nanditume v The Minister of Defence*, the only Namibian case on HIV brought before the Labour Court, Haindongo claimed that the NDF unfairly discriminated against him by not employing him due to his HIV status. In terms of the recruitment policy of the Ministry of Defence, all potential recruits have to undergo a medical test, including an HIV test, before they are employed in the NDF. Haindongo was medically fit, but HIV-positive. The NDF refused to employ him because of his HIV status. The court held that the test is whether the person is physically fit to do the job at the time of employment, rather than whether or not the person is infected with HIV.
2.2.2 Protection offered by the Labour Act

The Labour Act protects an employee from:

- **unfair dismissal**, e.g. dismissal solely on the grounds of an HIV-positive status;
- **unfair disciplinary action**, e.g. being treated unfairly due to an HIV-positive status; and
- **unfair discrimination**, e.g. being discriminated against due to an HIV-positive status.

Disciplinary action or dismissals are **unfair** if:

- there was **no fair and valid reason** for the disciplinary action taken; and/or
- **proper procedures** were not followed.

**Valid reasons** for a dismissal include:

- **misconduct** - doing something wrong at work, such as stealing;
- **incapacity** - being unable to fulfil the requirements of the job, such as when a person is too sick to work; and
- **operational requirements** - when the needs of the business have changed to a large extent, such as in the case of retrenchments.

**Example**

A doctor tells a company that Justus is HIV-positive. The company dismisses Justus, saying that he is too ill to work. Justus knows that this is not true as he completed a marathon last weekend. He could go to the District Labour Court to claim that this was an unfair dismissal.

2.2.3 Unfair discrimination

Section 5 of the new Labour Act prohibits unfair discrimination or harassment in employment or occupation.
The prohibited grounds of discrimination are:

- Sex
- Race
- Colour
- Ethnic origin
- Religion
- Creed
- Social status
- Economic status
- HIV/AIDS
- Political opinion
- Marital status
- Sexual orientation
- Family responsibilities
- Disability

The last six grounds of discrimination are not mentioned in the Constitution. The Labour Act therefore lists more grounds of prohibited discrimination, but this does not mean that the Constitution offers less protection. The constitutional right to equality is still the most important safeguard against discrimination.

**Example**

Access to employment includes applying for a job. In Nanditume’s case, the NDF required a pre-employment HIV test. The results of this test excluded Nanditume from becoming a soldier.

Employers are allowed to choose between applicants, but this choice must be based on reasonable criteria. For example, an employer can require that applicants for a secretarial job are able to type 60 words per minute. An employer cannot require that applicants be unmarried with no children.

Many people with HIV or AIDS are not allowed to be members of medical aid schemes or pension funds. Some medical aid schemes exclude benefits relating to HIV. Many people living with HIV or AIDS cannot make use of housing allowances because they cannot get insurance to cover the mortgage. These are examples of discriminatory practices which have to be addressed by legislation or by the courts.

**3. The National Code on HIV/AIDS and Employment**

In 1998, the Minister of Labour issued the *Guidelines for the Implementation of the National Code on HIV/AIDS in Employment* under the Labour Act. With this Code, the Ministry of Labour hopes to address most of the issues relating to HIV and AIDS in the workplace, in order to prevent new infections as well as provide optimal care and support for people in the workforce.
The Code states that employees will not be subjected to compulsory workplace testing for HIV; and provides that employees living with HIV or AIDS have a legal right to the confidentiality of their medical records.

**Important point**

The National Code on HIV and AIDS in Employment is a guide for all employers. It encourages employers and employees to jointly develop information, education and prevention programmes addressing HIV and AIDS in the workplace.

### 3.1 Health and safety at work

If there is an injury at work that results in bleeding, there is a possibility that HIV can be transmitted. Under the Labour Act, employers have a duty to take all steps possible to ensure the safety, health and welfare of employees at work, and this includes a safety plan, proper training in safety procedures and information on how to protect oneself from infection in the event of an accident or injury.

With the application of universal precautions in the workplace, the possibility of workplace HIV infection through blood spills and accidents would be greatly minimised.

**Important point**

Health and safety in the workplace should include:
- a safety plan;
- information on how to prevent infection;
- protective clothing and equipment; and
- training to foster an understanding of why the above are important and necessary.

### 3.2 The Employees Compensation Act

- Under the Employees Compensation Act, employees who earn less than N$72 000 per year have the right to claim compensation for industrial illnesses and accidents that happen at work.
- HIV is not recognised as an occupational disease, with the result that people who contract HIV through their employment are not entitled to claim employees’ compensation under the Act.
- However, it would still be possible to sue an employer directly for HIV infection in the workplace, particularly if negligence on the employer’s part can be proved.

**Example**

In Vigario v Afrox Ltd, the widow of a man who died after an explosion in an Afrox factory successfully sued the company for damages resulting from her husband’s death. The court found that the company was negligent by not having foreseen that an explosion could take place in the factory where there were high oxygen levels (part of the manufacturing process), and that Afrox could and should have taken reasonable steps to prevent the accident from happening.
3.3 The Social Security Act

Employees who are paid-up members of the Social Security Fund are entitled to claim sick leave and disability benefits under the Social Security Act.

Disability benefits for HIV and AIDS are provided as a one-off payment of N$2 500. This is the same amount paid out by the Social Security Fund on the death of an employee.

Namibian social security legislation does not provide for unemployment benefits.

**Guidelines**

**Steps to take to prove that HIV infection resulted from an accident at work**

1. Report the accident to the employer.
2. The injured person (the person with an open wound) should take an HIV test, with pre- and post-test counselling. Ask him/her to take the test.
3. He/she may refuse to take the test. Keep a record of any and all refusals to do so.
4. If the person does refuse to consent to the test, report this to the manager in charge of safety.
5. To make sure of the injured person's HIV status, he/she should be tested again six weeks to three months after the accident.
6. The injured person (or complainant) can claim more compensation if it can be proved that personal protective equipment was not available, and HIV infection was the result of negligence on the part of the employer who did not provide a safe workplace.

**Important points**

- Report the accident to the employer immediately.
- If an accident is not reported to the employer or the Social Security Commission within six months, an employee loses the right to claim.
- A case against a state hospital must be launched within 12 months of the accident.
- If the employer is sued (because there is no claim in terms of the Employees Compensation Act), the claim must be instituted within three years of the accident.

4. Issues relating to HIV/AIDS and employment

4.1 HIV testing for job applicants

- An employer cannot force a job applicant to undergo pre-employment testing for HIV. Any company or government department requiring this is acting unlawfully.
- An exception to this rule is where legislation such as the Defence Amendment Act allows for HIV testing - although this is controversial.
4.2 Refusal to employ a person due to HIV

- It is unfair discrimination if an employer refuses to employ a person who is HIV-positive or suspected of being HIV-positive, unless the employee is too sick to work.

4.3 Confidentiality of medical information at work

- An employee is not legally obliged to tell an employer that he/she is HIV-positive. An employee’s medical condition is private.
- It is unlawful for a health care worker to inform an employer of an employee’s HIV status without the employee’s consent.
- A breach of confidentiality can result in a claim for damages against the employer.

4.4 Entitlement to sick leave

- All employees, including people living with HIV or AIDS, are entitled to sick leave under the new Labour Act. This Act prescribes how sick leave is to be calculated.
- Employees are entitled to full pay for sick-leave days.
- Employees must provide their employer with a medical certificate if they are off sick for more than two days.

**Important point**

An HIV-positive employee who falls ill should be treated like any other employee.

The important thing is how the illness affects the employee’s ability to work and not whether the illness is due to HIV.

4.5 Dismissal of employees with HIV or AIDS

- It is unfair to dismiss a person living with HIV or AIDS who is still fit to work.
- An employee living with HIV or AIDS may be dismissed only if he/she is incapacitated (too sick to work), and the dismissal must be executed in accordance with the Labour Act.

**Important point**

It is unlawful to dismiss an employee on the suspicion that he/she has AIDS.

An employee has to be incapacitated before he/she can be dismissed.
Guidelines

Obligations of an employer in the event of dismissal for incapacity

1. Investigate the **extent** of the incapacity.
2. Establish whether the incapacity is **permanent or temporary**.
3. Investigate **alternatives to dismissal**, such as shorter working hours.
4. Consider the possibility of **alternative employment** before terminating the employee’s services. Alternative employment is also referred to as **reasonable accommodation**.

Employers do not have to create new jobs to provide alternative employment.

The **National Code on HIV/AIDS in Employment** also deals with HIV and incapacity, alternative employment and termination of employment of HIV-positive employees.

4.6 **Refusal of co-workers to work with a person who has HIV or AIDS**

- The best strategy for addressing the fear and ignorance that leads co-workers to refuse to work with a colleague who has HIV or AIDS is to have a **workplace policy on HIV and AIDS** which provides the workforce with **information** and **education** on HIV and AIDS.
- A **safety policy** and the application of **universal precautions** in case of an accident will help to address the fears of co-workers.
- Thereafter, **disciplinary action** should be taken against those workers who refuse to work with the person who has HIV or AIDS.

