HIV/AIDS and the law in Namibia

AIDS Law Unit
Legal Assistance Centre

With the assistance of The AIDS Law Project & The AIDS Legal Network

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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Publisher: AIDS Law Unit, Legal Assistance Centre
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First edition, first impression 2003
ISBN:99916-63-31-2

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Introduction

HIV and AIDS have inflicted a terrible toll on Namibian society. UNAIDS estimates that about 230 000 Namibians are living with HIV or AIDS, while we have a cumulative total of about 47 000 children under 15 years of age who have been orphaned by AIDS.

The government realised the urgency of the situation and adopted the *National Strategic Plan on HIV/AIDS (Medium Term Plan II) 1999 – 2004*, 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.

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 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 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 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 as well, 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 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 effect of the disease and its consequences on real people, thus encouraging Namibians to take responsibility for their own lives and sexual activities. HIV/AIDS is 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 safeguard the citizens of our country, the young and the economically active. The government is under an obligation to provide the

necessary education, because without this information, the prevention efforts currently under way are doomed to failure.

We also hope to raise awareness of the possibility of treatment and medication for those living with HIV or AIDS. At the moment, antiretroviral therapies to treat HIV infection are very expensive. There are, however, ways to access these medications whether by means of compulsory licensing or by parallel importation of the drugs. Our government could negotiate with pharmaceutical companies to make the drugs available at much lower prices than at present, following the example set by Botswana.

Namibians need to know that it is possible to prevent mother-to-child transmission of HIV through the administration of antiretroviral drugs such as Nevirapine and AZT. This knowledge will hopefully result in the public demanding that the medication be made widely available rather than only to the 250 pregnant women who are to take part in a pilot study announced by the Ministry of Health and Social Services.

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 book, we have used the following headings to help 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.

Chapter 2

Responses to HIV and AIDS

1. Introduction

Even though HIV and AIDS can affect anybody, regardless of race, sex, or sexual orientation, people with HIV or AIDS face **prejudice** and **stigmatisation**. This stems from the fact that AIDS was first diagnosed amongst gay men in the USA, leading to the misunderstanding that HIV and AIDS was only found amongst gay men. Other population groups amongst which HIV and AIDS are also found included injecting drug users and sex workers. As a result, many people alleged that HIV and AIDS mainly affected gay men and similar **"risk groups"**.

2. Responses to HIV and AIDS internationally

HIV is mainly transmitted through sexual conduct and in most parts of the world, through heterosexual conduct. This leads to questions of morality that are often a source of prejudice. Some countries passed strict laws that they hoped would protect society from these "risk groups". For example, some countries require negative HIV test results before allowing people to enter the country.

These laws, far from controlling the spread of the HIV epidemic, increased prejudice and often violated people's human rights.

Important point

It is sexual behaviour and not sexual orientation, that is to say whether a person is gay (homosexual) or straight (heterosexual), that puts a person at risk of infection. Sexual behaviour that places people at risk of HIV infection includes behaviour like having multiple sex partners and not practising safer sex.

2.1 The need for HIV and AIDS education

HIV and AIDS spread quickly and were diagnosed in all parts of the world during the late 1980s and the 1990s. However, HIV and AIDS were not restricted to members of the so-called “risk groups” and it became clear that unless millions of people were taught quickly how to avoid HIV, it would become a major epidemic. Through education and information campaigns, most industrialised countries succeeded in educating their populations about prevention of HIV infection. As a result, only a small part of their populations became infected.

However, in developing countries the situation was different: governments did not have similar responses as a result of insufficient political will, a lack of resources and other reasons, such as war and oppression. People were not educated about how to protect themselves from becoming infected. It also became clear that it is difficult for very poor people to change their sexual behaviour. Both men and women may sell sex to provide for their families, while others stay in risky relationships because they have nowhere else to go.

This partly explains why, by December 2001, Sub-Saharan Africa had 28,1 million adults and children infected with HIV, compared with 940 000 infected North Americans and 560 000 Western Europeans. In 2001, 2,3 million people died of AIDS in Sub-Saharan Africa, compared with 20 000 in North America.

UNAIDS estimates that in Namibia, at the end of 2001, there were 230 000 people living with HIV or AIDS. This means, by the UNAIDS estimate, that 22,5% of Namibians are infected with HIV. These figures are, to a large degree, substantiated by the 2002 Namibian Epidemiological Survey that shows that .....sexually active Namibians are infected with HIV.

Important points

- Poverty does not cause HIV or AIDS, but it creates the conditions in which people are more at risk of infection.
- Poor people develop illnesses more quickly because they do not have adequate medical treatment and proper standards of living and nutrition.

3. Power and HIV/AIDS

Similarly, HIV and AIDS are linked to **power** in society. Usually, the least powerful people are at the greatest risk of infection. In our society, this means that black people in Namibia who were discriminated against and disadvantaged by the previous regime are more likely to be infected than white people who have wealth and power. Because women have a lower social status than men in Namibia and in other African countries, they are more at risk of infection. Often women cannot insist on safer sex and many men still do not want to use condoms. This situation is made worse by the fact that there are few female-controlled methods of HIV prevention.

Men who have sex with men are stigmatised in most societies. Sex between men is illegal in many countries, including Namibia, with the result that these men do not obtain information on safer sex. Similarly, people in jail and in police custody are at risk of infection because the authorities do not provide prisoners with condoms.

Clearly, one way of fighting the epidemic is to ensure the equality of all people. We should strive to give people full control over their social and economic destinies, regardless of their differences. The enforcement of the Namibian Constitution, which protects people from discrimination and unequal treatment, is crucial in the fight against HIV and AIDS in this country.

4. Language and HIV/AIDS

Language is a tool of power. In Namibia, we can still remember the racist language used by the apartheid government that made people feel powerless. Expressions like “non-european” and “non-

white" were used in a way that made people feel that they were a "non-somethings", rather than people who were proud to be "black" or "African".

The same is true about some words that are often used when talking about HIV and AIDS. People who are living with HIV and AIDS don't like to be described as "AIDS victims", "sufferers" or "patients". We should avoid words that attach blame or moral judgements to an illness, or that suggest that people are powerless.

Important point

When talking about people with HIV or AIDS, the emphasis is on the fact that people are living with the illness. That is why we talk about "people **living with** HIV or AIDS."

5. 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 adult HIV infection rates between 20-25%. 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.

Because HIV was first diagnosed amongst gay men, people associated HIV and AIDS with gay men. Later on, foreigners were blamed for the spread of the disease. These misconceptions resulted in discrimination and victimisation. Families and friends rejected people with HIV or AIDS, and many people with HIV or AIDS lost their jobs. There are many stories of children who have lost their parents to an AIDS-related condition and who now have no homes. Fear and ignorance lead to stigmatisation.

Many of these reactions result from misinformation about the disease. Only when the facts about HIV and AIDS 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.

5.1 Violence against people living with HIV or AIDS

People with HIV or AIDS often face violence. They are beaten up, lose their jobs or are kicked out of their homes. In 1990, the South African AIDS activist Gugu Dlamini was murdered by people in her community because she disclosed in public that she was living with HIV.

South African Appeal Court judge, Edwin Cameron, highlighted the difficulties of disclosing one's HIV status, saying that he was only able to do so 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, their families and partners.

Example

Common forms of discrimination

People with HIV often experience the following types of discrimination:

- They are refused employment or membership of employee benefit schemes.
- They lose employment because of HIV or AIDS.

- 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 with HIV, or children of parents with HIV, are victimised at schools.
- People are often 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 these actions 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."

6. The link between discrimination and the spread of HIV

Discrimination, stigmatisation and victimisation not only violate the rights of people with HIV or AIDS. They also contribute to the spread of HIV. People blame others, such as gay people, sex workers and promiscuous people 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. Nobody is safe from the virus. Everybody must be educated about how to protect him or herself from infection.

Effective HIV prevention and treatment depends on people wanting to know their HIV status and voluntarily going for HIV tests. Many Namibians with HIV do not know that they have HIV as they have not been for the HIV test. This means that many people unknowingly pass HIV on to other people.

Fear of discrimination deters people from going for an HIV test. If there was treatment available for all people diagnosed with HIV or AIDS, those who suspect they might be infected would probably be more willing to be tested, as there would be hope for them. Unaffordable treatments and discrimination in treatment therefore also deter people from being tested.

Effective prevention and treatment depends on the destigmatisation of the disease. People should not be afraid to tell their lovers and sex partners, friends, family and even colleagues at work about their HIV status. When the disease becomes destigmatised, ignorance and misunderstanding about HIV will start to disappear.

Important point

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

7. 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 people 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, however, important that people should know about their rights. People who are not aware of their rights are unable to protect themselves and their interests. Many organisations work towards educating people about their rights, and particularly the rights of people living with HIV or AIDS.

Namibian organisations that advance the rights of people living with HIV or AIDS

- *Lironga Eparu*, a national association of people living with HIV/AIDS.
- *Catholic Aids Action*, a faith-based organisation that offers counselling and home based care to people living with HIV or AIDS.
- *AIDS Care Trust*, an organisation that provides counselling and home based care for people living with HIV/AIDS and assists with the design and implementation of HIV workplace programmes.
- The *AIDS Law Unit* of the Legal Assistance Centre published a *Charter of Rights* for persons with HIV or AIDS and provides legal advice, works on policy formulation and advocates a rights-based approach to HIV/AIDS.

The need to protect and promote the human rights of people with HIV or AIDS has been widely accepted. Internationally, the United Nations Human Rights Commission and UNAIDS published *International Guidelines on HIV/AIDS and Human Rights*. The protection of human rights also forms part of the government's *National Strategic Plan on HIV/AIDS (Medium Term Plan II) for 1999 - 2004*.

8. What can we do?

We have to campaign for the rights of people with HIV or AIDS. We can work in the following 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 with HIV or AIDS.
- More funds for prevention campaigns.
- Better information.
- The rights of marginalised groups such as gays, lesbians, 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 and schools – and in all areas in which people face discrimination and where accurate information will make a difference to people's lives.

9. References and resource materials

Laws

Constitution of the Republic of Namibia, 1990

Labour Act, Act No 6 of 1992

Policy documents

National Code on Employment 1992

Charter of Rights on AIDS and HIV (Namibia), 2000

The National Strategic Plan on HIV/AIDS (Medium Term Plan II) 1999 – 2004, Namibia

United Nations International Guidelines on HIV/AIDS and Human Rights, 1998

Cases

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

Reports, manuals and other useful materials

AIDS Law Project (ALP) and Lawyers for Human Rights: HIV/AIDS and the Law – A Trainer's Manual, (First Edition), July 1997.

ALP: HIV/AIDS Current Law & Policy booklet 1: 'Know your rights and how to enforce them', July 2000.

AIDS Legal Network (ALN): ALQ – The AIDS Legal Quarterly.

Human Rights Internet: Human Rights and HIV/AIDS – Effective Community Responses, 1998.

UNAIDS: Report on the Global HIV/AIDS Epidemic, December 2000

UNAIDS: Fact Sheet on Namibia, 2002 Update

UNAIDS / Inter-Parliamentary Union: Handbook for Legislators on HIV/AIDS, Law and Human Rights, 1999.

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

Chapter 3

The Namibian legal system

1. Introduction

In this chapter we want to 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.

Namibia, being a **democratic** country, allows its citizens to help make the law. We vote in elections and our representatives make laws in accordance with our wishes. We can also make our views known when new laws are proposed, by participating in public forums in which the draft laws are discussed. Democratic participation helps to ensure that we follow the law, because our involvement in the making of it makes it more difficult to break.

The law brings peace and order to society. As a result, people obey the laws, because we know what the laws are and what the penalties are if we do not follow the law.

1.1 Sources of the law

We have already mentioned the one source of law, namely statute law, which is made by the National Assembly and the National Council and signed by the President when finalised. It then becomes law. The sources of the law are:

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

1.2 The Constitution of Namibia

The Constitution is the highest law of Namibia. All 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 (the National Assembly and National Council) and the Judiciary (the courts).

The Constitution also has a Bill of Rights, which contains the human rights of all people in Namibia and sets a standard for all laws. Laws that go against the Constitution can be challenged in the High Court. The courts must also follow the principles in the Bill of Rights when they interpret (give meaning to) the common law and 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 adopted by Parliament. Statutes are also called “legislation” or “Acts of Parliament”. Parliament is another name for the National Assembly and the National Council. It is the highest law-making body in the country. Once the two Houses have approved the new draft law, the President has to sign the law before it becomes legal.

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

Under most statutes, a Minister from a particular Ministry is given powers to issue further rules under the particular Act. These rules are called **regulations.** They are necessary to implement the new Act properly. Statutes such as the Local Authorities Act give towns and municipalities the power to make **by-laws** for the particular town or municipality. By-laws and regulations must be in line with the legislation under which they are made.

1.4 Common law

Common law is law that is not made by Parliament or another law-making body. This law comes from Roman-Dutch law and English law. Many of the general principles of our law come from the common law, such as the duty to pay maintenance for your children, or the right to privacy and medical 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 is customary law, because it is mostly unwritten. When written down, the laws may be out of date and no longer practiced 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 it does 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 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. Then the courts make a judgment (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 courts have set a precedent (a case example) for other courts to follow.

2. Three types of law

There are three main kinds of law in Namibia:

- Constitutional law
- Criminal law
- Civil law

2.1 Constitutional law

Constitutional law is the law that relates to matters that are dealt with in the Constitution. This has to do with the organisation of the State in the executive, legislative and judicial arms, and the relationships between the various State branches. The Constitution also has the Bill of Rights in which human rights are contained.

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 in three main organs:

- The Legislature, also called Parliament. The Legislature makes the laws.
- The Executive, eg the President and Cabinet. The Executive carries out the laws.
- The Judiciary, eg the High Court and the Supreme 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, lists the basic human rights of all people in Namibia. Every person has these rights, merely because they are a person. These rights cannot be taken away from them. The rights to life, privacy and to family life are examples of human rights.

If the 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 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)
- If it is a statute, say that the statute must be **changed** to bring it in line with the Constitution.
- Instead of declaring the law invalid, in certain cases the court can refer the matter to Parliament to change the law within a period of time to comply with the Constitution.

2.2 Criminal law

Criminal law is the law that describes how a person should act in society, and it prescribes **punishments** if you break the law. Criminal law therefore tells us what conduct is a **crime** (or an **offence**). Crimes, even though often done to another person (such as when a person steals your property), are seen as a wrong against the State. Criminal law comes from both common law and statute law. For example, theft is a common law offence, while driving under the influence of alcohol is a statutory offence.

When a crime has been committed, the State (represented by the prosecutor) charges the accused person in a criminal court with the offence. The State will call the complainant (the victim) and other witnesses to **testify** against the accused. The accused and her or his witnesses will 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** the person and **punish** him or her, either by ordering the convicted person to pay a fine or sending the convicted person to jail.

2.3 Civil law

Civil law is the law that tells you how you must behave in your private relationships with other people. It tells you what your rights and duties are in a particular relationship. For example, marriage is a civil law matter. It tells spouses about their property and their duty of maintenance towards each other and their children. A contract is another example. If you buy something, the contract tells you that you should pay the money, the seller must hand over the item to you, and that you then become the owner of the property. An employment agreement is another example.

2.3.1 Civil law disputes

The State does not become a party in a civil law dispute, like in a criminal case. The **plaintiff** (the person who thinks 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, the defendant is ordered to pay some sort of compensation (usually money) to the plaintiff. Sometimes the court will order the defendant to do something it has undertaken to do (for example, to build a bridge), or it can be ordered to stop doing something. (For example, a factory can be stopped to pollute the environment.) The court can also order the defendant to correct the wrong.

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 the Magistrate's Court, while a judge decides a matter in the High Court or Supreme Court. The judges and magistrates are neutral (they do not choose sides, they interpret the law.) Courts let each party gives her/his side of the story, and will then decide the legal position.

3.1 Magistrates' Courts

Magistrates' courts are situated in each magisterial district. They hear less important criminal matters and civil disputes involving less than N$100 000, 00. The magistrates' courts are also functioning as Children's Courts (hearing matters relating to the welfare of children), Maintenance Courts (hearing maintenance matters) and District Labour Courts (deciding on labour matters).

3.2 Regional Courts

Regional Courts are criminal courts that decide on more serious crimes than magistrates' 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. The High Court also hears civil claims involving amounts more than N$100 000,00. In addition, appeals from the magistrates' courts are heard by the High Court.

3.4 Labour Courts

Appeals from the district labour court are heard in the **Labour Court**, which is a division of the High Court. Labour matters that cannot be heard in the District Labour Ccourt are heard in the Labour Court.

3.5 The Supreme Court

The Supreme Court is the highest court in the land. It hears appeals from the High Court and it 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

In some areas, traditional communities have their own courts, called Community Courts. These courts can hear some civil and criminal cases, using customary law.

The Community Courts Bill that is being discussed in Parliament will clarify the situation with regard to community courts, the cases they may hear, their processes and also who will be the justices in these community matters. The bill provides for appeals from the community courts to magistrates courts, and eventually to the High Court. It is expected that this bill will become law in the not too distant future.

4. Different court processes

4.1 Trial

A **trial** is a court hearing, in which the court listens to all sides of the dispute in the case of a civil dispute, or to the State and the accused in a criminal matter. The court hears oral evidence, and can also look at objects, such as knives and photos. These are called physical evidence. The court makes a judgment after considering the law and the facts of the case. In a civil case, the court orders the losing party to pay compensation, while in a criminal matter the accused person is convicted and sentenced (punished).

4.2 Appeal

When somebody is unhappy with the result of a trial, one can take the case to a higher court. This is called an **appeal**. The court that hears the appeal looks at the evidence again. It decides if the first court was correct in the way it looked at the law and the facts. The appeal court can agree with the first court decision, or it can 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 had been considered and if the decision was reasonable. The court can refer the matter back to the official for a new decision.

Courts can also review the **procedure** of a lower court. The court must now decide if the lower court has followed all the procedural safeguards built into the system. A review means that the higher court will look at the record of the trial, to make sure that the trial took place fairly, and by the rules. The court that reviews the trial can order the trial to be heard again.

5. Settlement of disputes not involving the courts

5.1 The Ombudsman

The office of the **Ombudsman** has been created by the Constitution to watch out for human rights violations, corruption, and damage to the environment by the State and by private individuals. One can approach the Ombudsman when there is a violation of human rights. The Ombudsman will investigate the complaint, and try to settle the matter through negotiations. It can also refer the matter to the Prosecutor-General for prosecution, or bring the matter to court to stop the violation.

5.2 Negotiation, arbitration and mediation

It is possible to resolve disputes by not making use of the courts. This is normally done because it is cheaper than going to court, and it is also faster. **Negotiation, arbitration** and **mediation** are ways in which parties try to resolve disputes. The parties agree that they will follow the outcome of these processes. Examples are wage negotiations between trade unions and employers, and contracts, where the two parties negotiate to come to an agreement on how to finish a project in a way that satisfies both parties.

6. Points for discussion

- 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 work, because she is pregnant.

In either of these case, do you think -

  – A crime has been committed?
  – There is a civil law problem?
  – There is a constitutional law problem?

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 15 of 1928
Traditional Authorities Act No 25 of 2000
Community Courts Bill

Cases

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Reports, manuals and other useful materials

AIDS Law Project and Lawyers for Human Rights: HIV/AIDS and the Law – A Trainer's Manual (First Edition), July 1997.

Black Sash and Education and Training Unit: Paralegal Manual (Updated Edition), January 2001.

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
The Ombudsman of Namibia	www.ombudsman.org.na

Chapter 4

The Constitution and the Bill of Rights

1. Introduction

The Bill of Rights is contained in Chapter 3 of the Constitution. The Bill of Rights contains a list of the fundamental rights and freedoms that all people in Namibia have. These rights and freedoms belong to people because they are human. These rights cannot be taken away – we say they are "**inalienable"**. The Bill of Rights is the foundation of our democracy. Parliament, different levels of government, the courts, private organisations (such as companies) and individuals must all respect these human rights.

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** (like the right to vote and the right to form associations) and equal **civil rights** (like the right to equality and the right to a fair trial).

Human rights do not include only political and civil rights, but also **social**, **economic** and **cultural rights**. These rights are important because they create an environment within which Namibians can enjoy their civil and political 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**. 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 health care, which is a socio-economic right. 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 and are called **Principles of State Policy**. This chapter requires the State to *"…actively promote and maintain the welfare of the people by adopting, inter alia, policies…"* to improve the position of Namibians.

The Constitution also provides that these rights may only be limited under certain specified circumstances, for example during an emergency that threatens the life of 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 stated in the Constitution.

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

Despite the right to equality, it is clear that equality does not exist for all people in Namibia – partly as a result of our colonial history. The Constitution therefore allows Parliament to introduce new laws that will enforce equality – in other words, make equality a reality in people's everyday lives. For example, Article 23 of the Constitution prohibits racial discrimination and allows for affirmative action to correct the wrongs of the past.

Many people living with HIV or AIDS live in poverty and are prevented from enjoying equal rights due to discrimination and stigmatisation, such as:

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

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. But 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 Case No SA 8/99 (unreported)

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, "All persons shall be equal before the law." This includes people (such as people with HIV or AIDS, or gay and lesbian people) who belong to categories that are not listed in the second paragraph. Article 10 therefore prohibits unfair discrimination **in general**, while only mentioning a few grounds in particular.

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

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."

3. The law with regard to HIV and AIDS

Our law does not specifically deal with HIV or AIDS, or with the need to protect people with HIV or AIDS. We have to rely on the Constitution and existing, general laws to see if those laws protect people with HIV or AIDS.

The Constitution guarantees the right to equality of *all* people, which includes people living with HIV or AIDS. 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 people. When dealing with people and when sentencing them in courts of law, the State may not treat people in an inhuman or cruel way. For example, if the State were to say that all people with HIV or AIDS should go and live in the Namib Desert without food or water, this would be inhuman treatment and in conflict with the right to dignity.

Even though HIV/AIDS is not listed as a prohibited ground for discrimination, it does not mean that the equality provision does not protect people with HIV or AIDS. The prohibited grounds of discrimination form a special group, but the right to equality is wider than the listed grounds of discrimination with the result that discrimination on the basis of HIV or AIDS would be in conflict with the right to equality.

In other countries, such as the United States of America, HIV and AIDS are protected as disabilities and disability laws are used to protect people with HIV or AIDS from discrimination.

3.1 HIV or AIDS as disabilities

Many people argue that HIV and AIDS should be regarded as **disabilities**, as this would give added protection to individuals with HIV or AIDS. 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** refers to a person who is able to work but some condition makes it difficult to do so. 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 with the disability. For example, very few offices provide ramps for people in wheelchairs, thereby effectively excluding them from working in offices without easy access.

People with HIV or AIDS face the same challenges: they want to work, but society makes it difficult 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 with HIV have a right to anti-discrimination protections under the Americans with Disabilities Act, 1990.

Article 10 of the Constitution does not mention disability as a prohibited ground of discrimination. We have already seen that the right to equality includes the rights of people with HIV or AIDS.

With regard to employees with HIV or AIDS, 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 the NDF 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 or she seeks employment. 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 discrimination in an unfair manner. The Court did not, however, specifically decide on whether HIV or AIDS should be treated as a disability by our law. Our law is still unclear whether HIV and AIDS should be regarded as disabilities.

Important point

Whether or not 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 or AIDS are disabled by a condition or illness which makes them face the same kind of barriers or discrimination which other people with disabilities experience.

4. HIV and AIDS under international and foreign law

“International law” refers to the laws that regulate the conduct of countries in the international arena. These laws come from international customary law and from treaties such as the *Convention on the Rights of the Child*.

“Foreign law” refers to the judgments and statutes of other countries. The Americans with Disabilities Act of 1990, mentioned above, is an example of foreign law.

When interpreting the 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 (agreements) provide for equal protection of all people by the law, and freedom from discrimination on any grounds such as race, sex, religion or “other status”. Examples of these international human rights treaties are the *International Covenant on Civil and Political Rights*, the I*nternational Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child*. 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 with HIV or AIDS.

The United Nations is very active in HIV/AIDS work. The UN recognised that protecting and respecting the rights of people, including those with HIV or AIDS, is the best way to address the epidemic. UN guidelines advise countries on how to incorporate human rights in national strategies against HIV and AIDS. The *UN International Guidelines on HIV/AIDS and Human Rights* states as follows:

> *"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 United Nations General Assembly held a Special Session on HIV/AIDS in 2001. Following this Special Session, the General Assembly adopted the **Declaration of Commitment on HIV/AIDS**, in which all the member States of the UN agreed to work together to stem the HIV/AIDS epidemic. This Declaration (also called the *UNGASS Declaration*) recognised that respecting the human rights and fundamental freedoms of people is essential to reduce vulnerability to HIV/AIDS. In terms of this Declaration, UN Member States agreed:

> *"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 ad 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 and AIDS as disabilities under their disability laws, thereby protecting people with HIV or AIDS 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 also 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 status violates 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 a decision of the Australian Human Rights and Equal Opportunity Commission that the dismissal of an employee on the basis of his HIV 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:

- 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 property and to have access to health care services.
- Cultural rights, such as the right to exercise your culture and speak your own language.

Social and economic rights are often discussed together and are referred to as **socio-economic rights**.

Socio-economic rights are important rights that can help to improve the everyday living conditions for people with HIV or AIDS. Socio-economic rights deal with the access that people have to basic services. There is a strong link between social and economic rights, and civil and political rights: the one sort of rights cannot be enjoyed if the other is not given effect to.

Important case

This link between civil and political 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 mainly found in Chapter 11 under the heading **Principles of State Policy**. The rights listed in this chapter are not directly enforceable in a court. But that 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 them. Courts may also consider these principles when interpreting laws dealing with the same issues.

In terms of the Principles of State Policy, the State undertakes to *actively promote and maintain the welfare of the people* by adopting, inter alia, policies aimed at the following:

- Enactment of legislation to ensure the equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society.
- Enactment of legislation to ensure that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength.
- Active encouragement of the formation of independent trade unions to protect workers' rights and interests.
- Membership of the International Labour Organisation and where possible adherence to and action in accordance with international conventions and recommendations of the ILO.
- Ensuring that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law.

- Ensuring that senior citizens are entitled to and do receive a regular pension adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities.
- Enactment of legislation to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the State.
- A legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State.
- Ensuring that workers are paid a living wage adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities.
- Consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health.
- Encouragement of the mass of the population through education and other activities and through their organisations to influence government policy by debating its decisions.

5.2 International agreements

In addition to the Principles of State Policy, socio-economic rights are also contained in international agreements that Namibia has adopted. The most important one in this regard is the **International Covenant on Social, Economic and Cultural Rights** (ICESCR). Namibia ratified this Covenant on 28 November 1994. The ICESCR requires State Parties, including Namibia, "*to undertake steps to achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including legislation*." Namibia must do so to "*the maximum of its available resources*."

From the way in which the covenant is drafted, awareness of the fact that budget limitations will have an influence on achieving all the rights mentioned in the covenant is clear. It therefore allows States to **progressively** (over a period of time) implement the rights, subject to the availability of resources. Lack of resources is not an excuse for not trying to achieve these aims – Namibia must act in good faith to achieve the objects of the ICESCR. States do not have to provide the benefits of each of these rights immediately, but must be able to show that a programme has been developed that will eventually provide the benefits of each of these rights to those who need them. If nothing else, legislation can be passed to give effect to these rights.

Important terms

Progressive realisation:	The achievement of the socio-economic rights may take place over a period of time, but the State must take reasonable steps to fulfil these rights.
Available resources:	Includes money, people, materials, legislation, courts and technology.

Rights that are of particular importance for persons with HIV or AIDS are:

- The right to the enjoyment of 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 protection of and assistance to the family, especially to pregnant women and children (Article 10).
- The right of everyone 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 the enjoyment of the highest attainable standard of physical and mental health. This right particularly includes:

– The reduction of still-birth rate and of infant mortality and for the healthy development of the child;

– The prevention, treatment and control of epidemics, endemic, occupational and other diseases;

– The creation of conditions which would ensure to all medical service and medical attention in the event of sickness (Article 12).

The Covenant requires States, including Namibia, to report regularly on the implementation of this Covenant to the Economic and Social Council of the United Nations. This will help to ensure that Namibia is meeting its obligations under international law. Even though these mechanisms are not as strong as rights contained in an enforceable Bill of Rights, they are not meaningless. We can lobby the government to fulfil its obligations, under both the Principles of State Policy and under the *International Covenant on Economic, Social and Cultural Rights*.

In appropriate cases, we can also take the government to court where it is clear that it is not meeting its obligations.

6. Access to health care for people with HIV or AIDS

We have already seen that one of the Principles of State Policy is to plan consistently to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health. Access to health care, including for people with HIV or AIDS, is covered by this provision. The right to equality ensures that there may be no 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 Namibian living with HIV and their families have access to services that are affordable, of high quality and responsive to their needs.

Despite these provisions, people with HIV or AIDS receive different standards of treatment depending on where they are. Rural hospitals and clinics are usually less well-equipped than hospitals in Windhoek, and they may also have staff that are not as well-trained. There are still some health workers who refuse to treat people with HIV or AIDS.

To address these different standards of treatment, the Ministry of Health and Social Services published the *Guidelines for the Clinical Management of HIV and AIDS* in 1998. This publication includes guidelines for Highly Active Anti-Retroviral Treatment (HAART), even though the treatment is not available at government hospitals due to the high costs involved. (It is available at private pharmacies.) Recent price reductions will help to make it more affordable. The *Guidelines* also provides for treatment to prevent mother-to-child transmission (MTCT) of HIV. Despite the existence of *Guidelines* for a number of years, it was only in 2002 that the government indicated its intention to start with a pilot project to prevent MTCT.

Important points

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

- Prevent discrimination against people living with HIV or AIDS 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 or AIDS. 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. Children's rights to health care

The Namibian Constitution does not deal specifically with the rights of children with regard to health care, other than in the general *Principle of State Policy* to improve standards of living, nutrition and public health. However, the United Nations' **Convention on the Rights of the Child** (CRC), which Namibia ratified, does provide for the right of the child to the highest attainable standard of health. States are required to fully implement this right and to take appropriate measures:

- to reduce infant and child mortality,
- to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care,
- to combat disease and malnutrition,
- to ensure appropriate prenatal and postnatal health care of mothers,
- to ensure that members of society (in particular parents and children) are informed, have access to education and that people are taught about basic child health and nutrition, and
- to develop preventive health care, guidance for parents and family planning education and services.

Namibia is thus obliged to adopt measures to ensure the health of the child, particularly where there is treatment available that can greatly reduce the possibility of HIV infection from mother to child.

HIV and AIDS give a new urgency to the rights of children with regard to health care. Pregnant women with HIV can transmit the virus to their babies. This can happen either during pregnancy, at birth, or through breastfeeding after birth. It is possible to greatly reduce the chances of transmitting HIV through the use of anti-retroviral drugs such as Nevirapine. The government currently provides almost 500 women and infants with Nevirapine, free of charge, at two sites: Katutura and Oshakati. The Ministry of Health and Social Services plans to extend the Prevention of Mother-to-Child Transmission programme to at least one State hospital in each of the 13 regions during 2003.

Important point

MTCT is important because:

- It is very expensive to treat and hospitalise sick children with HIV or AIDS.
- It is more cost-effective to prevent infection in the first place.
- Studies have shown it is possible to reduce MTCT.
- It is crucial to achieving children's rights to the highest attainable standard of health.

8. 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 or AIDS:

Article in the Bill of Rights	Right	What this means for people with HIV or AIDS
6	Life	Access to medication and information.
7	Personal liberty	A person with HIV or AIDS cannot be locked up for no reason.
8	Human dignity	Hospitals or institutions may not damage a person's self-respect by words or actions.
10	Equality and discrimination	Equal treatment and freedom from discrimination.

11	Arrest and detention	Prisoners cannot be treated differently or in an undignified way just because of their HIV status.
13	Privacy	If you have HIV or AIDS you have the right to keep that information to yourself. An employer or a hospital cannot force you to tell them, or force you to have a blood test to find out this private information.
15	Children's rights	Prevention of economic exploitation, or doing work that interferes with education.
17	Political activity	A person with HIV or AIDS may advocate and lobby for better treatment.
18	Administrative justice	A person with HIV or AIDS is entitled to fair and reasonable treatment by officials.
20	Education	Persons with HIV or AIDS have the same rights to education. Schools cannot refuse to accept a child because of HIV.
21(1)(a)	Freedom of speech and expression	The right to criticise policies and decisions adversely affecting persons with HIV or AIDS and to discuss prevention campaigns in schools and prisons.
21(1)(d)	Peaceful assembly	Persons with HIV or AIDS can organise meetings or rallies.
21(1)(e)	Freedom of association	Persons with HIV or AIDS may join organisations working to improve their situation.
21(1)(g)) and (h	Freedom of movement, residence	A person with HIV or AIDS cannot be forced to live anywhere against his or her wishes.
21(1)(i)	Freedom to leave and return to Namibia	A person with HIV or AIDS cannot be prevented from travelling outside or from returning to Namibia.
21(1)(j)	Freedom to practise any profession or carry on any trade, occupation or business	A person with HIV or AIDS can work in any profession.