The **National Code on HIV/AIDS in Employment** requires that employees with HIV or AIDS are protected from **victimisation**.

4.7 **Developing an HIV and AIDS policy for the workplace**

- Workplaces should have a policy on HIV and AIDS.
- Workplace policies are crucial for overcoming stigmatisation and victimisation of people with HIV or AIDS in the workplace.

4.8 **HIV/AIDS and employee benefits**

- The unfair discrimination prohibited by the Labour Act applies to employee benefits as well. Employee benefits include medical aid, pension, and death and disability benefits.
- As HIV and AIDS lead to more illness and death among younger employees, they do have an impact on employee benefit schemes.
- This is not sufficient cause to discriminate against people with HIV or AIDS by denying them all benefits.
**Important case**

**NS v SA Old Mutual Life Assurance Society LTD t/a Old Mutual and Others**

NS worked with Old Mutual as a probationary employee. She became a permanent member of the staff, but had to undergo medical examinations to determine whether she could become a member of four employee benefit funds. The medical examination showed that she was not insurable and excluded her from three funds. She referred the dispute to the Commission for Conciliation, Mediation and Arbitration, but resigned before there was a decision. She laid a complaint of unfair labour practice in the Labour Court. Old Mutual tried to have the case dismissed by claiming that her resignation from the company meant that she no longer had a right to sue the company.

The Labour Court decided that NS could sue Old Mutual, because the injury was the result of an unfair labour practice during her employment, which did not fall away with her resignation.

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5. **Enforcing employees’ rights in the workplace**

When an employee has been unfairly dismissed (e.g. due to HIV status) or has suffered unfair disciplinary action, the employee can report the matter to the District Labour Court (DLC). The DLC will refer the matter to a Labour Inspector for negotiations.

If the matter is not resolved, the case will proceed to court.

6. **Activity**

- A farmer requires his farm workers to take an HIV test. Any worker who refuses to take the test will be fired. Is this action legal? What can these farm workers do to protect their rights?
- Patience works in a fish factory where most of the working space is refrigerated. She had TB and has been diagnosed with HIV. She has fully recovered from the TB. Her doctor has advised her to go back to work, but to try to avoid working in cold areas. What alternative employment opportunities could the employer investigate to accommodate Patience?
- Daniel is a doctor in a public hospital. He tests HIV-positive following a needle-stick injury. Can he claim treatment with anti-retroviral drugs (which will keep him fit and at work for longer) from the Employees Compensation Commissioner?
- Are there any types of employees who should be required to disclose their HIV status due to the nature of their work (e.g. doctors and nurses who come into contact with patients)?
- Amelia works in a factory. One of her workmates is involved in an accident which results in a loss of blood. Amelia helps to clean up the blood, and in the process contracts HIV. What steps does Amelia need to take to prove that the HIV infection was a result of the accident at work?
7. References and resource materials

Laws
Constitution of the Republic of Namibia
Labour Act No. 6 of 1992
Employees Compensation Act No. 30 of 1941
Social Security Act No. 34 of 1994
Defence Amendment Act No. 8 of 2001

Policy documents
ILO Convention on Discrimination in respect of Employment and Occupation, 1958
SADC Code on HIV/AIDS and Employment, 1997

Cases
Nanditume v Minister of Defence 2000 NR 103 (LC)
Hoffman v South African Airways 2001 (1) SA 1 (CC)
NS v SA Old Mutual Life Assurance Society LTD t/a Old Mutual and Others (2001) 22 ILJ 1864 (LC)
Vigario v Afrox Ltd 1996 (3) SA 450 (WLD) at 463

Reports, manuals and other useful materials
AIDS Legal Network: AIDS Legal Quarterly.

Websites
AIDS Law Unit, Legal Assistance Centre: www.lac.org.na
AIDS Law Project: www.hri.ca/partners/alp/
AIDS Legal Network: www.aidslegal.co.za
Ministry of Labour: www.grnnet.gov.na/Contact_Us/Ministries
International Labour Organisation: www.ilo.org
UNAIDS: www.unaids.org
Module 6
Prisoners’ rights

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Module 6

The purpose of this module is to outline the rights of prisoners and explain how the HIV/AIDS epidemic affects these rights. Prisoners have constitutional rights and statutory rights. We shall look at both of these types of rights.

By the end of this module, participants will be able to do the following:

- Distinguish between the constitutional rights and statutory rights of prisoners.
- Outline and discuss some of the important issues relating to prisoners with HIV or AIDS.
- Explain what prisoners can do if they feel that their rights are being abused.

1. Introduction

We often think that prisoners have no rights because they are no longer free to move around or practise their professions. This is wrong. Prisoners, including those with HIV or AIDS, have rights. All the rights in the Bill of Rights still apply to them, particularly the rights to equality and dignity. Some rights, such as the rights to liberty and freedom of movement, are limited for prisoners by virtue of their being in prison.

**Important case**

In *Namundjebo v Commanding Officer, Windhoek Prison*, the Supreme Court held that to put prisoners in leg-irons or chains was a violation of the right to dignity because it constituted degrading treatment. This action was therefore unconstitutional. Namundjebo and other prisoners had been chained for five to six months when they were recaptured after escaping from prison. The Court said:

"... Imprisonment does not deprive a prisoner of all or every basic right which the ordinary citizen enjoys ... To imprison a person would in many respects invade his or her rights and also the right to dignity but these inroads are the necessary result of the incarceration and are sanctioned by the Constitution, Art 7. That does not mean that a prisoner can be regarded as a person without dignity."

2. Prisoners’ rights

2.1 Constitutional rights

Rights that apply specifically to prisoners come into effect at the time of arrest and detention, and are specified in the Constitution. The Constitution prohibits arbitrary arrest and detention. In other words, a person may be arrested only for a good reason and in accordance with the proper procedures. The Constitution also requires that people be informed promptly of the reason for their arrest, and states that they must be brought to a court within 48 hours of their arrest or as soon as possible thereafter.
Prisoners have rights, despite the fact that they are in prison. Some of their rights are limited by their custody in prison, but many other rights operate without limitation. For example, prisoners have:

- the right to equality and non-discrimination;
- the rights to life and dignity; and
- the right not to be tortured or treated cruelly or inhumanely.

Our Bill of Rights is not specific about issues such as prisoners’ food, accommodation and protection, but the working of the above-mentioned rights ensures that prisoners are entitled to an adequate standard of living under prison conditions. Because the State has taken away the prisoners’ liberty, it has the responsibility of looking after their well-being in prison.

**Example**

Prison officials may not put prisoners with HIV in a separate part of the prison. This will show other prisoners that they have HIV, which is a breach of confidentiality. Also, it may lead to discrimination against these prisoners as well as other violations of their rights, such as subjecting them to physical violence.

People suspected of having committed a crime are presumed (believed to be) innocent until proven guilty in a court of law. This is meant to protect people from being found guilty by the media or just because people suspect they are guilty.

The following rights specified in the Constitution ensure a fair trial:

1. The right to a fair and public hearing by an independent and impartial court.
2. The right to a court hearing within a reasonable time.
3. The right to call and cross-examine (question) witnesses.
4. The right to adequate time and facilities to prepare a defence.
5. The right to legal representation.
6. The right not to give evidence against oneself or one’s spouse.
7. An accused can only be charged with a crime which the law identified as a crime at the time that the crime was committed.
8. A person cannot stand trial twice for the same offence.

These rights ensure that people’s rights are protected before and during a trial. They also ensure that innocent people are not found guilty. The HIV status of an accused person should not play a role in deciding whether the person is guilty or innocent.

**Important point**

A prisoner awaiting trial has the right to be presumed innocent even if he/she is accused of a very serious crime, such as murder, and even if there is evidence that he/she has committed the crime. This is necessary because all the evidence is considered in a trial to determine a person’s guilt or innocence.
Example

Jane is accused of murder. A man was shot, and the police found her holding the pistol (gun). Although it is known that Jane shot the man, she is still presumed to be innocent as the evidence may show that she acted in self-defence because the man was trying to rape her. If the evidence does prove that she acted in self-defence, she will be found not guilty.

Guidelines

**HIV and AIDS and sentencing**

HIV and AIDS may play a role when the court comes to sentencing.

On the one hand, having HIV or AIDS may be a **mitigating factor** (a factor that makes the crime less severe and the sentence lighter), for example where an unemployed man living with HIV has stolen bread to feed his sick child.

On the other hand, having HIV or AIDS may be an **aggravating factor** (a factor that makes the crime more severe and the sentence heavier), for example where a man who knows he is HIV-positive rapes a woman (see the Combating of Rape Act 8 of 2000).

A magistrate or judge can impose a sentence of **correctional supervision** or **community service** if there are good reasons for not sending a convicted person to prison.

Health considerations or illness can be one good reason, but there is no rule that ill health will automatically be a reason for not imposing a sentence of imprisonment.

Important case

In *S v Cloete*, the Supreme Court in South Africa changed a person’s sentence for fraud into correctional supervision after he had served five years of his sentence.

The Court said that his HIV status was a good reason to change his sentence.

*“His condition is such and has changed so that to continue to serve imprisonment would be far harsher a sentence for him than for any other person serving a similar sentence.”*

2.2 **Statutory rights of prisoners**

There is legislation dealing with the rights of prisoners. The **Criminal Procedure Act** prescribes the procedures that must be followed in a criminal trial as well as what evidence may be used against an accused. For example, the Criminal Procedure Act prohibits the use of a confession made by an accused if the confession was not made voluntarily, such as when police torture a person to get him to admit that he stole a car.

The **Prisons Act**, on the other hand, deals with the care of prisoners and matters of discipline in prisons. The Minister of Safety and Security may issue regulations that must be followed by prison authorities with regard to the operation of prisons.
The Prisons Act also covers prison officials. While we concentrate on the rights of prisoners, especially those with HIV or AIDS, we should remember that prison staff have the same rights as all employees with regard to HIV and AIDS. These include information and education on HIV and AIDS, non-discrimination and the right to work in a safe and healthy place where universal precautions are followed to prevent HIV infection.

**Important points**
- Prisoners have the right to consult with lawyers when they prepare their defence in a criminal case.
- Prisoners have the right to receive visitors, letters, food and literature.
- Prisoners have the right to report violations of their rights or abuses of the prison’s power to the Ombudsman.

### 3. Prison policies on HIV and AIDS

In 2000, the AIDS Law Unit of the Legal Assistance Centre worked with officials of the Namibian Police and Ministry of Safety and Security to formulate a policy on awaiting-trial prisoners and HIV/AIDS, but this policy has not yet been finalised due to delays on the government’s part.

The main obstacle is giving condoms to prisoners. The government representatives feel that the police and prison wardens should not provide condoms to prisoners because Namibian law views sodomy as a crime, and condoms would encourage this illegal act between prisoners.

This is a clear example of the discrimination faced by men who have sex with men, and the government’s short-sightedness in its HIV/AIDS prevention programme. For the government, the main issue is the illegality of sex between men. This stance loses sight of reality: some prisoners do have sex; some may be HIV-positive; and when prisoners leave prison, they will have sex, be it with men or women, thereby encouraging the spread of HIV.

### 4. Some important issues with regard to prisoners with HIV or AIDS

#### 4.1 The right to medical treatment

Prisoners have a right to medical treatment. The Prisons Act says that a medical officer must be appointed for every prison. This medical officer is responsible for the health care of all prisoners, and must visit the prison regularly to see to the health of the prisoners and to examine prisoners when necessary.

Every prisoner must be examined when admitted and when released.

The treatment of prisoners must be of the same quality as the treatment provided by the State to patients. The prisoner must consent to any medical examination, test or treatment. The medical
officer is allowed to treat a prisoner without the prisoner’s consent if the doctor wants to restore or safeguard the health of the prisoner or to prevent the spread of any disease. For instance, TB and meningitis can spread very quickly in a prison, and the doctor must act quickly to stop the spread of such diseases. It is in the best interests of all prisoners for a prisoner with TB to be treated as soon as possible.

**Important case**

In the South African case, *Van Biljon and Others v Minister of Correctional Services*, the Court ordered the Department of Correctional Services to provide combination anti-retroviral therapy to two prisoners, because under the circumstances this therapy would be adequate medical treatment as required by the South African Constitution. The Court said:

"Even if it is, therefore, accepted as a general principle that prisoners are entitled to no better medical treatment than that which is provided by the State for patients outside, this principle can, in my view, not apply to HIV infected prisoners. Since the State is keeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside, the adequate medical treatment with which the State must provide them must be treatment which is better able to improve their immune systems than that which the State provides for HIV patients outside."

The finding in this case does not mean that all prisoners are entitled to anti-retroviral therapy. It is only applicable to the facts of the particular case.

**Guidelines**

The *United Nations Standard Minimum Rules for the Treatment of Prisoners* also provides for medical services for prisoners. With regard to specialist treatment, it requires that:

"Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers."

**Important point**

Prisoners with HIV or AIDS are more vulnerable to opportunistic infections than they would be outside prison due to, for example, crowded conditions and lack of exercise and clean air.

**4.2 The right to consent to treatment and HIV testing**

Testing a prisoner for HIV without his/her knowledge and consent is against the law. The policy of the Ministry of Health and Social Services is to require informed consent to an HIV test and to provide both pre- and post-test counselling. The Ministry of Safety and Security also follows these guidelines.
Prisoners undergo a health examination after being admitted to prison. This can include testing for contagious diseases such as hepatitis and TB if the medical officer thinks it is necessary. To prevent the spread of infections, the new prisoners are kept apart from the other prisoners until the medical officer has examined them.

### Important case

In the South African case of *C v Minister of Correctional Services*, a prisoner successfully sued the Department of Correctional Services because he was tested for HIV without his informed consent. The Court found that his rights had been violated because there was no pre- and post-test counselling, with the result that it could not be said that the prisoner had given his informed consent to the test. The Court said:

> "Generally speaking, it is axiomatic [self-evident] that there can only be consent if the person appreciates and understands what the object and purpose of the test is, what an HIV-positive result entails and what the probability of AIDS occurring thereafter is.”

### 4.3 The right to medical confidentiality

Prisoners have a right to confidentiality regarding their health. Prison officials may only disclose health information, including the results of an HIV test, with the prisoner’s consent.

The World Health Organisation (WHO) recommends that any kind of marking or coding of a prisoner's file or cell to indicate HIV status should be prohibited.

### 4.4 Segregation of prisoners with HIV or AIDS

Segregation of prisoners with HIV or AIDS indicates the HIV status of these prisoners to other prisoners and to the wardens. This violates prisoners’ rights to privacy and confidentiality, and may lead to acts of discrimination against the prisoners with HIV or AIDS.

Prisoners may be separated from other prisoners only on medical grounds. If there is a possibility of other prisoners being infected with a contagious disease such as TB, this will be a medical ground for segregation. HIV is not contagious. One does not get HIV from normal social contact with other people. Most of the illnesses associated with AIDS are also not infectious, so there are no medical grounds for separation because of HIV or AIDS.

### 4.5 HIV and AIDS education and provision of condoms in prisons

Theoretically, prisoners face the same risks of HIV infection as people outside prison. In fact, usually, conditions in prisons pose a higher risk of HIV infection. Whether the authorities like it or not, there is sexual activity between prisoners. Also, tattooing and other practices that take place in prison carry a risk of HIV infection.
Prisoners have the same right to protect themselves from infection as people outside prison, and this protection comes in the form of HIV education and provision of condoms. However, the prison authorities in Namibia have indicated that they will not provide condoms to prisoners as they do not want to promote (illegal) sex between men.

The decision not to provide condoms to prisoners is unwise for the following reasons:

- Prison authorities have a duty to protect the prisoners in their care. The Ministry could be sued if a prisoner can prove that he was infected while in prison.
- Medical treatment in prisons should be equal to that provided by the State outside prison. People have access to HIV-related information and condoms outside prison, so it stands to reason that these should also be provided inside prison.
- The prison authorities’ stance on condom provision is evidence of prejudice against men who have sex with men. It is also a form of discrimination against them. The message received by prisoners is that their equality, dignity and lives have less value than those of non-prisoners.
- It is bad public health policy. The HIV/AIDS epidemic must be fought on all fronts. By not providing for groups who are particularly at risk of HIV infection, such as prisoners and men who have sex with men, the government is creating a loophole through which HIV can spread in the community.

Even if condoms are not distributed in prisons, prisoners should have the right to ask for and receive them.

4.6 Discrimination against prisoners with HIV or AIDS

Prisoners with HIV or AIDS have the right to equality and non-discrimination. Their right to dignity should also be respected.

**Important case**

In the South African case of *W and Others v Minister of Correctional Services*, the Court ordered the Minister of Correctional Services to:

1. Observe confidentiality about the status of all persons who are HIV-positive or suffering from AIDS.
2. Protect, as far as possible, prisoners from stigmatisation on account of their HIV status or sexual orientation.
3. Provide, or cause to be provided, condoms to all prisoners.
4. Provide or make available the necessary and appropriate medical attention and treatment to HIV-positive prisoners.
5. Carry out and permit testing for HIV or AIDS only with the informed consent of the prisoners involved.
6. Not deprive any prisoner of access to work solely on the basis of his or her HIV status.
7. Not discriminate against HIV-positive prisoners compared to other prisoners as far as the provision of accommodation and ablution facilities are concerned.
8. Provide appropriate education and information about the HIV and AIDS condition to staff and prisoners.”
4.7  Early release because of serious illness

The Prisons Act provides for the release of prisoners on medical grounds. A medical officer can recommend the early release of a prisoner who is suffering from a dangerous, infectious or contagious disease, or where it would be best to release the prisoner because of his/her physical condition.