9. Enforcing the rights contained in the Bill of Rights

All three branches of government, namely the Executive, the Legislature and the Judiciary, as well as private individuals and legal persons (for example companies and foundations) must respect and uphold the Bill of Rights. These rights can be enforced in a court.

The Supreme Court and the High Court interpret the Constitution. These courts decide if a law or an action by someone violates the Constitution. The Supreme Court is the highest court in the land, and all other courts must follow its decisions.

Going to court to enforce one's rights is, however, very expensive and not everyone can afford it. There are other ways to enforce rights. The Constitution has established the Office of the Ombudsman to protect and promote human rights. Private NGOs such as the Legal Assistance Centre and the National Society of Human Rights may also assist when human rights abuses have occurred.

10. Limitations on human rights

The Constitution recognises that some human rights may be “limited”. This means that a limited right does not have full effect, because of other 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 such limitations (Article 22).

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

11. Conclusion

The Bill of Rights has important rights that can be used to end discrimination against people living with HIV or AIDS and to improve their social and economic living conditions.

Everyone must work together to achieve 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. This means that we have to make sure that we do not violate someone else’s rights.

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

12. Points for discussion

- What can we do to improve the delivery of socio-economic rights in Namibia?
- What can be done to prevent mother-to-child transmission of HIV? Should this be the government’s responsibility?

13. 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

UN Declaration of Commitment on HIV/AIDS, 27 June 2001

International Covenant on Economic, Social and Cultural Rights (1966)

Convention on the Rights of the Child (CRC) 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

UN International Guidelines on HIV/AIDS and Human Rights, 1998

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

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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

AIDS Law Project (ALP) and Lawyers for Human Rights: HIV/AIDS and the Law – A Trainer's Manual (First Edition), July 1997.

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

Chapter 5

International law

1. Introduction

As indicated in a previous chapter, international law and foreign law both play important roles in the field of HIV/AIDS and human rights.

International human rights law has seen great developments since the formation of the United Nations (UN) in 1945. The *Universal Declaration of Human Rights (1948)* was the formative document in this respect. It was followed by the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Apart from these instruments, there were further treaties dealing with the rights of women, children, racial minorities and ethnic groups. Most of these international developments took place due to the intervention of the UN.

The UN is also involved with HIV and AIDS: it drafted the *UNAIDS International Guidelines on HIV/AIDS and Human Rights*. In 2001, the United Nations General Assembly (UNGASS) convened a special session on HIV/AIDS, at which a **Declaration of Commitment on HIV/AIDS** was adopted. This UNGASS Declaration shows the importance of HIV/AIDS as a matter of international concern and it called on Member States to take concrete steps to address the epidemic.

Our Constitution says that the general rules of international law and international agreements that are binding upon Namibia, form part of the law of Namibia (Article 144). Our courts often refer to foreign law to see how other countries have interpreted particular rights.

In this chapter, we will briefly discuss foreign law, but we will focus on international law and its relevance to Namibia regarding HIV/AIDS.

2. What is foreign law?

Foreign law refers to the judgments and statutes from other countries around the world. Because countries are independent, foreign law can never be binding in another country, but it does help our courts to interpret various laws and rights because of the similarities between rights. For example, only one case relating directly to HIV/AIDS has gone to court in Namibia, whilst many cases have been decided in the United States, Canada, South Africa and other countries. Foreign law cases are helpful for our courts when deciding similar issues in Namibia.

Throughout this book we refer to cases from other countries, particularly South Africa.

3. What is international law?

International law is made up of the rules and principles which are binding on States when they deal with each other. Some areas of international law are also binding on individuals and companies. For example, international law prohibits slavery. This applies to States *and* to individuals and companies.

There are three types of international law:

- Customary international law
- Agreements between two States (bilateral agreements)
- Agreements between many States (multilateral agreements)

3.1 Customary international law

Customary international law comes from the long-standing practices between States and not from formal agreements. Because they are long-standing and generally followed by all States, these long-standing practices become legal rules and are therefore binding on States. For example, the prohibition of slavery has become part of international law because all countries condemn the practice. Similarly, the principle of non-discrimination has become part of customary international law and that would include not discriminating on the basis of HIV status.

Declarations made by countries are normally not part of international law – they are merely expressions of intent. Declarations can, however, sometimes develop into accepted principles of customary international law because of their wide acceptance. The best example of this is the *Universal Declaration of Human Rights*.

3.2 Bilateral agreements

Bilateral agreements are agreements between two countries. They are only binding upon the two countries. An example is an agreement to extradite (hand over) people who are wanted for criminal offences.

3.3 Multilateral agreements

These are agreements (known as “treaties”) made between more than two States. Multilateral agreements are binding on all the States that sign the agreement. The agreement on *Trade-Related Aspects of Intellectual Property* (TRIPS) which governs countries that are members of the World Trade Organisation is an example of a multilateral agreement.

4. Who makes international law?

Countries want to have certainty in their dealings with other countries. They also want to address relevant issues like environmental matters, human rights and trade problems. It makes sense to streamline cooperation between States. International organisations such as the United Nations and the World Trade Organisation are at the forefront of such efforts. In recent years, the massive growth

in communications, travel and trade has made some of these bodies more important and more powerful.

The most important international organisations with regard to HIV/ AIDS are:

- the United Nations (UN),
- the World Trade Organisation (WTO), and
- the World Health Organisation (WHO).

4.1 The United Nations

The United Nations was established in 1945, at the end of Second World War, to maintain international peace and security, to develop friendly relations between States, to promote peace and prevent future wars, to strengthen cooperation between countries and to promote and encourage respect for human rights and for fundamental freedoms for all people without distinction as to race, sex, language, or religion.

The United Nations has its headquarters in New York and almost all countries in the world are members. The *Founding Charter of the United Nations* requires Member States to *"respect human rights and fundamental freedoms"*.

In 1948, the United Nations General Assembly adopted the **Universal Declaration of Human Rights** (UDHR). Even though it is not a multilateral agreement, this Declaration is an important part of international human rights law, as it has become part of international customary law. One of the Declaration's key principles, especially important to people with HIV or AIDS, states:

> *"All human beings are born free and equal in dignity and rights."*

The UDHR gave rise to the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. These Covenants are treaties (in international law) and so they are binding on those countries that ratify them.

In 2001, the UN General Assembly held a Special Session on HIV/AIDS at which the *Declaration of Commitment on HIV/AIDS* was adopted. This Declaration describes in its Preamble, the extent of the epidemic, the effects it has had, and the ways to combat it. The Declaration then states what governments have pledged to do – themselves, with others in international and regional partnerships, and with the support of civil society – to reverse the epidemic. The Declaration is not a legally binding document. It is, however, a clear statement by governments concerning that which they have agreed should be done to fight HIV/AIDS and that which they have committed to doing, often with specific guidelines. As such, the Declaration is a powerful tool with which to guide and secure action, commitment, support and resources for all those fighting the epidemic, both inside and outside government.

4.2 The World Trade Organisation (WTO)

The WTO was established in 1995, following the *General Agreement on Trade and Tariffs* (GATT). The WTO regulates international trade between countries. It has more than 100 member countries, including powerful industrialised nations.

For a country to become a member of the WTO it must agree to follow the rules and regulations drawn up by the WTO. States are required to change their national laws to comply with WTO rules. Sometimes, these rules can have a negative effect on the lives of the citizens of a country, particularly citizens of poor countries.

These rules often reflect the interests of powerful nations – and powerful lobby groups that can influence the laws and policies adopted by governments of industrialised countries. For example, the rules in the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS) were heavily influenced by lobbying from pharmaceutical companies that used their power within the United States government to put intellectual property rights high on the agenda of the WTO. Similarly, agricultural bodies in industrialised countries lobby for subsidies that make it more difficult for African farmers to sell their products to Europe and North America.

4.3 The World Health Organisation (WHO)

The WHO is an international body set up in 1948 to promote the health of the world's population. It defines health as:

> *"A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."*

The WHO examines international health problems, issues guidelines on treatments and safety of medications, monitors outbreaks of epidemics (like HIV/AIDS and malaria) and helps to control them. The WHO plays an important role in the HIV/AIDS epidemic.

5. International human rights agreements

After the *Universal Declaration on Human Rights* (UDHR) was issued, the UN produced a number of international agreements on human rights. These agreements, which are also called "convenants", "conventions" and "charters" aim to give more detail to the rights in the UDHR. The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) were born in 1966 and are examples of such agreements.

When it became clear that these Covenants do not deal with the position of women and children adequately, the UN drafted the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *Convention on the Rights of the Child* (CRC).

The UN encourages its members to sign and ratify these agreements, and then to include these agreements in their national laws. Although Covenants, Conventions and Charters are examples of international law, they are not binding on a country until the particular country has ratified them.

Important points:

- When a country **signs** an agreement, it commits itself to the aim and purpose of the agreement. Signing an agreement does not necessarily mean that a country is bound by the agreement.
- The country has to **ratify** the agreement before it becomes binding. After ratification, a State is said to be a **party** to the agreement. The rights and duties in the agreement are then binding on the country under international law.
- Before Namibia can ratify an international agreement, that specific agreement must be **approved** by Parliament. It must also comply with the Constitution.
- **National law** must be changed in line with the agreement. Our courts will **take note** of the international agreement if the government has signed or ratified the agreement, even before national laws have been changed.

Example

An example of how courts use international law comes from the South African case of *Hoffman v South African Airways*. In this case, the Constitutional Court held that there was a need to eliminate unfair discrimination because of the South African Constitution and South Africa's international obligations under international law:

"The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligation. South Africa has ratified a range of anti-discrimination Conventions, including the African Charter on Human and Peoples' Rights. In the preamble to the African Charter, Member States undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of Article 1, Member States have an obligation to give effect to the rights and freedoms enshrined in the Charter."

Some of the international agreements that Namibia has ratified include:

- *International Covenant on Civil and Political Rights* (ICCPR), on 28 November 1994.
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR), on 28 November 1994.
- *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), on 23 November 1992.
- *Convention on the Rights of the Child* (CRC), on 1 October 1990.

Namibia is also party to the regional *African Charter on Human and People's Rights*, which was adopted by the Organisation of African Unity (OAU) in 1981.

None of the treaties specifically mention HIV/AIDS, but many contain articles that are relevant to people living with HIV or AIDS. Remember, all people have the same human rights, including people with HIV/AIDS. In the ICESCR, the right to health care is recognised as *"the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."*

6. The right to health in international law

Just like other people, people with HIV or AIDS need access to medication and quality health care services. The Namibian Constitution does not include a specific right to health care, but calls for the promotion and maintenance of the welfare of the people by adopting policies aimed at, amongst others, achieving an acceptable level of nutrition and standard of living and to improving public health. This right is not directly enforceable in a court because it is only a *Principle of State Policy*.

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR), to which Namibia is a party, says that all States must:

> *"…recognise the right of everyone to the enjoyment of the highest attainable level of physical and mental health."*

States must also create:

> *"Conditions which would assure to all medical services and medical attention in the event of sickness."* (Article 12)

As a party to this Covenant, Namibia is obliged to ensure that every Namibian enjoys the right to the highest attainable level of physical and mental health.

Clearly it is important to be aware of international law and Namibia's international obligations. Introducing international law aspects into the debate about HIV/AIDS would help to raise awareness about issues that have been decided already in other countries. It would also guide us about what to lobby for and it would provide examples for our courts to consider when they face difficult decisions. Knowing international and foreign law would help to encourage people with HIV or AIDS to stand up for their rights.

7. Intellectual property laws and patents

We have seen that it is very useful to know the rights of persons with HIV or AIDS according to international agreements. Another aspect of international law that is directly relevant to people with HIV or AIDS is intellectual property law, as this allows for the patenting of medications.

In addition to regulating trade, the World Trade Organisation (WTO) has worked to improve the protection of intellectual property around the world.

Intellectual property is the term used for the inventions of individuals, companies and governments. Intellectual property covers inventions of new techniques or medicines (these can be **patented**), new books and music (these are **copyrighted**).

The aim of protecting intellectual property is to give exclusive rights to the inventor and to prevent other people from making copies and selling them for their own benefit. A person who makes something new (or uses a new process to make something) may apply for a **patent**. If the application is successful, the inventor is given the patent and becomes the “patent holder”. After this, only the patent holder may make the thing or use the process – it is illegal for others to do so.

Before the WTO was born, many developing countries did not have laws to register patents. With certain things, including medicines, countries deliberately chose not to have laws to grant and protect patents. Instead, they encouraged local manufacturers to find ways to copy products and processes safely. This happened in countries like India, Egypt and South Africa. These countries argued that patents should not restrict access to public goods, like medicines.

7.1 The TRIPS Agreement

However, the WTO has created a new international law to extend and strengthen the protection of intellectual property world-wide. It is called the TRIPS Agreement. TRIPS stands for *Trade-Related Aspects of Intellectual Property Rights*.

7.1.1 What the TRIPS Agreement means

WTO members must all grant patents fora minimum of 20 years for all new inventions – including inventions of essential products such as medicines and processes for the manufacturing of medicines.

When this happens, for at least 20 years after the patent is registered, no other company is allowed to manufacture or market the same product.

The effect of the patent is that even if another company can produce an identical product and sell it at a cheaper price, it is not allowed to do so. With medicines, this means that poor countires cannot buy affordable medicines, but must either buy the patented products or not buy them at all. Unfortunately, patents give drug companies the power to set high prices – and to reap high profits.

Many people and organisations say that:

- this is a violation of human rights because it means that poor people cannot afford to buy medicines that may make them well and improve their lives, and
- while international patent law may be justified for intentions such as computer parts, it should not cover essential life-saving goods like medicines.

In Namibia, the Patents, Designs, Trade Marks and Copyright Act 9 of 1916 allows for the registration and protection of patents. Agreement.

7.2 The TRIPS agreement and our government

Many countries have to change their laws to comply with the TRIPS Agreement if they want to become members of the WHO. Countries do not have to join the WTO, but if they do not, it is more difficult for them to trade internationally and their citizens suffer. Namibia is a member of the WTO and is a signatory to the TRIPS Agreement. As a result, Namibia has to fulfil its obligations; otherwise other Member States can take action against us.

Member States can complain to the WTO about other members who do not comply with the TRIPS Agreement. A tribunal of the WTO will decide the matter. It can authorise steps against the country refusing to respect the agreement, such as imposing a fine.

7.3 Generic medicines

Patents last for 20 years before expiring. After a patent has expired, other companies may manufacture and sell the item, such as medication. Medication made in this way without a patent is called **generic medicine** (or generic “drugs”). Generic medicine is always much cheaper than the patented original.

Many older drugs for diseases such as tuberculosis have generic substitutes that are cheap and affordable, however most of the anti-retroviral drugs used to treat HIV and AIDS are still under patent as HIV is a new disease. They are very expensive and most developing countries cannot afford them. This has led to people campaigning for the prices to be brought down – many companies have done so, but the drugs are still too expensive for poor countries to afford.

8. What can governments do to increase access to essential medicines?

Access to affordable medication is a matter of life and death in Namibia.

Every year, many people die who could have been saved with the right medication. Generic medication can be used to treat people who need medication, but because of patent restrictions, it is illegal to sell or distribute generic medicines in countries where these medicines are still under patent.

Luckily, none of the anti-retroviral medicines used to treat HIV are patented in Namibia. There is thus no legal barrier to Namibia importing cheaper generic medicines.

All medicines need to be registered in Namibia before they can be sold legally. The Medicines and Related Substances Control Act covers the registration of medicines. This Act establishes the Medicines Control Council, which is responsible for the registration of medications. Medicines can be registered once they are proved to be:

- safe,
- of good quality, and
- effective.

Both patented *and* generic medicines can meet these criteria.

Namibia is in the fortunate position of being able to import and distribute generic medicines. But in countries where anti-retroviral medicines are patented, there are still steps that governments can take to increase access to these medicines. These include:

- compulsory licensing, and
- parallel importing.

8.1 What is compulsory licensing?

Compulsory licensing is when a government or court issues a license to allow someone other than the patent holder to make and sell a patented product in a particular country. The TRIPS Agreement only allows compulsory licensing when:

- An attempt has been made to buy the product from the patent holder.
- The licence is for public, non-commercial use, ie the government does not want to sell the product for profit but rather to use it to treat people who are ill and poor.
- The patent holder must receive a royalty or compensation payment.

In cases of emergency or extreme urgency, the TRIPS Agreement allows a compulsory licence to be issued without the above conditions being met. The UN has said that HIV/AIDS is an **emergency** and a **threat to security and development**. This should be a strong enough reason for using compulsory licences to to reduce the price of medicines.

8.2 What is parallel importing?

Drug companies sell medicines for different prices in different countries. The price is often decided by what a market can afford to pay, rather than the cost of the ingredients of the medicine or the amount that was spent on its development.