HIV or AIDS is not a reason for early release, but a prisoner dying of an AIDS-related illness may be considered for early release.

Of course, there should be no discrimination between prisoners with HIV or AIDS and other seriously ill prisoners when considering early release.

In addition to early release on medical grounds, prisoners, including those with HIV or AIDS, have the right to be considered for parole and remission of sentence, depending on their behaviour in prison, the seriousness of the crime and the time already served.

5.  Enforcing the rights of prisoners

Prisoners have rights, but discrimination and abuse are still commonplace. Prison authorities often fail to look after prisoners properly, and living conditions in prisons are often very poor.

What can prisoners do to have their concerns addressed?

- Prisoners can complain to the officer in charge of the prison or the Commissioner of Prisons.
- Prisoners have the right to take legal action against the prison authorities. Many prisoners have been successful in taking the prison authorities to court. An example is the case where prison officials at Windhoek Prison kept prisoners in leg-chains for months, a practice that was declared unconstitutional by the High Court.
- Prisons are inspected regularly by visiting justices. Magistrates, judges, Members of Parliament and Regional Governors are all visiting justices. They may inspect any part of the prison, test the quality and quantity of the food given to the prisoners, investigate prisoners’ complaints and inspect prison records. They write their observations and comments in the visiting justices’ book, which is sent to the Commissioner of Prisons.
- Prisoners can complain to the Ombudsman about abuse and human rights violations.

6.  Activity

- Do you think condoms should be made available to prisoners? Give reasons for your answer.
- What can prisoners do to get adequate services to cope with HIV and AIDS in prison?
- While Sakkie was being interrogated and beaten by prison wardens, he confessed that he knew of his HIV infection when he had sex with Maria. He was accused of attempted murder. Can this confession be used against him in his trial?
- Tom was HIV-positive when he was sentenced to two months’ imprisonment. While in prison, the prison wardens, on realising that he was HIV-positive, segregated him from the rest of the prisoners. Discuss.
- Can an HIV-positive prisoner obtain an early release from prison? Explain.
7. References and resource materials

Laws
Constitution of the Republic of Namibia
Prisons Act No. 17 of 1998
Criminal Procedure Act No. 51 of 1977
Police Act No. 19 of 1990
Labour Act No. 6 of 1992

Policy documents
UN Standard Minimum Rules for the Treatment of Prisoners, adopted 30 August 1955
World Health Organisation Guidelines

Cases
Namundjepo v Commanding Officer, Windhoek Prison 1999 NR 271 (SC) at 282 BC and 282 GH
C v Minister of Correctional Services 1996 (4) SA 292 (T) at 301BC
Minister of Justice v Hofmeyr 1993 (3) SA 131 (A)
S v Berliner 1967 (2) 193 (A)
S v Cloete 1995 (1) SACR 367 (W)
Van Biljon v Minister of Correctional Services 1997 (4) SA 441 (CPD) at 457DE
W & Others v Minister of Correctional Services CPD, 1996 (unreported: Case No 2434/96)

Reports, manuals and other useful materials
AIDS Legal Network: AIDS Legal Quarterly.

Websites
AIDS Law Unit, Legal Assistance Centre: www.lac.org.na
Ministry of Health and Social Services: www.healthforall.net/grnmhss/
General government ministries contact page: www.grnnet.gov.na/Contact_us/Ministries
Namibian Police: www.nampol.gov.na
AIDS Law Project: www.hri.ca/partners/alp/
AIDS Legal Network: www.aidslegal.co.za
United Nations: www.un.org
UNAIDS: www.unaids.org
World Health Organisation: www.who.org
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Module 7

The purpose of this module is to introduce participants to non-indemnity insurance contracts and to explain how they operate.

By the end of this module, participants will be able to do the following:

- Define the term ‘insurance’.
- Define the term ‘non-indemnity insurance’.
- Explain how insurance companies operate.
- Discuss the duty to disclose and the consequences of non-disclosure.
- Outline the procedure followed by insurance companies when testing for HIV prior to granting insurance cover.
- Discuss the importance of confidentiality with regard to doctors and insurance companies.
- Explain how to cancel an insurance policy.

1. Introduction

People take out insurance for various reasons. With life insurance, a person insures his/her life or the life of another person. When the insured person dies, a sum of money is paid out to the beneficiaries (meaning persons who benefit from an insurance policy, a will or something else).

HIV and AIDS are important issues with regard to insurance. When you apply for life insurance, the insurer requires you to go for an HIV test. Most insurers do not grant life insurance to people who test positive for HIV, but some do. Usually, however, either the premium (the monthly payment to the insurance company) is so high that very few people living with HIV can afford the policy, or the amount that will be paid out is limited.

Testing for HIV when applying for life insurance can be problematic. Often, no pre- and post-test counselling is provided, and obviously, an HIV-positive result will not be kept strictly confidential since the insurance company has to be informed. Furthermore, people who test positive and are denied life insurance also cannot obtain a home loan because they do not have life insurance.

If an applicant for life insurance refuses to take an HIV test, he/she will probably not be granted a life insurance policy.

Guidelines

When applying for life insurance, be aware of the following:

1. You will be asked to take an HIV test.
2. You cannot be tested for HIV without your informed consent.
3. You may refuse to take the test, but then the insurer may refuse to insure you.
4. You have the right to receive pre- and post-test counselling.
5. The insurer must respect your right to confidentiality if the test result is positive.

It is no wonder that people ask if it is fair for insurers to refuse to grant life insurance to people with HIV or AIDS. In this module we will try to address this question of fairness.
Important point

People living with HIV or AIDS should find out about financial planning options other than a life insurance policy. Insurance companies offer other products that may be suitable, such as an education policy for children or unit trusts.

2. **Why have life insurance?**

An insurance policy is a contract (an agreement) between an insurance company and a person. It is meant to protect the person and his/her family from financial difficulty when an accident, robbery, illness, death or some other event results in financial loss.

We insure our own lives for different reasons, the most common reason being that we may die prematurely and leave behind financial commitments and people who depend on us financially. Life insurance primarily helps us to protect the financial security of our dependants. We pay an insurance company to take on the risk. This means taking out a policy, or in other words, paying the company a monthly premium in return for the company paying out a sum of money to the policy-holder’s dependants or other beneficiaries in the event that the policy-holder dies.

Example

Rosa has two children. She worries that if she dies unexpectedly, her children will not be cared for. She insures her life for N$250 000, meaning that if she dies, the insurance company will pay her children N$250 000. This would enable them at least to cover their basic expenses (food, clothing, etc.) for some time, and perhaps additional expenses.

Before agreeing to grant a life insurance policy, the insurance company considers how likely it is that the applicant will die. In other words, the company assesses the risk of death and then decides whether or not to grant the policy. To assess the risk of death, and then to decide what the value of the policy and the monthly premium should be, the company will ask many questions about the applicant’s health (including HIV status).

3. **Indemnity and non-indemnity insurance**

Indemnity insurance (often called short-term insurance) means that the insured person is entitled to recover from the insurer the **actual commercial value** of what he/she has lost as a result of the insured event, such as a robbery and damage to property.

Non-indemnity insurance means that the sum which the insured person is entitled to receive from the insurer **does not necessarily bear any relation to the actual loss** suffered. Life insurance contracts and those covering personal accident and illness are examples of non-indemnity insurance contracts.

With non-indemnity insurance, if the insured person dies, the money will be paid to his/her beneficiaries. The monthly premium amount paid by the insured person depends on the contract: if you want a higher amount to be paid out, you will have to pay a higher premium.
4. How insurance companies operate

An insurance contract is an agreement between the insurer and the insured, just like any other contract. Before the insurance company can decide whether or not to provide insurance, it needs information from the applicant to assess the risk to the company.

Insurance companies require an applicant to answer a long list of questions, such as whether the applicant has any serious disease (e.g. TB or cancer) or dangerous habits (e.g. smoking or alcohol abuse) that may affect life expectancy (how long the applicant is likely to live). The applicant may also be required to go for medical examinations and tests, including an HIV test.

**Example**

Smoking is a high-risk activity since a smoker stands a higher chance than a non-smoker of dying prematurely due to lung cancer or another illness encouraged by smoking. A smoker will therefore be charged a higher premium to minimise loss to the company if the smoker dies soon after taking out the policy.

4.1 HIV screening

Applicants for life insurance and disability insurance are tested for HIV and other potentially life-threatening conditions such as high blood pressure and respiratory infections. People are screened for HIV for the following reasons:

- A person infected with HIV may well die or be incapacitated at a younger age than a person not infected with HIV.
- The risk of insuring an HIV-positive person is heavy for insurers because the person stands a higher chance than an HIV-negative person of dying within a few years.
- Insurance companies cannot afford to make a loss and thereby disadvantage their clients. If a person's HIV-positive status is not known to an insurer and the person pays a low-risk premium, the company will suffer a loss if the person dies or is incapacitated due to HIV. If the company suffers a loss, premiums would increase for all its clients, and insurers want to keep premiums low, especially for low-risk policy-holders.

Insurance companies also protect themselves by inserting exclusionary clauses into contracts, meaning clauses to exclude liability (legal responsibility) or to limit liability on the company's part should a policy-holder dies of an HIV/AIDS-related disease.

5. The duty to disclose

Every applicant for insurance will have to complete a long questionnaire to enable the insurance company to assess the risk of insuring the person.

The questions and answers concern material facts. Material facts, such as whether a person suffers from a serious illness, are crucial to the insurer’s decision to grant insurance. Insurers regard HIV as a material fact that must be disclosed.
Important point

The applicant has a legal duty to disclose all material facts when answering the insurer’s questionnaire because non-disclosure of a material fact can affect the insurer’s assessment of the risk. All questions must be answered truthfully because the insurer can refuse to pay out under the policy if a false answer is given.

Important case

In the case of Wilke NO v SWABOU Life Assurance Company Limited, the High Court found that SWABOU Life did not have to pay out the policy-holder’s life insurance because, when he applied for the policy, he failed to mention in the questionnaire that he abused alcohol. The Court said:

“An insurer can avoid an insurance contract if it was induced to enter into it by a misrepresentation of the fact made by the proposer (the applicant) which was false in a material particular.

An applicant for insurance is thus under a duty to disclose to the insurer, prior to the conclusion of the contract, all relevant, that is, material, facts within his knowledge, even though he does not appreciate their materiality, and which are material for the insurer to know. What information is material for the insurer to know is information that may influence his opinion as to the risk that he is incurring and, consequently, as to whether he will take it, or what premium he will impose.”

Both the insurer and the applicant have a duty to disclose. The insurer must tell the applicant before granting the policy that, for example, the company will not pay out if a policy-holder has HIV or AIDS. If the insurer does not do so, the policy-holder will think that he/she has full cover, even if this is not the case. This would be fraud on the insurer’s part.

6. The consequences of non-disclosure

The Long-Term Insurance Act states that any person who applies for insurance and who makes a false statement or conceals material facts is committing a crime. There are serious consequences when an applicant does not disclose all the material facts:

- The applicant commits a crime if he/she lies in response to a question. The applicant can be charged with fraud.
- The insurance company may declare the contract null and void (meaning that the contract is deemed never to have existed) if it thinks that a particular answer would have affected its assessment of risk.
- The insurer may also declare the contract null and void if the applicant is negligent (makes a mistake) in answering a question on a material fact.

If a material fact is not disclosed, it is more than likely that the insurance company will not have to pay out under the policy, even in the event of a death or serious damage to property.
Important points

- An applicant for insurance should think very carefully about every question posed in the insurance application form or questionnaire.
- If unsure of how to answer, a person should ask for help to complete the form.

7. Why HIV testing for insurance purposes may sometimes be a problem

- People are often tested without their informed consent and without adequate pre- and post-test counselling. Many insurance companies do not offer post-test counselling, but instead forward the HIV-positive test results to the applicant’s doctor, leaving the doctor to talk to the applicant.
- Some insurance companies do not respect the confidentiality of the applicant’s medical status.
- People who find out in this way that they have HIV, and who are then denied an insurance policy, immediately experience their first form of HIV-related discrimination.

8. Exclusionary clauses

Insurance policies have exclusionary clauses which exclude the insurance company’s liability under certain circumstances. For example, HIV or AIDS may be excluded from a policy, which means that the company will not pay out if the insured person dies of an HIV/AIDS-related illness. Most insurance companies have exclusionary clauses concerning HIV and AIDS.

If you believe that an insurance company is unfairly refusing to pay your insurance benefits, you should contact the AIDS Law Unit at the Legal Assistance Centre for help.

Examples

- Being HIV-positive or suffering from AIDS at the time of death
  The exclusionary clause in an insurance policy may say that the company will not pay out if the policy-holder has HIV or AIDS at the time of death. A person infected with HIV or suffering from AIDS will not necessarily die of an HIV/AIDS-related condition. He could die in a car accident. Sometimes the insurer will still refuse to pay out, even if the cause of death has nothing to do with HIV or AIDS. This would constitute an unfair and illegal refusal.

- The insurance company decides on the cause of death or disability
  Some exclusionary clauses say that the insurance company will not pay out if it decides that the policy-holder has died or become disabled due to HIV or AIDS. Any company is capable of making an unfair and illegal decision.
Important points

Be careful when you sign an insurance contract!

- Read the contract carefully before you sign, particularly the exclusionary clauses. Ask someone to explain the contract to you, and especially the exclusionary clauses.
- Exclusionary clauses may say that the insurance company will not pay out if the insured dies of AIDS or an AIDS-related or HIV-related condition.
- Ask someone to explain the policy to you if the language is difficult for you to understand or if you cannot read.

9. Insurance companies and confidentiality

Breaches of confidentiality on HIV status often occur when insurance companies arrange for HIV tests. Applicants for insurance have a right to confidentiality on their HIV status and can make a civil claim if the insurance company discloses this information unlawfully.

It is difficult, however, to find out who gave out the information. This is because many people are involved in the application procedure and any one of them could learn of your HIV status and unlawfully tell others.

Important points

- People are entitled to confidentiality regarding their medical condition. A person must consent to information about his/her medical condition being given to someone else.
- If a person can prove that an insurance company has leaked this information, he/she can institute a civil claim against the company.

10. Insurance policies and the insured’s doctor

An insurance company cannot know that an insured person has died or become incapacitated or disabled due to HIV or AIDS unless someone informs the company. In the case of death, or if incapacity or a disability prevents the insured person him/herself from informing the company, it is best that the person’s doctor does so, rather than anyone else.

But, doctors are under an ethical and legal duty not to give out confidential medical information without a patient’s permission to disclose such information.

To get past this duty of confidentiality, insurance companies often ask the insured person to sign an authorisation form that will allow his/her doctor to provide confidential information to the company after the person has died or if the person is unable due to incapacity or disability to provide this information him/herself. Of course, this would require the doctor to disclose the cause or suspected cause of the death or incapacity/disability, be it HIV or AIDS or anything else.
Important points

- An insurance contract may include an **authorisation clause** which gives the insurance company permission to ask the insured person’s doctor for confidential medical information should the insured person die or become too incapacitated to provide this information him/herself.
- There may be a separate form called a **client authorisation form** which authorises the insured person’s doctor to release confidential medical information.
- If the insured person has signed the contract with the authorisation clause as well as the client authorisation form, the insurance company has the right to ask his/her doctor for confidential medical information and the doctor must provide the information.
- If it is not clear to the applicant that an insurance contract includes an authorisation clause and a client authorisation form, the applicant should ask the insurance company if it does. Of course, if an applicant does not want to sign the contract due to the inclusion of this clause and form, he/she may not be granted the insurance requested.
- If you are unsure of the meaning of any part of an insurance contract, get advice before signing it!

II. Cancelling a policy

Many insurance contracts make provision for the policy-holder to cancel the policy. This is more correctly called **surrendering** the policy.

The insurance contract will say that the policy can be surrendered only after a **specified period**, such as one or two years. People can surrender a policy before the date specified, but then they will lose the contributions (monthly payments) which they have made so far. In other words, the company will keep all the money that the person has paid into the policy. People who surrender a policy usually lose a lot of money.

On the other hand, a policy-holder who contracts HIV after signing an insurance contract will not be paid out if HIV is excluded under the policy’s exclusionary clauses. Therefore, surrendering the policy may not mean losing a lot of money; in fact, it may be best to surrender it.

Important points

- Get advice before surrendering a policy.
- If HIV and AIDS are excluded under the policy’s exclusionary clauses, find out what effect an HIV-positive status will have on the policy and your finances should you die due to HIV or AIDS. This may affect your decision as to whether and when to surrender the policy.
- After surrendering a policy, you may want to apply for a new policy. For the same benefits, however, you will have to pay more because you are older.
- Surrendering a policy can be useful if you need money urgently and there is no other source available to you.
- It is possible to borrow money from a bank against an insurance policy. You may have to **cede** (transfer ownership of) the policy to the bank to serve as **surety** (security).
12. Insurance and home loans

If a person applying for a home loan does not earn enough money to repay the loan or does not have enough assets to cover the value of the loan, the bank will require the person to take out a life insurance policy for the same amount as the loan. The buyer will then have to cede the policy to the bank so that the bank will be able to recover the money loaned if the buyer dies or becomes incapacitated. In other words, the bank would claim the proceeds of the policy.

Most people infected with HIV are refused life insurance, so it is not easy for them to get a home loan, but it is not impossible.

Guidelines

1. When applying for a loan to buy a home, try to persuade the bank to give you the bond (the loan) without life insurance. Banks are sometimes willing to grant a bond for a limited amount of money without life cover.
2. Ask somebody (a parent, business partner or friend) to stand as surety for the bond. This means that they will take responsibility for repaying the loan if you cannot.