Parallel importing happens when a government chooses tobuy a medicine from a wholesaler in a country where it has been sold by the manufacturer at a cheaper price than the price that the manufacturer is offering to that government for the same medicine. This is also called “parallel importation”.

9. Points for discussion

- Do you think that some essential lifesaving products, such as medicines for HIV/AIDS, should be exempted from patent protection?
- What action can be taken to speed up and improve access to cheaper, safe and effective generic drugs for people living with HIV or AIDS in Namibia?

10. References and resource materials

Laws

Constitution of the Republic of Namibia

Medicines and Related Substances Control Act No 101 of 1965

Patents, Designs, Trade Marks and Copyright Act 9 of 1916

Policy documents (including international law agreements)

Universal Declaration of Human Rights, 1948.

African Charter on Human and Peoples’ Rights, 1981

Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

Convention on the Rights of the Child (CRC), 1989

International Covenant on Civil and Political Rights (ICCPR), 1966

International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

Ministry of Labour, National Code on HIV/AIDS in Employment, Government Notice No 78, Government Gazette No 1835/1998

UN International Guidelines on HIV/AIDS and Human Rights, 1998

Cases

A v South African Airways (unreported), Case No J1916/99, Labour Court, Braamfontein.

Bragdon v Abbott 524 US 624.

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

Hoffman v South African Airways 2001 (1) SA 1 (CC)

Quebec v Montreal 2000 SCC 27.

Reports, manuals and other useful resource materials

AIDS Legal Network (ALN): ALQ – The AIDS Legal Quarterly (quarterly magazine).

Community Law Centre: Socio-Economic Rights in South Africa (A Resource Book), October 2000.

Globalization and Access to Drugs, Perspectives on the WTO/TRIPS Agreement, WHO, Second Edition, 1999.

Gruskin, S: The highest priority: making use of UN conference documents to remind governments of their commitments to HIV/AIDS, Health and Human Rights, Vol 3 No 1, 107–142.

UNAIDS Guide to the United Nations Human Rights Machinery for AIDS service organizations, people living with HIV/AIDS, and others working in areas of HIV/AIDS and human rights, UNAIDS, 1997.

Websites

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

Ministry of Trade and Industry	www.mti.gov.na
AIDS Law Project	www.hri.ca/partners/alp/
AIDS Legal Network	www.aidslegal.co.za
Médecins Sans Frontières	www.msf.org
Treatment Action Campaign	www.tac.org.za
UNAIDS	www.unaids.org
World Health Organisation	www.who.org

World Trade Organisation ..... **www.wto.org**

Chapter 6

Health rights

1. Introduction

One often hears of people with HIV or AIDS 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 about confidentiality not being respected and about being tested for HIV without their informed consent. In fact, in many cases, they complain that they did not know that they were being tested for HIV at all.

In this chapter 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, from statute law and from the common law. There are also official policies that protect the rights of patients. The Ministry of Health and Social services 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 patients' rights that are especially important for HIV/AIDS 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 offer health care services to all people in Namibia. Furthermore, the right to equality ensures that all people, including people with HIV or AIDS, are entitled 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/AIDS, the matter must be reported to:

- the Ministry of Health and Social Services,
- the Office of the Ombudsman, or
- the AIDS Law Unit at the Legal Assistance Centre, where legal advice will be available.

The *Policies and Guidelines for HIV/AIDS Prevention and Control* states that no health care worker should refuse to treat someone with HIV 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 patients who do not have HIV.

But the *Guidelines* also says that some health care workers themselves may have certain conditions such as pregnancy, immune-compromised status or certain infections that would require them not to treat patients with HIV.

2.1 Public health care services

People living with HIV or AIDS have a right to access any health care services that are available. The State has a *duty* to promote every person's right to access to health care services and also to improve the range of health care services and treatments available to people living with HIV or AIDS. In order to improve medical diagnoses and the 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 are not yet available in government hospitals because the medications are very expensive. Every patient with HIV or AIDS has the right to receive the treatments recommended in the *Guidelines*.

2.2 Private health care services

In the past, many medical aid schemes discriminated against people 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 however, and many medical aid schemes are now offering benefits to people living with HIV and AIDS, including the 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 sets out the rights, as well as the duties and responsibilities, of patients.

The Charter is not a law, but it provides guidelines that 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, you can take the matter to court.

Patients have the following rights:

- Access to services, based on need. These include:
  - emergency services,
  - examination and treatment as soon as reasonably possible,
  - referral to the next level of care.

- To be treated with integrity and dignity, including the right to:
  - be treated with respect and courtesy.
  - privacy during consultation, physical examination and treatment.
  - confidentiality.
  - be given detailed information on treatment and intervention, and to be consulted on options.

- Access to information, including information on:
  - available health and social services.
  - one's own personal files.
  - the identity of the health care worker.

Patients are responsible for:

- knowing the contents of this Charter.
- keeping her or his own health passport safe and with him/her.
- asking for assistance and information.
- accepting that emergency cases receive priority.
- paying the required fee.
- 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 to leave the facility.
- keeping facilities clean.

3. The right to confidentiality

Health care workers such as doctors, nurses, psychologists, dentists and other health care workers 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 *and* a legal requirement.

Confidentiality is very important in the field of HIV/AIDS. Persons who suspect that they may be infected with HIV must be encouraged to go for voluntary counselling and testing. Knowing that the results will be confidential will encourage them to go through this process. Similarly, confidentiality encourages people who know that they have HIV or AIDS to look for medical assistance without fear.

The Ministry of Health and Social Services recognises the importance of upholding the right to confidentiality. The *Policies and Guidelines for HIV/AIDS Prevention and Control* published in June 2001 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 Nursing Board and the Medical Board set up guidelines to regulate the conduct of their members. Ethical guidelines are not like laws from parliament: they do not have the force of law. However, when these guidelines are not followed and this results in misconduct or improper conduct, the professional body can investigate the complaint and take disciplinary steps against the person involved.

In Namibia, in addition to other professional boards, we have the:

- **Medical Board.** This Board is established by the Medical and Dental Professions Act to control the training, registration and conduct of doctors. Every doctor must be registered with the Board to be allowed to practise in Namibia. The Board may enquire into improper conduct or misconduct and may take disciplinary steps against a doctor who is found guilty of misconduct. The Board can caution or reprimand a doctor, suspend a doctor from practice for a specified period, and remove the doctor's name from the list of registered professionals.

- **Dental Board.** This is a similar body to the Medical Board, established by the same Act, but relates to dentists.

- **Nursing Board.** This Board was established by the Nursing Professions Act to control the training, registration and practice of nurses and midwifes. Nurses and midwives must be registered before they may practise in Namibia. The Nursing Board issues rules regarding the conduct of its members and can investigate improper conduct. The Board has the power to caution or reprimand nurses and midwives, to suspend them or to remove their names from the professional register.

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
- when it is in the interests of a patient who is unable to give permission.

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 of a patient can only be given to another person when:

- the patient has consented to it,
- in the case of patient who is a child, the child's parents or guardian have given consent,
- if the patient has died, the patient's next-of-kin (closest family) has agreed to it.

Confidentiality of HIV status is important for the following reasons:

- It is important for the control of the epidemic that people with HIV or AIDS are diagnosed, treated and counselled.
- Patients will not go to health workers if they think their medical information will be made public. People with HIV or AIDS will be afraid to be tested or to obtain services and treatment.
- People with HIV and AIDS already face discrimination and stigmatisation. 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 McGeary's right to confidentiality.

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 because it discusses the common law position with regard to confidentiality. As Namibia shares the same common law as South Africa, our courts will most likely come to the same conclusion in a similar matter. In the case *Nanditume v Minister of Defence*, Nanditume sued the Minister of Defence for breach of confidentiality of his HIV status. The Minister of Defence settled the claim by paying damages for breach of confidentiality.

4. Common questions about confidentiality

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

- You must **consent** before a health care worker may 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, you will most likely consent to this information being given out when it is in your best interests in order to get proper medical treatment.
- For example, other health care workers may need to know your HIV status if you need special treatment related to your HIV infection.

- If you refuse to agree 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 you getting unsuitable medical treatment and if this may be dangerous to your health. Your health care workder also has a right to refer you to another doctor if you refuse to agree to this information being given to other health care workers in this type of situation.

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

- ***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 may only inform your sexual partner of your HIV status if you have **consented** to this. Normally, counselling will help you to see the need to inform your sexual partners, and to protect yourself and your partners.
- The *Policy on HIV/AIDS: Confidentiality, Notification, Reporting and Surveillance* provides for **involuntary partner notification** (ie without consent) by a health care worker only in the following circumstances:
  - where you have been thoroughly **counselled** about the need to tell your partner,
  - where you have **refused** to inform your partner, or have refused to allow the health care worker to inform your partner,
  - where there is a **real risk** of HIV transmission to an **identifiable partner**,
  - where the health care worker gives you **reasonable advance notice** of the intention to inform your sexual partner, and
  - where **follow-up support** is provided to the people involved.

Important points

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.

Steps to take before deciding to tell a patient's sexual partner

We recommend that health care workers take these minimum steps before deciding to inform a person's known sexual partner:

1. Give in-depth counselling on why it is important to tell a sexual partner. If you are unable to give this counselling, then the patient should be referred for HIV/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 the patient's right to confidentiality in the circumstances, and then offer the patient the opportunity to inform his or her sexual partner with or without your help.
4. Make the decision 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?

- The sexual partner of a person with HIV may **sue** a health care worker if the health care worker did not tell him or her that he or she is at risk of HIV.
- A health care worker has the duty to protect a sexual partner from possible infection only if:
  - the health care worker knows the sexual partner is in **danger** (ie the person with HIV refuses to tell the partner or to use condoms during sex) and
  - the health care worker has followed the steps set out above in trying to deal with the situation.
- A health care worker must **believe** the patient with HIV or AIDS who says their partner is not at risk of infection because they are having safer sex, unless the patient is clearly 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 about HIV status

- A person with HIV has to decide which family members or caregivers to tell. For this she or he may need counselling or advice from the health care worker.
- The health care worker has no legal duty to inform family members, unlike the legal duty to inform a sexual partner at risk.

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 only because the court has 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 they discussed during a counselling session.

Most of the training for lay counsellors in Namibia is done by organisations such as Catholic AIDS Action and the Phillipi Trust of Namibia. These organisations have tried to standardise their training of lay counsellors, but this has not been finalised.

Important points

Lay counsellors should be guided by:

- The accepted guidelines of professional bodies, such as the Nursing Board and the Medical Board.
- Constitutional and common law rules on privacy.
- The Ministry of Health and Social Service's *Policies and Guidelines on HIV/AIDS*, and the *Policy on Confidentiality, Notification, Reporting and Surveillance.*

4.7 HIV status and medical certificates for employers

- Employees have to give medical certificates to their employer when they are booked off sick for more than two days.
- The Labour Act requires information on the **nature** and **duration** of the specific illness. 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.
- Health care workers may **not** give false information on a sick certificate; this is unethical and illegal.

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 and 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/AIDS reporting and confidentiality

Notification is only important where a person can contract a disease through mere 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 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 with HIV or AIDS do not seek medical care, it seriously affects prevention efforts.

- The *Policy on Confidentiality, Notification, Reporting and Surveillance* only allows reporting 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, without providing information on the identity of the person who has AIDS.

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

- The person with HIV or AIDS 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 Boards can take disciplinary action against the member.
- The person with HIV or AIDS can lay a criminal charge against the health worker.

Important points

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 against doctors and nurses: three years.

- There are no time limits for reporting the matter to the professional body concerned, but this should be as soon as possible after the violation occurs.

5. Issues regarding HIV testing

The Constitution and the common law protect everyone's rights to privacy, dignity, autonomy and bodily integrity. Because of these rights, a person has the right to make decisions about her or his own body, including decisions about medical treatment and HIV antibody tests. This requires that a person must **consent** before any medical treatment or testing is done. Likewise, a person may refuse medical treatment.

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 of the treatment, its nature and possible consequences, and must give permission before the examination, testing, treatment or operation starts.
- **Express permission:** This must be a clear indication that a person agrees to specific medical treatment. It 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 their decision.

The *Policies and Guidelines for HIV/AIDS* has this to say about informed consent:

> *"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 in 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 to treatment.

5.1 Who may consent to an HIV test

The person who will be tested must consent. 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 who are of **sound and sober mind** can give valid consent to treatment. Adults **without** legal capacity (for example, 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, the 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**: 18 years or older.

5.2 Pre- and post-test counselling

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

- **Pre-test counselling** is done 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 done 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* recognises the importance of pre- and post-test counselling. It says that pre-test counselling should help a person to "…*grasp the significance and possible implications of testing"*. Post-test counselling, on the other hand,

> *"…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. Constitutes part of the prevention strategy by encouraging behaviour change.

5.3 Deciding to test for HIV

- A person can only be tested with her or his **informed consent**, when she or he wants to go for a test.

- If a doctor thinks that an HIV test is necessary for diagnosis or for treatment, the doctor must discuss this with the patient first. 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. When doing so, researchers must 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 different test. For example, he 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 only be done with the informed consent of the patient.
- 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 the case of an emergency, a doctor or hospital does not need to get consent before carrying out essential, life-saving treatment.

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

In an emergency, health care workers can only do an HIV test 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 diseases. When donating blood, a person is asked to fill in a form asking questions in order to determine if 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 (no names are used) and is **unlinked** (the person who was tested cannot be traced afterwards).

In Namibia, this kind of research is done on pregnant women who go to clinics for checkups.

6.4 Testing without consent

Testing can take place without consent if the law allows it. **In Namibia, we do not have any such laws.**

An example would be a law allowing the testing of alleged rapists for HIV.

6.5 Mentally ill patients

Testing a mentally ill person for HIV can only be done if it 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 treatment or testing on behalf of a mentally ill patient if the patient cannot do so:

- the patient's curator (the person appointed by a court to look after the mentally ill person),
- the patient's spouse,
- the parent of the patient,
- the child of the patient, if the child is 21 or older,
- the brother or sister of the patient, or
- the medical superintendent of the mental institution if the patient's next-of-kin cannot be found.

6.6 Refusing to undergo an HIV test

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

6.7 The consequences of an HIV test without consent

Testing without consent is unlawful. The rights of the person have been violated. He or she can:

- Institute a civil claim for invasion of privacy, and infringements of the rights to dignity and bodily integrity.
- Lay a criminal charge of assault with the police.
- File a complaint with the health care worker's professional body.

Important cases

C v Minister of Correctional Services

Prison authorities tested C for HIV without 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 the 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 he received no pre- or post-test counselling. During the trial, SAA admitted they should have obtained his informed consent and provided counselling and the matter was settled for R100 000.

7. Testing summary

Testing and consent

Informed consent

Testing that must take place with informed consent:

- Voluntary testing
- Testing for insurance purposes
- Testing to make a diagnosis

Consent by another person

Testing that can take place with the consent of another person:

- Emergency testing
- Testing of certain mentally ill patients
- Testing of children under the age of 14

Testing without consent

Testing that can take place without consent:

- Anonymous, unlinked testing for research purposes
- Testing of an existing blood sample
- Testing where the law allows for testing without consent

8. Points for discussion

1. Do you think that confidentiality is necessary in countering the HIV/AIDS epidemic?
2. When do you think it may be in a patient's best interests to disclose his/her HIV status?

9. 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 Labour, National Code on HIV/AIDS in Employment, Government Notice 78/1998

Ministry of Health and Social Services: Policies and Guidelines for HIV/AIDS Prevention and Control, June 2001

Ministry of Health and Social Services: The Patient Charter of Namibia, July 1998

Ministry of Health and Social Services: Policy on HIV/AIDS: Confidentiality, Notification, Reporting and Surveillance, August 2000.

Namibian HIV/AIDS Charter of Rights, 2000

Cases

Nanditume v Minister of Defence 2000 NR 103 (LC)

A v SAA (unreported), Case No. J1916/99, Labour Court, Braamfontein.

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 Law Project (ALP) and Lawyers for Human Rights: HIV/AIDS and the Law – A Trainer's Manual (First Edition), July 1997.

ALP: HIV/AIDS Current Law & Policy booklet 2: 'Knowing your HIV status – issues around testing', July 2000.

ALP: HIV/AIDS Current Law & Policy booklet 3: 'Who has the right to know?', July 2000.

AIDS Legal Network (ALN): ALQ – The AIDS Legal Quarterly (quarterly magazine).

Community Law Centre: Socio-Economic Rights in South Africa (A Resource Book), October 2000.

Department of Health: Patients' Rights – your right to dignity (pamphlet), 1999.

South African Law Commission: Compulsory HIV Testing in Persons Arrested for Sexual Offences, Discussion Paper 84 (Project 85), 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
South African Law Commission:	www.law.wits.ac.za/salc/salc.html
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/

Chapter 7

The rights of employees

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 her or his HIV status is found out, or a person with HIV may be excluded from benefits such as medical aid or housing loans.

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

2. The laws dealing with HIV/AIDS in the work environment

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 the right to equality and the right to protection against discrimination. The right to equality means that employees with HIV may be not be treated any differently from employees who don't have HIV. This applies to both the **public** and **private sectors**.

Article 10 reads:

"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 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 reads:

"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 for not employing him as a cabin attendant after he tested positive for HIV. The refusal of employment, because of HIV, also violated his dignity.

2.2 The Labour Act

The Labour Act was passed in 1992. This 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 has provisions dealing with the health and safety of employees at work.

For our purposes, the most important aspect of the 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 Namibia, 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 her or him can take the matter to the Labour Court.

In *Nanditume v The Minister of Defence,* the only Namibian case on HIV/AIDS 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 he also had HIV. The NDF refused to employ him because of his HIV status. The Labour Court found this to be unfair discrimination and ordered his instatement. The court held that the test is whether the person is physically fit to do the job at the time of employment and not only whether the person has HIV or not.

Important points

As a result of this case, the Defence Act was amended to exclude any person from being appointed in the Namibian Defence Force who has a disease of ailment which –

- will impair his or her ability to undergo any form of training,
- is likely to deteriorate to the extent that it will impair his or her ability to undergo any form of training,
- is likely to be aggravated by his or her undergoing any form of training.

(Sec 10, Defence Amendment Act, Act No 8 of 2001)

People with HIV or AIDS fall squarely within these categories and will therefore not be appointed by the Defence Force.

2.2.2 Protection offered by the Labour Act

The Labour Act protects an employee from:

- **Unfair dismissal** – for example, dismissal solely on the grounds of positive HIV status.
- **Unfair disciplinary action** – for example, being treated unfairly as a result of HIV status.
- **Unfair discrimination** – for example, being discriminated against because of HIV status.

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

- There was no **fair and valid reason** for the disciplinary action taken.
- **Proper procedures** were not followed.

Valid reasons for a dismissal include:

- **Misconduct** – doing something wrong at work, such as stealing.
- **Incapacity** – being unable to do fulfil the requirements of the job, such as when a person is too sick to work.
- **Operational requirements** – when the needs of the business have changed to a large extent, for example 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 107 of the 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
- *Political opinion*
- *Marital status*
- *Sexual orientation*
- *Family responsibilities*
- *Disability*

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

HIV and AIDS are not listed specifically as prohibited grounds of discrimination but could be dealt with under **unfair discrimination** on its own or under the heading of **disability**. In *Nanditume*'s case, the applicant claimed unfair discrimination, or alternatively, discrimination on the grounds of disability. The court found that the discrimination was unfair. It did not deal with the disability aspect.

Important terms

Disability means:

Any physical or mental disability that impairs or restricts such person's preparation for, entry into or participation or advancement in employment or occupation.

Presumption:

Unfair discrimination is presumed (taken for granted) if any act or requirement has an adverse effect on people from one of the grounds listed above, compared with people who do not belong to those groups.

Employment or **occupation** includes:

- Access to vocational guidance, training and placement services.
- Access to employment, occupation or work.
- Promotion, demotion and transfer.
- Remuneration or other conditions of employment.
- Discipline, suspensions or termination of employment.
- Access to any other benefits, facilities or services.

Other benefits, facilities or services include things such as:

- Car and housing allowances.
- Pension and medical aid benefits.

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.

Discrimination is not unfair if a person is selected *"According to reasonable criteria, including the ability, capacity, productivity and conduct of a person or in respect of the operational requirements and needs of the particular occupation or work."* Source of definition?

Employers are allowed to choose between employees, but this choice must be based on reasonable criteria. For example, an employer may require that applicants for a secretarial job are able to type 60 words per minute. The employer may not 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 related to HIV/AIDS. Many people with HIV or AIDS cannot make use of housing allowances because they cannot get insurance to cover the mortgage. (This is a bank requirement.) These are examples of discriminatory practices. These matters will 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 and Employment* under the Labour Act. With this Code, the Ministry of Labour hopes to

address most of the issues regarding HIV/AIDS in the workplace, in order to prevent new infections and to provide optimal care and support for people in the workforce. Because it falls under the Labour Act, its provisions will apply to the same people that fall under the Labour Act as outlined above.

The Code states that:

- There should be no pre-employment tests for HIV. Normal medical tests to determine current fitness for work should not include HIV tests.
- There should not be compulsory workplace testing for HIV.
- Voluntary testing should be done with the informed consent of an employee.
- Employees with HIV or AIDS have a legal right to the confidentiality of all of their medical information.
- HIV status should not be a factor in job status, promotion or transfer.

Example

Liesbet has been working for the same company for ten years. She was due to attend a training course when she told the company that she was HIV positive. The company decided to send someone else in her place.

This is unfair discrimination: in terms of the *National Code on HIV/AIDS*, her HIV status should not be a factor in her job status.

Important points

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

3.1 Health and safety at work

Working with dangerous machinery and equipment can lead to injuries and even the death of employees. With HIV and AIDS there is an additional risk: if there is an injury at work that results in an open wound, there is a possibility that HIV can be transmitted, particularly if there is a lot of bleeding.

Under the Labour Act, employers have the duty to take all steps to ensure the safety, health and welfare of employees at work (Section 96). This includes a safety plan, proper training in safety procedures and information on how to protect oneself from infection in the event of accident or injury.

The Labour Act also requires employers to provide protective clothing and equipment. To avoid exposure to HIV, the employer should provide gloves to wear and disinfectant to clean up the blood. 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 points

Health and safety in the workplace should include:

- a safety plan,
- information on how to prevent infection,
- protective clothing and equipment, and
- training about why the above are important and necessary.

Guidelines

1. When an employer has ten or and more employees, the employees should elect one employee to be their **workplace safety representative**. This person must carry out inspections to look for potential hazards, investigate

safety complaints, and make representations to the employer and an inspector.

2. The employer should establish a **workplace safety committee** to consider safety issues at work.
3. An employee who feels that the working environment is not safe may **leave** the workplace until the situation has been restored.

3.2 The Employees Compensation Act

Under the Employees Compensation Act, employees who earn less than N$72 000.00 per year have the right to claim compensation for industrial illnesses and accidents that happen at work. The purpose of this Act is to force employees to claim from the Fund rather than to sue their employers.

HIV/AIDS 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.

As HIV/AIDS falls outside the Act, it would still be possible to sue the employer directly for HIV infection in the workplace, particularly if negligence can be shown on the part of the employer.

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 avoid the accident from happening. The court said:

"It seems to me to be clear that an employer is obliged, even at common law, and leaving aside any obligations imposed under the Machinery and Occupational Safety Act and its regulations, to see that 'his servants do not… through his personal negligence such as a failure to provide a proper and safe system of working 'suffer harm'."

Of course, if an employee were to sue an employer for negligence in the context of HIV infection at work, the employee would have to show that all the legal requirements to establish the employer's negligence are present and that the accident gave rise to HIV infection. The absence of proper first-aid equipment, the failure to enforce the use of universal precautions and the failure to provide training in this regard may well lead to proving the liability of the employer.

3.3 The Social Security Act

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

Employees are encouraged to apply for sick leave benefits first – this would pay the employee part of her or his salary for two years. A person must be booked off sick for more than a month before she or he can apply for sick leave.

Disability benefits for HIV/AIDS are a one-off payment of N$2 500.00, the same amount that is paid out by the Fund on the death of an employee.

Namibian social security legislation does not provide for unemployment benefits.

Guidelines

Steps to take in order to prove HIV infection as a result of an accident at work

1. Report the accident.
2. The complainant should take an HIV test, with pre-and post-test counselling, to find out if he or she is HIV negative.
3. Ask the person who was injured (the person who has an open wound) to take an HIV test. Keep record of the attempts to get the permission.
4. If the person refuses to give permission, report this to the manager in charge of safety.
5. To make sure about the complainant's HIV status, he or she should take an HIV test again six weeks to three months later.
6. The complainant can claim more compensation if it can be shown that personal protective equipment was not available and the infection was due to the negligence 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 an employer or the Social Security Commission within **six months**, an employee loses the right to claim.
- A case against a government hospital must be started 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 incident.

4. Issues relating to HIV/AIDS and employment

4.1 HIV testing for job applicants

- An employer cannot force a person who is applying for a job to have an HIV test. (This is also called **pre-employment testing** for HIV.) Note that companies or government departments requiring this are acting unlawfully.
- An exception to this rule is where legislation such as the Defence Amendment Act allows for HIV testing.

4.2 Refusal to employ a person due to HIV

- It is unfair discrimination if an employer refuses to employ a person with HIV or suspected of having HIV, unless being HIV negative is directly relevant to the job.
- Of course, if the prospective employee is too sick to work, the employer does not have to employ the applicant.

It would not be unlawful to refuse to employ a person with HIV where legislation allows this practice.

4.3 Confidentiality of medical information at work

- An employee is not legally obliged to tell the employer that he or she is HIV positive. An employee's medical condition is private.
- An employer cannot force an employee to disclose his or her medical status.
- If an employee decides to tell an employer about his or her HIV status, the employer must keep this information confidential. The employer may only inform other people with the employee's consent. A breach of confidentiality can result in a claim for damages against the employer.

- It is unlawful for a health care worker to tell an employer of an employee's HIV status without the prior consent of the employee.

4.4 Entitlement to sick leave

All employees, including people with HIV or AIDS, are entitled to sick leave under the Labour Act. This Act sets out the basic conditions of employment, which include sick leave.

- Employees have 30 working days sick leave over a three-year period if they work five days or less per week.
- Employees have 36 working days sick leave over a three-year period if they work six days per week.
- In the first year of employment, sick leave is calculated differently: employees working five days or less a week are allowed one day sick leave for every five weeks worked; other employees get one day sick leave for every month worked.
- Sick employees are entitled to full pay for the days they are off sick.
- Sick employees must provide their employer with a medical certificate if sick for more than two days. The certificate must state the nature and duration of the illness.

Important point

An employee with HIV who falls ill should be treated like any other employee. The important thing is how the illness will affect the employee's ability to work – not whether the sickness is due to HIV or not.

4.5 Dismissal of employees with HIV or AIDS

- It is unfair to dismiss a person with HIV or AIDS who is still fit to do the job.
- An employee with HIV or AIDS may only be dismissed if that employee is **incapacitated** (too sick to work).

4.6 Dismissal of employees with AIDS

- Any employee, including employees with HIV or AIDS, is entitled to use their sick leave.
- A person with HIV may get sick with different opportunistic infections and then get better again. The employee may use sick leave during these illnesses.
- Eventually, an employee with HIV may develop AIDS. When a person has AIDS, he or she may not be able to work anymore. Such an employee has become **incapacitated**.
- An employer is allowed to dismiss an employee on the grounds of incapacity and poor work performance, even if the employee has not used all their sick leave.
- Dismissals due to incapacity may only be done in accordance with the Labour Act.

Important point

It is unlawful to dismiss an employee on the **suspicion** that he or she has AIDS. An employee has to be **incapacitated** before he or she can be dismissed.

Guidelines

Obligations of an employer in the event of dismissal for incapacity

1. Investigate the extent of the incapacity or injury.
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 too provide alternative employment. The **particular circumstances** of the workplace will dictate how much the employer can do to accommodate the employee.

Factors that can be considered in deciding whether there was reasonable accommodation of the employee include:

- The nature and cause of the employee's incapacity.
- The size and type of business.
- The nature of the employee's job.
- The possibility of adapting the employee's job or finding alternatives.
- The effect of the employee's illness on other employees.
- The employee's record with the employer.

Example

Erastus has to work in a freezing factory, but his health no longer allows it. His employer changed his employment to become the night supervisor at the factory. The employer provided Erastus with alternative employment.

The *National Policy on HIV/AIDS in Employment* also deals with HIV/AIDS and incapacity:

> *"HIV infected employees should continue to work under normal conditions in their current employment for as long as they are medically fit to do so. When on medical grounds they cannot continue with their normal employment, efforts should be made to offer them alternative employment without prejudice to their benefits. When an employee becomes too ill to perform his or her agreed functions, standard procedures for termination of service for comparable life-threatening conditions should apply without discrimination."*

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

- Fear and ignorance sometimes lead to other employees refusing to work with a person with HIV or AIDS.
- It is **unlawful** to dismiss an employee with HIV, even if his or her colleagues refuse to work with that person.
- The best strategy is to have a **workplace policy** on HIV/AIDS, which will provide the workforce with **information** and **education** on HIV/AIDS. A **safety policy** and the application of **universal precautions** in the case of an accident will help to address the fears of the other workers.
- Once the workforce has received adequate information, **disciplinary action** should be taken against the workers who refuse to work with the person with HIV or AIDS.

The *National Policy on HIV/AIDS in Employment* requires that employees with HIV or AIDS should be protected from **victimisation**:

> *"Persons affected by or believed to be affected by HIV or AIDS should be protected from stigmatisation and discrimination by co-workers, employers or clients. Information and education are essential to maintain the climate of mutual understanding necessary to ensure this protection."*

4.8 Developing an HIV/AIDS policy for the workplace

- Workplaces should have a policy on HIV/AIDS. It is easy to provide education and distribute condoms in the workplace.
- Workplace policies are crucial in overcoming stigmatisation and victimisation in the workplace itself.

Guidelines

Developing an HIV/AIDS policy for the workplace

1. Begin consultation between employers and employees (often via the trade union) on the need for a policy.
2. Establish a drafting committee including employee and employer representatives.
3. Conduct research and obtain advice on the various elements of the policy.
4. Write draft policy.
5. Arrange for discussions of the draft policy amongst employees and employers.
6. Finalise policy.
7. Implement the policy.
8. Evaluate the policy.

4.9 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/AIDS leads to more illness and death amongst younger employees, it does 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.
- The best solution is to renegotiate employee benefits between employers and employees to provide for all employees, including those with HIV or AIDS.

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 find out if she could become a member of four employee benefit funds. The medical examination showed she was not insurable and excluded her from three funds. She referred the dispute for conciliation to the Commission for Conciliation, Mediation and Arbitration, but before there was a decision, she resigned. 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.

5. Enforcing employees' rights in the workplace

When an employee has been unfairly dismissed (for example, because of HIV status) or unfair disciplinary actions have been taken against the employee, the employee can do the following:

- Report the matter to the **District Labour Court** (DLC) at the local magistrate's court. Such complaints must be filed within **one year** of the incident.
- The DLC will refer the matter to a **labour inspector**, who will try to resolve the dispute through negotiations with the parties.
- If the matter is not resolved, the case will proceed to court.
- The Labour Court can be approached to determine whether practices are discriminatory or not, such as the Namibian Defence Force's policy on pre-employment testing for HIV.

6. Points for discussion

- A farmer requires his workers to take an HIV test. If the workers refuse to take the test, they are fired. Is this action legal? What could 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 and avoid working in cold areas. What alternative employment opportunities could the employer investigate to accommodate her?
- 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?

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

Ministry of Labour: National Code on HIV/AIDS in Employment, GN 78 of 1998
ILO Convention on Discrimination in respect of Employment and Occupation 1958
SADC Code on HIV/AIDS and Employment, 1997
World Health Organisation / ILO Consensus Statement on AIDS in the Workplace, 1998

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 FHences & resource materials

Reports, manuals and other useful materials

AIDS Law Project (ALP) and Lawyers for Human Rights: HIV/AIDS and the Law – A Trainer's Manual (First Edition), July 1997.
ALP: HIV/AIDS Current Law & Policy booklet 4: 'Your rights in the workplace', July 2000.

AIDS Legal Network (ALN): ALQ – The AIDS Legal Quarterly (quarterly magazine).
South African Law Commission: Aspects of the Law Relating to AIDS: Pre-employment HIV testing: Project 85: Discussion Paper 72, 1997.

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
South African Law Commission:	www.law.wits.ac.za/salc/salc.html
UNAIDS:	www.unaids.org

Chapter 8

Women's rights

1. Introduction

It is important to look specifically at the rights of women with regard to HIV/AIDS. Both sexes are at risk of HIV infection, but proportionately, more women than men are infected. Women are infected at younger ages than men. Of all the population groups, young women of school-going age are most at risk.

1.1 Physical factors

Physically, women are more at risk of infection than men. The vagina has a larger surface through which HIV can enter the body than the male sexual organ, the penis. Some sexual practices, such as dry sex, can cause the vagina to tear, which makes it easier for HIV to enter a woman's body. Violent sex, such as rape, also increases the possibility of HIV infection.

1.2 Social and economic reasons

Women's socio-economic status is a major factor: many women in Namibia are unemployed and depend on their partners to maintain them. Women are often at risk of infection as a result of the behaviour of the men with whom they have relationships. When a woman is entirely dependent on the

goodwill of her husband, it becomes difficult to insist on him using a condom when they have sex. Stories of men becoming aggressive, violent or throwing the woman out of the house in such situations are common.