13. Activity

- What can Lisa do to make sure that an insurance company does not abuse her rights when she applies for an insurance policy?
- A person living with HIV dies in a car accident. The insurance company refuses to pay out, relying on the exclusionary clause that excludes liability if the insured person had HIV at the time of death. Is this an acceptable reason for not paying out? If not, why not?
- If a bank refuses to grant someone a home loan because he/she is HIV-positive, is this unfair discrimination? If so, what can be done to challenge this policy?
- Ndapanda has found out that she is HIV-positive. She has held an insurance policy for five years, but knows that the policy excludes liability for death due to HIV or AIDS. What can she do?

14. References and resource materials

Laws
Constitution of the Republic of Namibia
Long-Term Insurance Act No. 5 of 1998
Short-Term Insurance Act No. 4 of 1998

Policies
Namibian HIV/AIDS Charter of Rights, 2000

Cases
Wilke NO v SWABOU Life Assurance Company Limited 2000 NR 23 (HC) at 44BC and 44FH
Southern Life Association v Johnson 1993(I) SA 203
Reports, manuals and other useful materials

Websites
AIDS Law Unit, Legal Assistance Centre: www.lac.org.na
AIDS Law Project: www.hri.ca/partners/alp/
AIDS Legal Network: www.aidslegal.co.za
Life Offices’ Association: www.loa.co.za
Module 8
Criminal law

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Module 8

The purpose of this module is to outline the role of criminal law in the prevention of HIV and AIDS.

By the end of this module, participants will be able to do the following:
- Outline the role of criminal law in the prevention of HIV and AIDS.
- Discuss whether or not a person infected with HIV can be charged with a criminal offence if he/she infects another person.

1. Introduction

HIV and AIDS have implications for Namibia’s criminal law. People living with HIV or AIDS experience violations of their rights. Many people are tested for HIV without their consent. People living with HIV have been assaulted or killed merely because they are HIV-positive. Most rape survivors and victims of sexual assault face the fear that they may have contracted HIV.

Efforts to prevent the spread of HIV and AIDS are often hampered by criminal law. Campaigns aimed at sex workers and men who have sex with men are often neglected because both sodomy and prostitution are illegal.

In this module we will address such issues so that we can better understand how HIV and AIDS influence criminal law and how they challenge the rules of criminal law.

2. An overview of criminal law

Criminal law consists of rules and procedures to regulate our behaviour in society. Criminal law also prescribes the punishment that the State can impose on a person who commits a criminal offence. The threat of punishment is meant to ensure that we do not commit crimes.

Our criminal law comes from our common law and statute law. Statute law creates new crimes, and older statutes may be amended (changed) or repealed (declared invalid and scrapped). Crimes such as murder and theft are not created by statutes; they are common law crimes which have always been common law crimes in this country, even in the colonial era.

Today, common law and all common law crimes must be in line with the Namibian Constitution. If not, the High Court and Supreme Court can declare them unconstitutional and scrap them.

3. The rights of an accused person

People do not lose their constitutional rights just because they are accused of having committed a criminal offence. Our Constitution says that people are presumed innocent until proven guilty beyond reasonable doubt by a court of law. This presumption means that an accused person must be treated as if he/she is innocent.
People who are accused of having committed a crime (or who have been arrested) still have rights that must be respected by the police and the prison authorities.

The rights pertaining to arrest and detention, and the procedures for dealing with an accused person after arrest and during a trial, are contained in the Bill of Rights in the Constitution and in other laws such as the Criminal Procedure Act.

**Important terms**

**Accused:** We use the term ‘accused’ or ‘accused person’ because the person has only been *charged* with a crime but not yet *convicted* for the crime.

**Alleged crime:** The term ‘alleged’ (as in *alleged* rape or *alleged* rapist) is used until a court has found the accused guilty of the crime. This is because we presume the person’s innocence as required by the Bill of Rights.

The Criminal Procedure Act says that a sample of blood or semen can be taken against the wishes of an accused person if the person **resists** the taking of a sample.

**Important points**

- A blood sample may show that a person was driving under the influence of alcohol.
- A semen sample can prove whether a person charged with rape did indeed have sexual intercourse with the rape survivor.

### 4. Sentencing and the rights of guilty people

Once an accused has been found guilty of having committed the crime, the **presiding officer** (magistrate or judge) must impose a sentence that fits the crime. This part of the trial is called **sentencing**.

In deciding on an appropriate sentence, the presiding officer must look at all the circumstances of the accused and decide whether there are circumstances that should make the sentence either lighter, i.e. **mitigating circumstances**, or heavier, i.e. **aggravating circumstances**.

It is not a crime to be HIV-positive, so the HIV status of an accused should not affect the court’s **verdict** (judgement). But a person’s HIV status may have an effect on the sentence given. The Combating of Rape Act stipulates that if a rapist who is convicted for the first time knew at the time of the rape that he was infected with any serious **sexually transmitted disease**, such as HIV, he must be sentenced to imprisonment for no less than 15 years.

Where HIV has no relation to the crime, the presiding officer will have to consider the following factors when sentencing:

- The health of a person infected with HIV may deteriorate (worsen) as a result of imprisonment.
- A person infected with HIV or suffering from AIDS may need medical care.
- A person suffering from AIDS may need to be near family, friends and support groups.
5. The role of criminal law in the prevention of HIV and AIDS

Crimes such as rape and sexual abuse directly increase a person’s chances of being infected with HIV if the accused was HIV-positive at the time of committing the crime and the sexual act resulted in tearing and bleeding. This is a serious problem in Namibia where we have high rates of rape and sexual abuse, including rape and abuse of children.

Both sex work and sodomy increase people’s vulnerability to HIV and AIDS. Because sex work and sodomy are viewed as crimes in Namibia, it is more difficult to ensure that HIV prevention and safe sex messages reach sex workers and men who have sex with men. Therefore, criminal law is placing sex workers and men who have sex with men at higher risk of HIV infection, which means that these groups are being marginalised by criminal law.

We will now discuss rape, sodomy and commercial sex work in more detail to show how criminal law affects HIV prevention work and increases the relevant people’s risk of HIV infection.

5.1 Rape

The new Combating of Rape Act defines rape as follows:

“The intentional commission of a sexual act with another person under coercive circumstances.”

The Combating of Rape Act says that marriage or a relationship is not an excuse for rape. This means that a person can be charged with rape even if the alleged rape took place between a husband and wife or between parties in a relationship.

This definition of rape is gender-neutral, with the result that both a man and a woman can be the complainant or the accused person in a rape case. According to the previous definition, a rape occurred only if a man had sex with a woman without her consent.

Previously it was not possible to charge a man with rape if he had sex with another man. He could only be charged with sodomy or indecent assault. It is now possible to charge a man with the rape of another man.

The new definition of rape is much broader than the previous definition and therefore makes it possible to charge more people with rape. It was necessary to broaden the definition to address the many cases of rape and sexual abuse in our society.
5.1.1 Compulsory testing of accused rapists

The Combating of Rape Act is silent on the question of whether an alleged rapist can be forced to undergo an HIV test. The South African Law Commission recommends that a person arrested for having committed a sexual offence should be forced to have an HIV test if this is requested by the complainant and ordered by a magistrate. Such a test would give the complainant some peace of mind and help her/him to decide whether or not to take post-exposure prophylaxis (PEP) treatment to prevent HIV infection. Whether our policy-makers will come to the same conclusion as the South African Law Commission remains to be seen.

5.1.2 Bail and sentencing

The Combating of Rape Act gives a complainant the opportunity to oppose the granting of bail (temporary release from prison upon payment of a sum of money) when the accused appears in court for a bail hearing. Likewise, the investigating officer has to inform the prosecutor if there is any reason to believe that the complainant would be at risk if the accused were to be released on bail.

As we have seen, if the convicted rapist knew at the time of the rape that he/she had a serious sexually transmitted infection, he/she must be sentenced to not less than 15 years in the case of a first conviction for rape.

The new definition of rape helps both women and men to protect themselves from rape and from HIV and AIDS. The stiff minimum sentence for a rapist who knew of his/her HIV infection at the time of the rape should help to deter people from committing rape. But, as so few people know their HIV status, knowledge of HIV infection at the time of the rape may not be easy to prove.

<table>
<thead>
<tr>
<th>Important points</th>
</tr>
</thead>
<tbody>
<tr>
<td>▶ Both women and men have the right to say NO to sex, and to unsafe sex, even in a marriage or a relationship.</td>
</tr>
<tr>
<td>▶ Sex without the consent of one party is a violation of the non-consenting party’s autonomy and is a criminal offence.</td>
</tr>
<tr>
<td>▶ Educational campaigns directed at both men and women to make them aware that any person has the right to refuse sex will reduce the risk of HIV transmission.</td>
</tr>
</tbody>
</table>

5.2 Sodomy

Namibian common law prohibits anal sex between two males, i.e. sodomy, even if this involves two consenting adult men.

With unprotected anal sex, i.e. without the use of a condom, there is a high risk of HIV infection due to the possibility of tearing and bleeding during sex.

Because sodomy is viewed as a crime, very few men who practise this form of sex are willing to disclose the fact. This secrecy makes it very difficult in Namibia to target men who have sex with men for HIV prevention and education campaigns. As a result, there are still many men in the
country who have not been reached with HIV and AIDS prevention messages and who do not know how to protect themselves from HIV infection.

**Important points**

- It is not only gay men who risk being infected with HIV through unprotected anal sex, but all men who have unprotected sex with men.
- By providing HIV/AIDS prevention education to men who have sex with men, women can be protected too. For this reason, among others, we strongly advocate for HIV prevention and education campaigns in prisons, as well as condom provision in prisons. These measures would help to prevent HIV infection in prison that can spill over into society.
- The crime of sodomy should be declared unconstitutional because it discriminates against men on the basis of sexual orientation.
- The crime of sodomy hinders HIV prevention efforts.

### 5.3 Commercial sex work

The Combating of Immoral Practices Act prohibits some activities relating to commercial sex work or prostitution (having sex with someone in return for money) and soliciting (asking someone to have sex with you in return for money).

It can be argued that some provisions of this Act are unconstitutional as they do not respect the freedom to practise any profession or to carry on any trade of one's choice, nor the rights to privacy and equality contained in the Bill of Rights.

Also, the illegality of commercial sex work makes people involved in this profession very vulnerable to contracting HIV and AIDS.

**Important points**

- Sex workers cannot insist that their clients use condoms for fear of their clients harming them, or for fear of losing their clients.
- Sex workers who are harmed by a client are afraid to report the crime because they fear that the police will charge them for contravening the Combating of Immoral Practices Act.
- Because sex work poses a high risk of HIV infection, the clients of sex workers who don’t practise safe sex may well transmit HIV to their spouses or other sexual partners (women or men), and from there the infection spreads into their communities.
- The illegality of commercial sex work makes it difficult to run HIV/AIDS education and prevention campaigns with sex workers.
- The stigma associated with sex work and the illegality of sex work also prevent sex workers from accessing reproductive health services and from obtaining treatment for sexually transmitted infections (STIs). There is a close link between HIV and all other STIs: the presence of any STI increases the chances of HIV infection.
Decriminalisation of sex work would help to control the spread of HIV by allowing for the running of prevention campaigns and a proper support network for sex workers.

The Gender Research and Advocacy Project of the Legal Assistance Centre is looking at advocacy measures to decriminalise commercial sex work.

6. Criminal law and conduct that puts others at risk of HIV infection

One of the most crucial questions concerning HIV and AIDS is whether or not a person infected with HIV can be charged with a crime if he/she has infected another person.

The answer depends firstly on whether the HIV-infected person knew of the infection and whether he/she knew what to do to prevent its transmission. Proving beyond a reasonable doubt that someone wilfully infected someone else is very difficult. Transmission of HIV has a lot to do with social factors which may lead an infected person to have unsafe sex, such as fear, denial, prejudice and ignorance. Secondly, to prove wilful infection, it must be proved that the complainant was HIV-negative before the incident and that she/he was infected as a result of the incident.

We have not had any criminal cases in Namibia dealing with the question of whether or not a person deliberately passed on HIV. Some years ago, a woman claimed that a man infected her with HIV and the HIV test proved this. The man was charged with assault with intent to cause grievous bodily harm or attempted murder, but then it transpired that his HIV test result was falsified, so the case was dropped.

In the South African civil case of *Venter v Nel*, a woman successfully claimed damages from a man who had infected her with HIV. He knew that he was HIV-positive when he had sex with her. The Court awarded damages for both past and future medical expenses, and general damages for reduction of life expectancy, stress, pain and suffering. This case is not very helpful because the man did not defend the matter, so the legal issues were not properly argued and decided upon.

**Important points**

- A person who wilfully infects another person could be charged with the following crimes:
  - Murder
  - Culpable homicide
  - Assault
  - Assault with intent to cause grievous bodily harm
  - Attempted murder or attempted assault, where the accused intended to infect the other person but did not succeed in doing so.
- In charging a person with conduct that places others at risk of HIV infection, it is very difficult to prove the various elements of the alleged crime.

We will now discuss whether Namibia's existing criminal laws are sufficient to deal with wilful transmission of HIV, or whether new laws should be enacted to criminalise this practice.
7. **Do we need a new criminal law to criminalise wilful transmission of HIV?**

The discussion on the use of the existing criminal laws to deal with wilful transmission of HIV makes clear that it is difficult to prove this crime under the existing common law. Other policy considerations that should influence deliberations on this question of law are as follows:

- Criminal law may not be the best way to control voluntary sexual behaviour. For example, people still practise sex work and sodomy despite these being criminal acts in Namibia.
- Criminalising wilful transmission makes all HIV-positive people potential criminals.
- Criminalising wilful transmission may further marginalise groups who are already especially vulnerable to HIV infection, such as sex workers and men who have sex with men.
- The position of women under a new criminalisation law is not clear. On the one hand, a new law would better protect women from infection by their partners. On the other hand, many women know their HIV status, having been tested at an antenatal clinic. If HIV-positive, a woman may fear the consequences of telling her partner, even if it was that partner who infected her. If transmission is criminalised, such a woman could be prosecuted for not telling her partner, or assaulted or deserted if she does tell her partner.
- A criminalisation law could sabotage efforts to encourage voluntary testing for HIV because many people would not want to know their status for various reasons.

Namibia’s *Policies and Guidelines for HIV/AIDS Prevention and Control* recommend treating wilful transmission of HIV as **attempted murder**. This is in line with the United Nations *International Guidelines on HIV/AIDS and Human Rights*, which recommend using general criminal laws to deal with the deliberate or intentional transmission of HIV rather than creating specific laws to deal with this.

8. **The role of criminal law in HIV and AIDS prevention**

Criminal law certainly has a role to play in curbing, if not stopping, harmful behaviour relating to HIV and AIDS. However, strangely enough, it may not play much of a role in efforts to slow down or stop the HIV/AIDS epidemic, for the following reasons:

- HIV is transmitted mainly through consensual sexual intercourse between partners who are not aware of their HIV status. There is no crime involved in consensual sexual intercourse.
- The HIV/AIDS epidemic is a public health issue, not a criminal law issue. The public health system and public health programmes are primarily responsible for dealing with it.
- If people know that they can be prosecuted for transmitting HIV, a great many people will not want to be tested for HIV and will not be open about an HIV-positive status. This will hinder prevention and control efforts.
- If there is a criminal law directly relating to HIV transmission, many people may think that the law will protect them from HIV infection, which would undermine prevention efforts.

For these reasons, most countries and international organisations such as the United Nations Joint Programme on AIDS (UNAIDS) recognise that the best way to control the transmission of HIV is through principles of public health care, not criminal law.
The UN *International Guidelines on HIV/AIDS and Human Rights* also recommend reviewing and/or repealing criminal laws that prohibit sex between consenting adults (e.g. sex workers and men who have sex with men) or laws that prohibit sex where there is no victimisation involved. It is particularly important to ensure that such laws do not pose an obstacle to providing HIV/AIDS prevention and care services.

### 9. Conclusion

The intentional transmission of HIV is *wrong* and criminal law should take its course against it. But criminal law, even if a new crime of intentional transmission is introduced, will not be of much help in efforts to control or stop the HIV/AIDS epidemic. In fact, it may have the opposite effect by driving people away from the assistance they need to protect themselves and others.

### 10. Activity

- Jason has sex with Bobby. Jason knows that he is HIV-positive, but he does not tell Bobby and they do not use a condom. Can Jason be charged with a crime?
- Christine and Festus are married. Neither of them knows their HIV status as neither of them has been tested for HIV. Festus, who drives trucks for a living, has sex with sex workers along the road. Christine is not aware of this. When she falls pregnant, she goes to the clinic where she consents to being tested for HIV. She is told that she is HIV-positive. Can Festus be charged with a crime?
- Sarah is a sex worker. Gert meets her one day and pays her for sex. They fall in love and start a relationship. After a few months, Gert finds out he is HIV-positive. Can Sarah be charged with a crime?
- How can we reduce the rate of violent crimes against women, especially crimes that may transmit HIV?
- What can be done to help sex workers protect themselves from being infected with HIV?
- What is your opinion of the role of criminal law in HIV/AIDS prevention?
- Jonathan decides to tell his family that he is HIV-positive. After doing so, his brother gets angry and starts beating him, telling him to take his clothes and go away and never come back to the house. How can we stop this kind of behaviour?

### 11. References and resource materials

**Laws**
- Constitution of the Republic of Namibia
- Criminal Procedure Act No. 51 of 1977.
- Combating of Rape Act No. 8 of 2000
- Combating of Immoral Practices Act No. 21 of 1980

**Policy documents**
**Cases**

Venter v Nel 1997 (4) SA1014 (D)

**Reports, manuals and other useful materials**


AIDS Legal Network: *AIDS Legal Quarterly*.