It is difficult to get information on HIV prevention and access to proper health care under such circumstances and if women in this sort of situation try to find out more about protecting themselves against infection, they may be accused of promiscuity.

Many cultures make it difficult for women to talk openly about sexual matters and allow them no choice with regard to the planning and spacing of children. Many women do not realise that if their husbands have sex with them against their wishes, it is in fact rape.

Important point

"No marriage or other relationship shall constitute a defence to a charge of rape under this Act."

Combating of Rape Act, Act No 8 of 2000

The reality in society is that women are often treated differently from men, and men often occupy a more favourable position in society. Men get better jobs, earn more, and often do not help around the home. Culture certainly has a role to play, as many cultural rules require men to make the important decisions in their families and in society. We call this **gender discrimination**.

Society and culture may impose behavioural roles on men and women, meaning that men and women are expected to behave in a certain way –- this is called **gender stereotyping**. If a person behaves differently, the community views that person with suspicion. If a man is expected to sleep around to prove his masculinity, he may be at risk of HIV infection. Through his behaviour he puts women at risk, because cultural expectations of women may prevent her from obtaining the education and information necessary to protect herself from HIV. Thus, failing to break away from the stereotypical roles required by society in fact puts men and women at risk of HIV infection.

The **Convention on the Elimination of All Forms of Discrimination Against Women** (CEDAW) recognises the role that stereotyping has in oppressing women, and requires States to change these roles through education.

The Constitution demands equal treatment for men and women. Legislation such as the Affirmative (Employment) Act aims to improve the situation of women in employment. But these attempts will not be successful if women do not understand their constitutional rights. But men should also be involved in the struggle against **gender inequality**. Only when society as a whole understands and implements equal rights for women and recognises women's equal status will we be able to say that gender discrimination has been overcome.

Important point

Gender discrimination and **gender inequality** (perception of some members of society that women and men should behave differently from one another and that men are of higher social status than women) put women at greater risk of HIV and AIDS.

In this chapter we will consider women's rights: in our Constitution, in terms of legislation and under international law, with a view to **empowering** women to make changes in their lives.

2. Women's rights

2.1 The Constitution

The Constitution protects the human rights of all people in Namibia, including women. The Constitution guarantees the right to equality, saying, *"All people shall be equal before the law."* It specifically prohibits discrimination on the grounds of sex.

The right to dignity is just as important. This recognises that women are independent human beings and that they are entitled to dignity, respect and personal liberty. The rights to personal liberty and privacy provide women with the power to make decisions for themselves, free from the approval or interference of others.

The right to education, and the freedoms of speech, expression, association and assembly give women the means to obtain the information necessary to improve their situation.

Another important right is the right to a family. This right provides that:

- Women and men have the right to marry.
- Both spouses must freely consent to the marriage.
- Both spouses have equal rights prior to marriage, during the marriage and at its dissolution.
- The family – the fundamental group unit of society – is entitled to protection by the State.

All of these rights work together to protect women from unequal treatment. They can and should be used to change cultural and social practices that help to oppress women.

Our Constitution also allows for affirmative action measures through which the imbalances of the past can be addressed. Article 23 specifically states that women have been disadvantaged:

> *"Women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation."*

The Constitution created an Office of the Ombudsman to act as a watchdog to ensure that the human rights of all Namibians, including women, are not violated.

The advancement of women is also a *Principle of State Policy*.

Important case

In *Myburgh v Commercial Bank of Namibia*, the Supreme Court said the following about the effect of the common law on women married in community of property:

"…It must be concluded that women can claim to have been part of a prior disadvantaged group. This is acknowledged by the Constitution itself. (See Art 23 (3). Where such differentiation is based on stereotyping which does not take cognisance of the equal worth of women but reduces them, in the eyes of the law, to minors who cannot act independently but need the assistance of their husbands, there can also be no doubt that such disabilities to which such women are subjected, impair the dignity of women as a class or individually. The differentiation takes no cognisance of the fact that in many marriages in community of property the intelligence, training, qualifications or natural ability or aptitude of the woman may render her a far better administrator of the common estate than her husband."

2.2 International law

You will recall that international human rights agreements such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* protect the rights of all citizens and require equality between men and women.

Nonetheless, women continue to be subjected to discrimination and in some societies, serious inequality. In 1979, the United Nations adopted CEDAW to eliminate discrimination against women and to improve their status. Namibia ratified this Convention, and is required to implement its provisions in Namibia.

We will highlight some provisions that are particularly important with regard to HIV/AIDS:

- Equality of women and men.
- Elimination of discrimination against women.
- Requirement of Member States to take all appropriate measures to ensure the full development and advancement of women.
- Changing of social and cultural patterns, including stereotypes, to eliminate prejudices and customary practices based on the idea that women are inferior to men.
- Elimination of discrimination against women in political and public life, including education, employment, and other areas of economic and social life, such as marriage and family relations.
- Elimination of discrimination in health care, including where related to family planning. States must ensure appropriate services with regard to pregnancy, confinement and the postnatal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

3. Laws that promote women's rights

3.1 Married Persons Equality Act

Under common law, women married in community of property were subject to the marital power of their husbands. This meant that a husband had to act on behalf of his wife in legal proceedings and contracts. The wife was regarded as a minor under the common law.

The common law was disadvantageous to women in other aspects as well. Women had to follow their husbands with regard to their domicile, which had important implications regarding where a person could institute legal proceedings and other legal matters. A father automatically assumed the guardianship of all children born from the marriage.

The Married Persons Equality Act abolished marital power over women married in community of property, thereby removing legal restrictions on her capacity to litigate and enter into contracts. Under this Act, spouses (wives and husbands) have equal powers to:

- contract on behalf of the joint estate,
- dispose of the assets of the joint estate, and
- administer the joint estate.

For certain transactions, the consent of both spouses is needed, eg when buying or selling a house, or entering into litigation (legal proceedings in a court). Where a spouse unreasonably refuses to give consent, the court may be requested to do so on his or her behalf.

Example

Under this Act, married women can consent to their own medical treatment – they do not need to have their husband's consent.

The Act provides for equal guardianship over children, which means that either the mother or the father can make decisions regarding the children. However, in certain circumstances, both parents must consent – for example, in cases of adoption or the selling of immovable property (such as a house or a farm) belonging to a minor.

The Act affects marriages out of community of property by declaring that both parties are jointly or individually liable for debts incurred to provide for the household. Both parties also have to contribute financially to the joint household according to their incomes.

The provisions of the Married Persons Equality Act are unfortunately not applicable to customary marriages, with the result that women in customary marriages are still regarded as minors under the law.

3.2 Affirmative Action (Employment) Act

This Act follows the affirmative action provisions in the Constitution by classifying women as an historically disadvantaged group that should receive priority in employment.

3.3 Labour Act

The Labour Act ensures that women are not discriminated against in the workplace. Women are also entitled to maternity leave.

4. Reproductive health rights

Constitutionally protected rights guarantee women's personal liberty, privacy and bodily integrity. Women also have the right to gather information and access services that will promote reproductive health. Many women, however, feel that they have no control over their bodies, in the sense that they are neither in a position to refuse sex to their partners nor to control the number or the spacing of their children.

Our Constitution does not specifically mention reproductive health rights, but it grants women equal rights regarding marriage, during marriage and at its dissolution. It is clear that matters relating to the conception and maintenance of children fall under these provisions.

4.1 Abortion

Reproductive health rights include matters such as abortion and sterilisation. The *Abortion and Sterilisation Act* allows abortion under very specific circumstances. These are:

- The woman's life or physical health must be threatened by the continued pregnancy.
- The continued pregnancy must be a serious threat to her mental health.
- There must be a serious risk that the unborn child will suffer from such a serious physical or mental defect that the child will be irreparably seriously handicapped.
- The pregnancy must be the result of rape or incest.
- The pregnancy must be the result of illegitimate sexual intercourse with a woman who is mentally incapable of understanding the consequences of pregnancy or is unable to take responsibility for the child due to the mental defect.

4.1.1 Obtaining a legal abortion

- Two medical practitioners must certify that the continued pregnancy would have one of the effects mentioned above. If the woman's mental health is at stake, a psychiatrist should be one of the two doctors. The doctor who performs the abortion must not be one of the two doctors who certify.
- Abortions may only be done at State-controlled hospitals that have been authorised by the Minister of Health and Social Services to do abortions.
- The medical practitioner in charge of the hospital must authorise the abortion in writing.
- For an abortion following a rape or incest, the person in charge of the institution may only allow the abortion after the magistrate in the district where the offence was committed has

certified that a complaint has been made to the police regarding the unlawful intercourse, that it appears as if there was in fact unlawful intercourse, and in the case of incest, that the law does in fact prohibit sex between the woman and the man who fathered the child.

HIV infection is a valid ground for a legal abortion: the pregnant woman's health may be endangered by the pregnancy and there is a strong probability of the baby becoming infected. However, with medication and treatment it is possible to greatly reduce the risk of transmission to the child.

Attempts have been made to allow women to have the choice whether to have an abortion or not on more grounds, such as socio-economic reasons, but public opposition prevented the bill from becoming law.

It is imperative that women have the necessary information to make informed decisions about their lives. Adequate counselling should be provided to help women to make these choices.

Important points

- Women have the right to choose whether to have a child or not.
- Informed consent is needed before an abortion is performed.
- HIV is a ground for abortion, but a woman with HIV cannot be forced to have an abortion.
- The risk of mother-to-child transmission of HIV can be reduced with anti-retroviral treatment such as Nevirapine and AZT.

4.2 Sterilisation

All women, including women with HIV, have the right to bear children. Some women do not want to have children, or do not want any more children. These women can go to a hospital for a sterilisation operation, which means that they will not be able to have children. Women can only be sterilised with their consent. As this is a medical operation, the woman must be 18 years or older in order to give consent.

Important points

- Women must consent to a sterilisation operation.
- Women with HIV/AIDS cannot be forced to undergo sterilisation.

It is possible for a pregnant woman to infect her unborn child with HIV. For this reason, a woman with HIV should think seriously about having children. A woman with HIV cannot be forced to undergo sterilisation. This is a difficult decision that should be taken once she has received as much information as possible and the decision reached should be in her own best interests.

The Abortion and Sterilisation Act allows for sterilisation of persons who are incapable of giving consent as a result of a mental defect. The requirements are:

- Certification of two doctors, one of whom must be a psychiatrist, that the woman cannot understand the consequences of the pregnancy or that the child will suffer from a serious mental or physical defect.
- The person who may give consent on behalf of the patient must consent in writing to the operation, or if that person cannot be found, the magistrate of the district in which the patient *text missing*.
- The doctor in charge of the hospital where the operation is to be performed *text missing*.
- The Minister of Health and Social Services must also grant written consent for the operation.

5. Rape

Rape is an act of violence. Rape violates the rape survivor's rights to privacy, liberty and bodily integrity. Women are often injured during a rape and these injuries increase the risk of HIV infection.

A woman may want to have an HIV test after a rape to determine whether she has been infected with HIV. The normal procedures for HIV testing should apply, which means that the woman is entitled to pre-test counselling.

It is recommended that rape survivors ask for the PCR (*stands for?)* test. This HIV test does not need antibodies to develop, with the result that test results are available sooner. This test is more expensive than an HIV antibody test, and cannot be done in Namibia. Samples of blood are sent to South Africa for analysis and the results are normally available within three days.

The Combating of Rape Act substantially changed the law relating to rape. Rape is no longer an act that can only be committed by a man with a female victim. The new Act gives a gender-neutral definition of rape that will assist both women and men who have suffered sexual abuse.

The offence of rape is now defined as –

> *"Any person who intentionally under coercive circumstances (a) commits or continues to commit a sexual act with another person; or (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape."*

Important terms

"Sexual act" has a wider definition than previously. It now includes not only the insertion of the penis into the mouth, anus or vagina of another person, but also the insertion of objects (including parts of animals) and other parts of the body into the anus or vagina.

"Coercive circumstances" also has a wide meaning. It covers:

- Physical force and threats thereof.
- Circumstances in which the complainant is under 14 years of age and the alleged rapist is more than three years older.
- Unlawful detention of the complainant.
- Physical or mental disability of the complainant.
- Use of intoxicating liquor or drugs.
- Circumstances in which the complainant is asleep.
- Fraudulent misrepresentations to the complainant regarding the nature of the sexual act and the identity of the alleged rapist.

5.1 Post-Exposure Prophylaxis (PEP)

Women who have been raped should be informed of the possibility of taking **post-exposure prophylaxis (PEP)** to prevent them from becoming infected with HIV. Studies have shown that anti-retroviral therapy administered within 72 hours after the incident and taken for 28 days afterwards reduces the risk of becoming infected.

The Ministry of Health and Social Services has not yet developed protocols on the use of PEP with regard to rape survivors, with the result that PEP has not been distributed to Woman and Child Protection Units or to hospitals. (See *The Namibian*, 23 July 2002.)

Rape survivors can obtain information from the doctor treating them, or from the Woman and Child Protection Unit. Many women's organisations can assist with this information.

5.2 HIV testing after rape

We advise rape survivors to undergo HIV testing, traumatic as it may be, for the following reasons:

- Testing for HIV will help to provide certainty and ease of mind.
- The possibility of prevention of HIV infection through the use of PEP.
- A rape survivor can institute a civil claim for damages for her medical expenses against the rapist. HIV infection is difficult to prove: the rape survivor must be able to show that her infection was the result of the rape. The effort to prove this may make the trial even worse.
- HIV has an effect in criminal law proceedings. The alleged rapist can be charged, in addition to rape, with attempted murder or assault with intent to cause grievous bodily harm.
- The Combating of Rape Act states that any person who is convicted of rape and who at the time of the rape knew that he or she was infected with any serious sexually transmitted disease (ie HIV), must receive a jail sentence of no less than 15 years. Repeat rapists get heavier sentences.
- Knowing their HIV status will help rape survivors to make decisions about their lives, such as safer sex and whether to have children or not.

Important points

- PEP is expensive, and the government does not provide the treatment for free. Most hospitals and clinics have three-day starter packs of PEP, but to complete the course of 28 days, the rest must be bought from a pharmacy.
- Timing is very important. The rape survivor must start taking PEP within 72 hours of the rape for it to be effective.
- PEP is very strong medication. Nausea is one of its side effects and side effects of medication should be discussed with a doctor.

5.3 Testing an alleged rapist for HIV

Many rape survivors want to know whether the person who raped them has HIV. Our law does not allow for compulsory HIV testing of rapists and alleged rapists. They can only be tested if they consent to an HIV test.

In South Africa, the South African Law Commission recommended that a person who is accused of having committed a sexual offence where there is a risk of HIV transmission (such as a rape) can be tested for HIV without that person's consent and that the results of the test may be given to the victim. These recommendations have not yet been passed into law.

6. Domestic violence

Many women face violence in their personal relationships and often at home. This is called domestic violence. Domestic violence can include physical, emotional and economic abuse. Although domestic violence can affect both men and women, it generally affects more women and children than men.

Women in violent relationships are at risk of HIV infection: they are often not in a position to negotiate safer sex, or to insist on their partners using condoms. They fear being beaten up or thrown out of the house. Some people think that a woman may have deserved the beating, or that a man shows his love for a woman by beating her. This is totally wrong. No one should assault or beat another person, not even in if they are in a committed relationship.

All forms of domestic violence should be reported to the police:

- The Woman and Child Protection Unit was created to deal with these forms of violence. Any abused woman can lay a charge of assault against the person who abuses her. The police have to investigate these charges. The police may not refuse to intervene because it is a domestic matter. Their duty is to protect everyone.

- A person can apply to the High Court for an interdict (order) preventing a person from assaulting you, or from coming near you. If that person ignores the court order, he or she can be sent to jail.
- It has become clear that the current laws do not protect women and children adequately. To address this situation, a Domestic Violence Bill has been prepared to deal with issues relating to domestic violence. This Bill has been tabled in the National Assembly and is being discussed by Members of Parliament.

6.1 Domestic Violence Bill

Although there may be some small changes made to the Domestic Violence Bill, we will provide an overview of the Bill to give an idea of the protections that the final Domestic Violence Act will offer to victims of domestic violence.

The Bill provides for the protection of people in domestic relationships from domestic violence by the granting of protection orders. The police have a duty to respond to a request for assistance and protection and they must take all reasonable steps to protect the victim (and the children, if any).

Under the Bill, **domestic relationships** include:

- Spouses in a marriage, whether married under customary law or civil law.
- Partners living together as if they were married, even if they are not married.
- Two people, where they are expecting a child together.
- Family relationships.