**Websites**

AIDS Law Unit, Legal Assistance Centre: www.lac.org.na

Ministry of Health and Social Services: www.healthforall.net/grnmhss/

General government ministries contact page: www.grnnet.gov.na/Contact_us/Ministries

AIDS Law Project: www.hri.ca/partners/alp/

AIDS Legal Network: www.aidslegal.co.za

Module 9
Thinking about the future

Contents

1. Introduction
2. What is a will?
3. Making a will
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   2.2 Who can be heirs under a will?
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   2.4 Appointment of an executor
4. Formal requirements of a valid will
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Module 9

The purpose of this module is to introduce participants to the concept of a will, will-making and the formal requirements that make a will valid.

By the end of this module, participants will be able to do the following:
- Explain what a will is and why people should have a will.
- Outline the formal requirements for a valid will.

1. Introduction

HIV causes a lot of anxiety. One way to deal with the anxiety is to be aware of what course the infection could take and plan for the future. A will is an important element of this planning.

If you are HIV-positive, there may be times when you are too sick to work and to make important decisions. It is therefore important to have someone in your life who can make decisions on your behalf. A crucial thing to be considered is the effect that a family member’s death, and especially the breadwinner’s death, could have on the rest of the family, particularly on young children.

In this module we will discuss a few issues that a person living with HIV or AIDS should consider. Ultimately, it is up to the person living with HIV or AIDS to make the big decisions, and it is very important to respect that person’s autonomy.

2. What is a will?

A will is a legal document that specifies how a person wants his/her estate (money and property) to be managed and distributed after he/she dies. The person who makes this will is called the testator.

If a person does not leave a will, or the will is declared invalid, the person will have died intestate, which results in the distribution of the person’s estate according to the laws of inheritance or descent of the country in which the person lived.

A will enables a person to select his/her heirs (people who inherit an estate) rather than allowing the state laws to decide who the heirs should be.

A will also safeguards a person’s right to select someone to serve as the guardian of his/her young children.

Because a will is so important, the law requires it to have certain elements to be valid. Without these elements, it will be declared invalid. It may also be declared invalid if it is discovered that the person made the will as the result of undue influence, fraud or mistake.

A will also allows a person to decide who could best serve as the executor (administrator) of the estate, rather than allowing a court to appoint a stranger as the executor. The executor has to distribute the property fairly to the heirs/beneficiaries while protecting their interests.
3. **Making a will**

3.1 **Who can make a will?**

- Any person who is at least 16 years old can make a will.
- The testator must be **mentally capable** of making a will, meaning that he/she must understand the consequences of the will and must intend these consequences. A person who is drunk or mentally ill is deemed not to be mentally capable of making a valid will.

**TIP:** It is easier to prove that a testator was mentally capable of making the will if the document is **dated**. If more than one will exists, dating each one makes clear which one is the most recent. The most recent will is the one that should be given effect to.

3.2 **Who can inherit under a will?**

Generally, any person, group or organisation can inherit under a will.

The following people cannot inherit under a will:

- If the testator was killed, the person/people who killed him/her.
- The person who writes the will or the spouse of the person who writes the will on behalf of the testator. If Kristina writes her mother’s will, she cannot inherit from her mother.
- The people who sign the will as witnesses, and their spouses.
- The person who signs the will on behalf of the testator if the testator cannot personally sign, and his/her spouse.

3.3 **The contents of a will**

The testator can include any directions regarding his/her property in a will, as long as it is not any of the following:

- **Illegal** (against the law)
  - For example, you cannot say that your son can inherit if he burns down the town hall.
- **Against public morals**
  - For example, you cannot state that your daughter must marry David before she can inherit.
- **Too vague or uncertain to be carried out**
  - For example, you cannot say that your son should inherit *the thing that makes doof-doof*. Nobody knows what this means!

3.4 **Appointment of an executor**

The **executor** of the estate is the person who is appointed to administer the estate. The executor may not be a witness to the will. If the person you appoint as your executor signs your will as a witness, the appointment will be without effect.
4. Formal requirements for a valid will

As a will is a formal legal document, it must comply with strict rules for it to be valid. In other words, the will must be properly executed to be valid.

1. The will must be in writing. It can be typed on a computer or typewriter, or written by hand.
2. The testator must sign in full or make a mark, for example, an “X”. If the testator signs by making a mark, this must be done in front of a Commissioner of Oaths who must certify that he/she is satisfied:
   ▶ with the testator’s identity;
   ▶ that it is the testator’s mark; and
   ▶ that the will contains the wishes of the testator.
3. There must be two or more witnesses who must sign the will immediately after the testator. They must be present with the testator when he/she signs. The witnesses must be at least 14 years old.
4. If the testator can’t sign (e.g. if he/she is illiterate or physically unable to sign), then somebody can sign on behalf of the testator. This must be done in the presence of the testator.
5. The witnesses must sign the will in front of the testator and each other. The witnesses must sign in full – they should not use initials or a mark.
6. If the will has more than one page, each page must be signed by the testator (or the person signing on the testator’s behalf) and each witnesses. Each person must sign their full signature.
7. The last page must be signed as close as possible to the bottom of the page. This stops anyone trying to add something in a space left at the bottom of the page.
8. The testator and the witnesses must sign all mistakes, crossings-out or corrections.

Important points

Witnesses do not have to read the will or know the contents of the will. Their duty is to confirm the signature of the testator and to confirm that the document is the will of the testator.

If you have a big estate, it is advisable to get help from a legal practitioner or paralegal, or a bank or building society, to make your will.

Guidelines

What to include in a will

Personal and family details
1. Your full names, age, identity number and permanent address.
2. Your marital status. It is important to mention whether you are married in or out of community of property.
3. If married, your spouse’s name and identity number.
4. The names, sexes and ages of your children, noting whether they are married or single.
5. Details of your relatives and other persons or groups who will inherit.
6. The name and details of the executor – the person who will manage your estate, i.e. be responsible for winding up (finalising) the estate and making sure that the estate is distributed fairly and properly.
Business and financial details
1. Your personal financial position, properties and policies.
2. The income tax numbers of both you and your spouse.
3. Your employment details - provident or pension fund beneficiaries and employer’s address.
4. Your business details and duties (for example, the names and addresses of business partners, and instructions as to whether a business you own should be sold or carried on).

Example

WILL

This is the Will of ........................................................................................................................................... (full names)
Identity Number ...........................................................................................................................................................................
of (address) ...................................................................................................................................................................................

1. I revoke any past wills made by me.
2. I nominate ..................................................................................................................................................................................
   (full name and address of person appointed as Executor) to be Executor of my Estate.
3. I direct that my nominated Executor does not have to give security to the Master of the
   High Court for the proper administration of my Estate.
4. I leave my Estate to the people and in the amounts indicated here:
   ............................................................................................................................................................................................................
   ............................................................................................................................................................................................................
   ............................................................................................................................................................................................................
   ............................................................................................................................................................................................................
   ............................................................................................................................................................................................................
   ............................................................................................................................................................................................................
5. I appoint ..................................................................................................................................................................................
   (full names)
   Identity Number ...................................................................................................................................................................
of (address) ...........................................................................................................................................................................to be the sole guardian of my minor children.

Signed at .................................................................................. on the .............. day of ..................................... 20...........
in the presence of the undersigned witnesses, who signed in my presence and in the presence of each other, all being present at the same time.

.........................................................................................
TESTATOR

As witnesses:
1. ..............................................................
2. ..............................................................
5. **Activity**

- Emelia is HIV-positive. She is worried that she will soon be too ill to manage her finances. She is also concerned about the distribution of her property in the event that she passes away. What would be your advice to her?

6. **References and resource materials**

**Laws**

Constitution of the Republic of Namibia  
Criminal Procedure Act No. 51 of 1977  
Married Persons Equality Act No. 1 of 1996  
Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941  
Intestate Succession Ordinance 12 of 1946  
Wills Act No. 7 of 1953  
Anatomical Donations and Post-Mortem Examinations Ordinance No. 12 of 1977

**Cases**

*Clarke v Hurst NO and Others* 1992 (4) SA 630 (D&CLD) at 659 AC  
*State v De Bellocq* 1975 (3) SA 538 (TPD)

**Reports, manuals and other useful materials**

AIDS Law Unit, Legal Assistance Centre: *Your guide on how to write a valid will*, 2002  
National Institute for Democracy & Law Society of Namibia: *Wills, Testaments and Estates in Namibia – Your questions answered*, June 2002  

**Websites**

AIDS Law Unit, Legal Assistance Centre: [www.lac.org.na](http://www.lac.org.na)  
Ministry of Health and Social Services: [www.healthforall.net/grnmhss/](http://www.healthforall.net/grnmhss/)  
General government ministries contact page: [www.grnnet.gov.na/Contact_us/Ministries](http://www.grnnet.gov.na/Contact_us/Ministries)  
AIDS Law Project: [www.hri.ca/partners/alp/](http://www.hri.ca/partners/alp/)
A manual aimed at increasing knowledge of the rights of people living with HIV or AIDS in Namibia and ensuring that these rights are upheld.