Domestic violence has a wide variety of meanings:

- Physical abuse, including assault, deprivation of clothing, food, water and shelter.
- Sexual abuse, including forcing somebody to have sex or to do something that is humiliating.
- Economic abuse, including the withholding of economic or financial resources, or damage to or disposal of property.
- Intimidation.
- Harassment, which means the following and accosting of a person, or making unwanted telephone calls and sending letters.
- Entering the house of the other partner without her or his consent.
- Emotional, verbal or psychological abuse.

Procedures to apply for a protection order

- The abused person must apply for a protection order in the Magistrates Court where the applicant (the abused person) lives, or where the respondent (the person who is causing the abuse) lives.
- An applicant may ask the police for protection until the court hears the matter.
- The court can grant an interim (temporary) protection order if the respondent did not take part in the court proceedings. Interim or final orders **must** include:
  - a condition restraining the respondent from domestic violence against the applicant,
  - an order to hand in a fire-arm or dangerous weapons, and
  - an order instructing the police to protect the applicant's safety.
- Interim or final orders **may** include:
  - a "no-contact" provision, which prohibits the respondent from coming near the applicant,
  - an order giving exclusive occupation of the joint residence to the applicant, while the respondent must continue to make rent or bond payments,

  - an order directing the respondent to pay rent for the house of the applicant if she or he moves somewhere else,
  - an order restraining both parties from damaging or dealing in property in which the other party has an interest,
  - maintenance orders for the applicant and children,
  - temporary sole custody of a child, or
  - in the case of a final protection order, the court may order the respondent to attend a counselling or treatment programme approved by the Minister of Health and Social Services.
- If an interim protection order is granted, the court must hold an enquiry to decide if the interim order should be made final (permanent) or if it should fall away. The court can also change the conditions of the order.
- A final protection order should be given to the respondent so that the contents of the order are known.
- If the respondent breaches an interim or final protection order, the respondent can be fined or sent to prison.

The Domestic Violence Bill provides for criminal prosecution in the case of domestic violence offences. There is a duty on the prosecutor to consult with the complainant to see that all the relevant information has been obtained and to give information to the complainant regarding the trial.

Important point

Domestic violence is often a crime against women. Domestic violence violates a person's rights to personal security, autonomy, liberty and bodily integrity.

7. Violence against women with HIV or AIDS

HIV infection adds to the sense of vulnerability experienced by many women. There are many stories of women who have been assaulted or chased out of their homes as a result of their HIV status. In December 1998, a South African woman, Gugu Dlamini, was murdered after she disclosed her HIV status. It is against the law to threaten or abuse a woman because she has HIV or AIDS.

Important point

When dealing with domestic violence…

- Remember that nobody deserves to be assaulted. Domestic violence is not a sign of love.
- Report the matter to the police. They must help you.
- Ask for help from organisations that help women and men living with HIV or AIDS.

8. Sexual harassment

Women often experience situations in the workplace in which they feel uncomfortable because of the conduct of other people, usually men. This may take the form of jokes, touching, suggestions, or comments. These are forms of **sexual harassment**. Sexual harassment refers to any form of unwanted attention of a sexual nature.

Other forms of sexual harassment are staring, asking inappropriate questions about your sex life, whistling, rude gestures or blatant requests for sex.

Everybody has the right to appropriate working conditions – this includes being treated as an equal, and with dignity and respect. Section 107 of the Labour Act prohibits harassment in the workplace. It

allows for procedures to be followed ensuring that harassment is stopped, and that disciplinary action is taken against the person who causes the harassment, without fear of victimisation. Sexual harassment is a serious matter and complaints of harassment should be treated with confidentiality and sensitivity.

A person who is being harassed can try to improve the situation informally with the person who is harassing her, either by speaking to the person concerned or by writing a letter. If this does not help, or if the complainant feels that she wants the employer to solve the problem, she should institute disciplinary proceedings against the harasser by acting in accordance with the employer's disciplinary code.

If the complainant is not satisfied with the employer's response after the disciplinary hearings, she can take the matter to the district labour court.

Example

Simon and Festus always tell jokes at work, pointing at the women in the office. They also make comments about their looks. Pendukeni does not like this at all as it makes her feel very uncomfortable.

She confronts Simon and Festus, telling them how she feels about their behaviour. Simon laughs, telling her that she needs a man. Pendukeni is very offended. She discusses the matter with her female colleagues, who all feel the same way. In accordance with the company's grievance procedures, Pendukeni lays a complaint of sexual harassment against Simon.

9. Customary law and practices

Under customary law, women have a vulnerable position in society. Women are told to attend to their families and the fields, while men attend to more serious matters. As a result of customary rules and practices, wives have limited rights to property, as the property belongs to the husband.

Marriage and inheritance laws also disadvantage women under customary laws. The customary law of marriage gives a husband marital power over his wife. The husband makes all the decisions affecting the family, from where the family lives to when they buy a car. This makes a wife entirely dependent on her husband.

The Native Administration Proclamation recognises customary law and allows for these laws to regulate relationships in customary marriages.

Certain customary practices also increase the risk of HIV infection. The importance of virginity may endanger girls: in order to preserve their virginity, girls may turn to anal sex, which has a higher risk of HIV infection than vaginal sex. Ritual scarification with unhygienic instruments also carries a risk of HIV infection.

10. Commercial sex work

The Combating of Immoral Practices Act prohibits commercial sex work (or "prostitution") in Namibia. It is also a crime for sex workers to solicit (get customers). Although both men and women may be sex workers, women are more often prosecuted and are more at risk of abuse and violence.

10.1 Sex workers and HIV

The nature of their work means that sex workers are vulnerable to HIV infection as HIV is mainly transmitted through unprotected sexual intercourse. Their vulnerability is increased in the following ways:

- Sex workers cannot always insist that their clients use condoms.

- Sex workers are often abused and sex can be violent. They cannot report the abuses to the police, as they then face arrest for sex work. They may even be abused by the police themselves *(justify or remove)*
- HIV/AIDS prevention and education campaigns are not targeted at sex workers as sex work is illegal.
- The stigma attached to sex work makes it difficult for sex workers to access reproductive health services, including HIV/AIDS education and prevention.
- Untreated sexually transmitted infections (STIs) increase the risk of HIV infection and transmission of the virus to the client. It is crucial that sex workers receive proper treatment for STIs to prevent the spread of HIV/AIDS.

Many activists are arguing for the decriminalisation of sex work. This would help to address all the issues raised above and would also help to protect sex workers under the law.

11. Points for discussion

- Should women have the right to a voluntary abortion?
- Should there be compulsory HIV testing of a) sex workers, b) alleged rapists?
- Which customary practices put women at risk of HIV infection?

12. References and resource materials

Laws

Labour Act, Act No 6 of 1992
Native Administration Proclamation 15 of 1928
Constitution of the Republic of Namibia
Combating of Immoral Practices Act No 21 of 1980
Combating of Rape Act No 8 of 2000
Abortion and Sterilization Act No 2 of 1975
Married Persons Equality Act No 1 of 1996
Affirmative Action (Employment) Act No 29 of 1998

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AIDS Legal Network: www.aidslegal.co.za
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South African Law Commission: www.law.wits.ac.za/salc/salc.html
UNAIDS: www.unaids.org

Chapter 9

Customary law

1. Introduction

Many people live in societies in which their lives are governed by customary law. Customary law has a particularly prejudicial impact on women as it regulates important aspects of their lives such as their rights in marriage, property and inheritance. Under customary law, women have less power than men. Customary law unfairly discriminates between family members on the basis of their gender and their position in the family hierarchy.

In a customary marriage, a husband has marital power over his wife and by implication over his wife's property. On the death of her husband, a wife does not inherit her husband's estate. Ownership passes to the eldest son, although the wife may use the family property. This system makes women economically and socially vulnerable and inferior to men. Their dependence on men increases their vulnerability to HIV infection. Such women either remain in relationships that put them at risk of contracting HIV or are forced into other vulnerable circumstances like sex work, as they have no means to provide for themselves.

Customary laws have existed for a long time, and have not adapted to reflect the principle of equality that is fundamental to the Namibian Constitution. However, the importance of customary law is taken into account in the Bill of Rights. The Constitution protects the right to culture in Article 19, which reads:

> *"Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion, subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest."*

The right to culture is therefore respected, but it must be in line with the Constitution and it may not violate the rights of others.

This means that the rights to equality and to non-discrimination on the basis of sex are more important than the right to culture. All cultural practices, including customary laws, rules and practices, must respect the dignity and equality of women. Courts have to balance customary law with the right to equality, and can declare customary rules that unreasonably limit other rights enshrined in the Bill of Rights unconstitutional.

Important point

Cultural practices that discriminate against women and girls cannot be justified under the right to culture. These practices must be in line with the Bill of Rights.

The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) requires States to take all appropriate measures to change social and cultural patterns of behaviour of men and women in order to eliminate ideas of superiority and inferiority of either of the sexes, and to eliminate stereotypical roles of men and women. Namibia, therefore, has a duty to ensure that culture is not used as an excuse to prevent women's equality in Namibian society.

In this chapter we will briefly examine customary laws to point out how they increase women's vulnerability to HIV. We hope this will be of assistance to groups working to change customary laws in order to create a society that recognises the equal status and rights of women.

2. The origins of customary law

Customary law consists of the written and unwritten rules that have developed from the customs and traditions of communities and which are now regarded as binding on the members of the particular community.

Customs are regarded as law when they are:

- known to the community,
- followed by the community members, and
- enforceable (there must be some sort of punishment for not following the rules).

Customary law can be written and verbal (oral). There is a dispute over the validity of *codified* customary law: it is argued that codified customary law is not up to date because it reflects the customary law as it was a long time ago. It does not reflect current practices in a community as it does not cover all the principles and rules of unwritten customary law. For this reason it is not "living" customary law.

Another criticism of codified customary law is that European men wrote it down, using elderly African men as the experts on customary laws. This bias disadvantaged women and children when the laws were written down. Codified customary law does not reflect the many different communities with their varied rules and practices. It creates the false impression that there is only one system of customary law.

Customary law is codified in the Native Administration Proclamation of 1928. This ordinance is still applicable in Namibia. The Married Persons Equality Act is not applicable to customary marriages, with the result that women married under customary laws remain in a very vulnerable position.

The Traditional Authorities Act has repealed most of the Native Administration Proclamation. However, the provisions on marriages and succession still apply.

3. The meaning and application of customary law

Customary law only applies to the members of a particular community, or a person who voluntarily submits to customary law, even if that person is not a member of the particular community.

Under the Traditional Authorities Act, traditional leaders have to supervise and ensure the observance of customary law by the members of the particular community. Traditional leaders also have to:

- ascertain the customary law in a community and assist with its codification,
- administer and execute the customary laws of that community, and
- hear and settle disputes over any customary matter between the members of the community.

3.1 Appealing against the decisions of traditional authorities

It is not clear what the current situation is with regard to appeals from the courts of traditional leaders. Under the Native Administration Proclamation, "Native Commissioners" had the discretion to apply customary law when deciding on matters of customary law, as long as their decisions were not against public policy or against natural justice. Under the Proclamation, a person could appeal from the Native Commissioner's Court to the High Court. It is not clear if this is still possible.

Another option would be to take the decision of the traditional authority on administrative review to the High Court, as the traditional authorities are appointed under legislation and receive salaries from the government. This makes them "administrative officials" as understood under Article 18 of the Constitution.

When a matter of customary law has to be decided by a court, the judge usually refers to the codified version of customary law because it is clear and easy to find. As explained, this version does not reflect the unwritten customary law, with the result that decisions often do not reflect "true" customary law, because the nature of customary law is not properly understood.

3.2 The Community Courts Bill

The Community Courts Bill is currently under discussion in Parliament. The Bill aims to create Community Courts in traditional communities which will apply the customary law of the traditional community to settle disputes, provided that the incident took place in the area of jurisdiction of the Community Court, and that the people are closely connected with the customary law. The Bill provides that Community Court orders that are not complied with can be referred to the Magistrate's Court for enforcement.

The Bill states that customary law rules may be proven either by written or by oral evidence. To help the Community Court justices, the Bill allows for the appointment of assessors.

Under the Bill, a person can appeal against a decision of the Community Court to the Magistrate's Court, and from the Magistrate's Court to the High Court.

The Bill defines customary law as follows:

> *"…The customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the provisions of the Namibian Constitution or any other statutory law applicable in Namibia."*

4. The effect of the Constitution and the Bill of Rights on customary law

The Constitution says that all customary laws used at the time of Independence will remain valid as long as the provisions do not conflict with the Constitution, which includes the Bill of Rights. Parliament has the power to change or repeal (do away with) customary laws.

This means that customary laws:

- must be in line with the Bill of Rights,
- must not discriminate between men and women,
- are invalid if they do not comply with the Constitution, and
- can be changed or repealed by Parliament.

Important case

In *Myburgh v Commercial Bank of Namibia*, the Supreme Court said that common law and customary law provisions became unconstitutional at the time of Independence insofar as they conflict with the Constitution. They do not need to be declared unconstitutional.

The Traditional Authorities Act also recognises that customary law provisions that do not comply with the Constitution are invalid. It says the following:

- Discriminatory customs, traditions or practices that violate the fundamental rights guaranteed by the Constitution will no longer apply.
- Customary laws that are inconsistent with the Constitution are invalid.

Important point

In order for all Namibians to enjoy the rights and freedoms promised by the Constitution, our courts should try to identify and protect the cultural practices which respect the rights of all people, and which are therefore constitutional. Our courts should do away with those customary laws that are unconstitutional. By doing this, our courts would protect group interests (such as the right to culture) and individual rights (such as a woman's right to equality).

5. Specific areas of customary law that discriminate against women

5.1 Customary law relating to marriage

Customary marriages do not have the same legal status as civil marriages (ie those that take place in a church or in the Magistrate's Courts). Women in customary marriages have limited legal status. They are regarded as minors and fall under the husband's marital power.

A woman married under customary law:

- has no legal right to inherit or own property in her own name,
- has no legal right to enter into contracts on her own,
- cannot divorce her husband on her own, but must be assisted by her father,
- cannot sue or be sued without her husband's assistance.

Because these marriages are not recognised by law, such women are not protected by the civil law rules of inheritance and property rights. This is unfair discrimination against women.

The Married Persons Equality Act does not change the position of women married under customary law.

Example

Loide is 50 years old. She lives on a farm in the Omusati Region. She was married to Erastus under customary law for 20 years. Together they had four children, who are currently all less than 18 years of age. Erastus lived and worked in Windhoek. Two years ago, he married a 20-year-old woman, Martha, in the Magistrate's Court in Windhoek. Loide did not even know of this marriage. After his marriage to Martha, Erastus bought an NHE house. Earlier this year, Erastus died. The NHE house and all his other property, goes to Martha, even though she has no children with Erastus. Loide gets nothing, despite their 20 years of marriage.

5.2 Customary law of inheritance

Under customary law, the husband controls the family property. When the husband dies, the family property goes to the eldest son. Succession has the following consequences:

- The heir, usually the eldest son, takes control of the family property and assumes the legal status of the deceased.
- The heir must protect the family members.

- The widow cannot own the family property, but she may use it. She may use the milk of the cows and the farm produce, but she may not sell it, because she has no rights of ownership.

Many heirs do not use the family property for the family, but rather for their own benefit, which is an abuse of their position. There is little way of preventing heirs from selling or misusing the family property. Because the widow and other children are dependent on the heir for their protection and livelihood, their security is sometimes very precarious and this dependence makes them vulnerable to HIV. These laws discriminate against women and other brothers and sisters. Customary law protects the social position of men. These customary law rules need to be tested against the Constitution to see whether they violate the rights of other family members to equality and dignity.

Important point

By making a will, a husband can ensure that his wife and other children also inherit because the common law will apply and not customary law rules on inheritance. This is very important for parents living with HIV or AIDS, who need to protect their children's property rights against other male family members.

5.3 Customary property rights

There are two types of property under customary law:

1. Personal property
2. Family property

Women have rights to personal property such as clothing, cooking utensils and jewellery, but they do not have rights to family property, even if they contribute to the growth of the family property. The fact that women do not have property of significant financial value makes them vulnerable to HIV.

For this reason, AIDS service organisations are encouraging Namibians to use wills to overcome the negative impact of customary law on women and children other than the first-born sons.

5.4 Customary practices and beliefs

Some cultural practices increase the risk of HIV infection.

5.4.1 Gender stereotyping

Many cultural practices require that men and women fulfil certain roles. Men and boys are taught to be dominant and the leaders of their families. Their culture requires that men should sleep around to prove their masculinity. Women and girls are taught to be submissive and to obey the men in their families. They are also discouraged from learning about sex as this is thought to create the impression that they are promiscuous.

These gender stereotypical roles put both men and women at risk of HIV infection.

5.4.2 Male ritual circumcision

Many African communities practise male circumcision. After undergoing an initiation ceremony, groups of young men are usually circumcised together. Often the same instrument is used for all of the circumcisions, increasing the risk of spreading HIV.

5.4.3 Scarification

Scarification is another customary tradition that can put people at risk of HIV infection. For example, the Kwambi tribe practises facial scarification. Scarification is done with needles or razor blades in the belief that it will protect people against harm and illness.

Again, it is the method used that carries the risk of infection, and not the beliefs themselves. As with male circumcision, these methods could be changed to decrease the risk of infection.

5.4.4 Virginity testing

Virginity testing also puts girl-children at direct risk of sexual assault. There is a false belief amongst some people that having sex with a virgin will cure a man of HIV. This has led to some men raping young girls in order to "cure" themselves. Virginity testing identifies these girls and makes them targets for such men.

Because virginity testing violates the rights of the child, many activists claim that the practice is unconstitutional and should be prohibited.

Important points

- Every individual has the right to customary practices and beliefs.
- Some customary practices put people at risk of HIV infection. These practices should be changed to reduce the risk of HIV infection (like disinfecting blades used for circumcision).
- If customary practices violate the rights of individuals, they should be stopped.
- Customary practices that help to stop the spread of HIV should be encouraged.

6. Points for discussion

- Would drafting a will change the situation of women and children under customary law?
- Name other customary practices that put women and men at risk of HIV infection.
- Is it possible to reconcile customary law and the Bill of Rights so that women are better protected?

7. References and resource materials

Laws

The Constitution of the Republic of Namibia

Native Administration Proclamation 15 of 1928

Traditional Authorities Act No 25 of 2000

Community Courts Bill

Cases

Myburgh v Commercial Bank of Namibia 2000 NR 255 (SC)

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Ministry of Health and Social Services:	www.healthforall.net/grnmhss/
General government ministries contact:	www.grnnet.gov.na/Contact_us/Ministries
AIDS Law Project:	www.hri.ca/partners/alp/
AIDS Legal Network:	www.aidslegal.co.za
South African Law Commission:	www.law.wits.ac.za/salc/salc.html
UNAIDS:	www.unaids.org

Chapter 10

The rights of gays and lesbians

1. Introduction

Homosexuality is a very controversial topic. Through the years, homosexuality has been viewed as a sin, a crime or a disease. People have been sent to jail and executed for being homosexual. Societies have stigmatised lesbians, gays, bisexuals and transgender people. Many people have lost everything – their jobs, homes, education, children and even their families – because of the views that such orientation is wrong or sinful.

The gay community has been on the receiving end of the blame, discrimination and prejudice associated with HIV/AIDS. In fact, the first name given to HIV/AIDS was “GRID” or “Gay-Related Immune Deficiency”, because HIV/AIDS was first diagnosed among gay men.

During the early days of the HIV/AIDS epidemic, homosexuality was automatically associated with the disease and many people regarded it as punishment for being homosexual. Much of the stigmatisation and discrimination associated with HIV/AIDS can be traced to these views of homosexuality.

Despite attacks on gays and lesbians, these people have played an important role in HIV/AIDS prevention, treatment and care. In the process, they have also been successful in getting equal treatment for people with HIV or AIDS.

Our Constitution says that everyone is equal before the law. Unlike the South African Constitution, it does not prohibit discrimination on the basis of sexual orientation. In Namibia, we have to rely on the equal protection clause to protect the rights of gays and lesbians.

Despite the right to equality, there are many laws that discriminate against homosexuals, while society still does not accept gays and lesbians. In fact, President Nujoma has said that gays and lesbians should be arrested, imprisoned and deported. (See *The Namibian*, 2 April 2001.) The Minister of Home Affairs and the leader of the SWAPO Youth League have echoed these sentiments. The Office of the Ombudsman refused, on a technical ground, to investigate a complaint filed by The Rainbow Project against the President’s homophobic statements in 1996.

Because of these attitudes, many gay men and lesbian women live in fear of persecution. Because of these attitudes, prevention and education campaigns are not aimed at lesbians, gays, bisexuals and transgender persons, with the result that they are especially vulnerable to HIV/AIDS.

In this chapter, we will study homosexuality and the law in Namibia, and how our laws contribute to inequality and the social stigmatisation of gays and lesbians.

Important point

Our Constitution protects the rights of all people, but lesbians and gay men still experience discrimination.

Important case

In the South African case, *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court declared the common law offence of sodomy unconstitutional as it violated the rights of gay men to equality, privacy and dignity. The court said:

"The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection."

Contrast this case with the Namibian Supreme Court decision in the *Chairperson of the Immigration Selection Board v Frank and Another* in which the Court said:

> *"Equality before the law for each person does not mean equality before the law for each person's sexual relationships."*

This is a very worrying statement because gays and lesbians must rely on the courts to protect their rights. Another effect of the decision is to cause gay men and lesbian women to think very carefully before seeking information or health care services, because of discrimination and the possibility of arrest.

2. Discrimination against gays and lesbians

Discrimination on the ground of sexual orientation can take various forms.

2.1 Discriminatory laws

Some laws discriminate directly against gays and lesbians. For example, under the common law, marriages can only be concluded between two people of the opposite sex.

The definition of a marriage is:

> *"The legally recognised voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts."*
>
> Hahlo, HR, The South African Law of Husband and Wife.

This definition of marriage has the result that many laws dealing with the family, such as the Immigration Control Act and the Children's Act regard the family as consisting of a legally married husband and wife and their children, and such laws only protect this form of family. This discriminates against customary and common law relationships, as well as same-sex relationships.

Sodomy and other "unnatural sexual acts" (for example oral sex and masturbation) between two consenting men are prohibited by the common law.

The Children's Act does not allow same-sex couples to adopt a child, but a *single* gay man or lesbian woman may adopt a child.

2.2 Discriminatory implementation of laws

Sometimes it is not the laws themselves, but the way that laws are implemented that unfairly discriminates against gay and lesbian people by denying them access to their rights, benefits and services.

The Labour Act prohibits discrimination on the basis of sexual orientation. This discrimination also extends to benefits. Many pension schemes and medical aid schemes, however, do not provide for same-sex partners to be registered as beneficiaries.

2.3 Social prejudice

Many gays and lesbians experience social prejudice within their families, in the community, at work, at school, at church and during public services.

They are victims of hate crimes such as assault ("gay bashing") and endure derogatory statements and comments that violate their dignity, privacy and right to equality.

Important point

- Violence or rape will not change a person's sexual orientation.
- Therapy will help a person to accept her or his sexual orientation and to live a life of dignity.

3. Specific issues affecting homosexual relationships

3.1 Non-recognition of same-sex relationships

Namibian law does not recognise same-sex relationships or same-sex family relationships. There are special legal provisions, such as consent to treatment and notification in case of death and inheritance, which apply to marriage but do not apply to same-sex relationships or relationships not formalised by marriage. These differences are an indication of the discrimination gays and lesbians suffer as a result of the non-recognition of their relationships.

Example

If a gay man is very sick, the law does not recognise his gay partner as his next-of-kin in order to consent to medical treatment, even if the couple have been together for 20 years. By law, doctors need the consent of the parents or another family member for treatment.

3.2 Rights to property

A same-sex partner is not entitled to inherit from the other partner, unless there is a will giving the property to the other partner. Surviving lesbian or gay partners often receive no pension or provident fund payouts on the death of the other partner.

When a person dies without a will, that person is said to die "intestate". Intestate succession laws require that any property goes to the lawful spouse and children of the deceased person. If the deceased was not married, the property goes to the parents, brothers and sisters, or other family members, in that order.

Namibia's law of intestate succession does not recognise the life partner of a gay or lesbian person as a person who can inherit, with the result that the partner may get nothing from the deceased, not even their house if it was registered in the name of the deceased partner.

To prevent this from happening, same-sex couples should make a will in which they specify what should happen to their property after the death of one of them. By making a will, a person can make provision for her or his life partner.

3.3 Discrimination at work

Lesbians and gay men face a lot of discrimination at work – in employment, promotion and employee benefits. They also face sexual harassment. For this reason, most lesbian women and gay men hide their sexual orientation and refuse to challenge the employer in order to get the same benefits for their partners as those benefits received by heterosexual employees.

The Labour Act prohibits discrimination and sexual harassment on the basis of sexual orientation. Despite this, many medical aid and pension schemes do not recognise the rights of same-sex partners.

Example

The Medical Aid Funds Act defines a dependant of a member of the fund as:

- the spouse
- any minor child, including a stepchild or adopted child, or
- any other person, who is recognised under the rules of the fund as a dependant of the member. Gay and lesbian partners should fall into this category, but this depends on the rules of the fund.

Important case

In the South African case of *Langemaat v Minister of Safety and Security*, a lesbian police officer wanted to name her partner as her dependant for the purposes of the medical aid scheme. The medical aid scheme did not allow same-sex partners as dependants. She took the matter to court and the High Court found discrimination on the basis of sexual orientation. The Court referred the matter back to the chairman of the medical aid scheme to make a proper decision regarding the inclusion of the partner as a dependant. The Court said:

"Parties to a same-sex union, which has existed for years in a common home, must surely owe a duty of support, in all senses, to each other."

3.3.1 Compassionate leave

Many employers grant compassionate leave to their employees in the case of the death or illness of a close relative. Gays and lesbians are entitled to the same compassionate leave as their heterosexual colleagues. If treated differently, a gay or lesbian employee can complain of discrimination.

3.3.2 Occupational injuries

Under the Employees Compensation Act, a dependant of an employee is:

- the widow or widower,
- the survivor in a relationship where they lived as man and wife,
- children,
- parents, or
- "Any other person who, in the opinion of the commissioner, was at the time of the accident wholly or partly dependent upon the employee for the necessaries of life." It seems that gay and lesbian partners would be able to claim compensation under this heading.

3.4 Health and social services

Lesbian and gay relationships are excluded from the definitions of “family” or “household”, with the result that they cannot make use of many social services, particularly financial benefits such as pension payouts and health services. These social services can help to reduce the impact of HIV/AIDS.

Gays and lesbians often fear a homophobic response (negative feelings towards homosexual people) when they access social or health services. Sometimes it may be of importance for a doctor to know their patient’s sexual orientation. But doctors have to respect the privacy of their patients and they may not discriminate against gays and lesbians. If they should do so, they would be breaching their professional duties, as well as their constitutional duty to treat all patients equally.

Important points

- The *Patient Charter of Namibia* states that every person, regardless of gender or sexual orientation, has the right to access to services and care, depending on the care that is needed.
- If a health care worker treats a person inadequately because that person is gay or lesbian, she or he can:
  - Report the matter to the professional body, for example, the Medical Board or the Nursing Board, or
  - Institute a civil case against the doctor or health care worker on the basis of discrimination.

Many gay and lesbian partners are excluded from decisions affecting their loved ones when it comes to medical treatment. The law requires that the next-of-kin must consent to treatment when the patient cannot do so. Family members may want to interfere or to exclude the partner from these decisions. When it comes to issues with regard to HIV/AIDS, this is even more of a problem.

Same-sex couples should plan ahead for this eventuality by preparing written instructions to make sure that their partners are included when decisions are made.

Important points

- By law, lesbian and gay partners cannot make decisions for their same-sex partners when the partner is sick.
- Under the law of intestate succession, lesbian and gay partners cannot inherit from their partners.
- It is important to advise gay and lesbian couples to make a **will**, to provide for a **power of attorney** that will allow the other partner to represent the sick partner in his or her business dealings. A **living will** will allow the healthy partner to make medical decisions for the sick person when she or he is no longer able to do so. Copies of these documents should be given to family members, doctors and lawyers to avoid disputes in the future.

4. Double discrimination: sexual orientation and HIV/AIDS

Discrimination because of sexual orientation can increase a person’s risk of HIV infection. It also makes prevention and care work much more difficult.

The reasons for this increased vulnerability are:

- It is more difficult to reach gays and lesbians with safer sex education because of social pressures and stigmatisation.

- The government does not make any effort to reach gays and lesbians for the same reasons. People often use old laws to hide their prejudices.
- Many men and women in same-sex relationships think themselves that their relationships are wrong or socially unacceptable, with the result that they do not tell other people of their relationships and do not look for information and ways to protect themselves and their partners.
- Many lesbian women and gay men cannot (or are afraid to) use services (like health care services, welfare services, sexuality education) that would help to reduce the risk of HIV infection, or would help them to cope with HIV infection.
- Gays and lesbians do not report abuses to the police because of their fear of discrimination and also because some male-to-male sexual practices are illegal, even when done in private between consenting adults.

As a result of these factors, lesbian, gay, bisexual and transgender people often experience **double discrimination**: discrimination because of their sexual orientation and discrimination because of HIV/AIDS.

5. Young people and HIV/AIDS

Young lesbian, gay, bisexual and transgender young people face additional pressures because of their sexual orientation. Not only do they face social prejudice and legal discrimination in their families, communities and schools, but also lack information, role models or people they can turn to with whom they can discuss their emerging sexuality. These young people are often the subjects of jokes about their sexuality, threats and violence. No wonder that young gays and lesbians are often depressed and desperate! In 1990, the United States Department of Health and Human Services published a report on youth suicide, in which it found that “gay youth are two to three times more likely to attempt suicide than other young people”. The report stated:

> *“The root of the problem of gay youth suicide is a society that discriminates against and stigmatises homosexuals while failing to recognise that a substantial number of its youth has a gay or lesbian orientation.”*

5.1 Sex education at school

It is not clear if sex education is always included in the school curricula. Some schools have sex education, while others do not. It seems that such education depends on the attitude of the principal and teachers at a particular school.

There is an urgent need for sex education, including sexuality education, as sex education at school does not include information on same-sex practices or relationships. Similarly, most HIV/AIDS prevention information aimed at schools does not discuss same-sex relationships. Most teachers are silent about the needs of young people who are not heterosexual and young people often cannot get access to any information about same-sex practices.

Important point

All students and young people have the right to receive education and information on how to protect themselves from HIV.

5.2 The age of consent

Under the Combating of Immoral Practices Amendment Act, it is illegal to commit a sexual act with a child under the age of 16. This means that boys and girls can legally consent to sex when they are 16 years of age. No distinction is made between heterosexual and homosexual relationships.

6. Points for discussion

- Why do people discriminate against gays and lesbians?
- Should same-sex relationships be recognised by the law?
- Do you think it is important to have sex education at school, including same-sex sex education?
- What can be done to challenge discrimination because of homophobia and AIDS-phobia?

7. References and resource materials

Laws

Constitution of the Republic of Namibia
Labour Act, Act No 6 of 1992
Medical Aid Funds Act No 23 of 1995
Combating of Immoral Practices Act No 21 of 1980
Combating of Immoral Practices Amendment Act No 7 of 2000
Children's Act No 33 0f 1960

Policy documents

Ministry of Health and Social Services, Patient Charter of Namibia, July 1998
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Cases

Chairperson of the Immigration Selection Board v Frank and Another Case No SA 8/99 (unreported), judgement on 05/03/2001, on p81
Langemaat v Minister of Safety and Security and Others 1998(3) SA 312 (TPD) at 316 HI
National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others 1991 (1) SA 6 (CC) at 27 DE& resource materials

Reports, manuals and other useful materials

Achmat, Z., Abrahams, J and Lewis, J: HIV/AIDS Workbook for Schools, Cape Town, 1998.
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National Coalition for Gay and Lesbian Equality (NCGLE): Fighting sexual orientation discrimination in the workplace (pamphlet), undated.
NCGLE: Young, Out and Proud (pamphlet for young people who are lesbian, gay, bisexual or transgendered), 1999.
NCGLE/Gay and Lesbian Legal Advice Centre: Recognising our Relationships – A guide to claim benefits for lesbian and gay partners (pamphlet), undated.
SALC: Sexual Offences: the Substantive Law, Discussion Paper 85 (Project 107), 1999.
United States Department of Health and Human Services: Report on Youth Suicide, 1990.

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:	www.grnnet.gov.na/Contact_us/Ministries
AIDS Law Project:	www.hri.ca/partners/alp/

AIDS Legal Network:	www.aidslegal.co.za
Lesbian and Gay Equality Project:	www.q.co.za/equality/archive.html
South African Law Commission:	www.law.wits.ac.za/salc/salc.html
UNAIDS:	www.unaids.org

Chapter 11

Children's rights

1. Introduction

Children often cannot take care of themselves; they need others to look after them. As a result, children have been identified as a group in need of **special protection**. Children are particularly vulnerable to HIV and AIDS because of sexual experimentation without having the information to protect them from HIV infection. Child abuse and child prostitution also increase the risk of HIV infection.

Many neglected and abandoned children end up as street children. In this situation, they have to fight for survival through crime and prostitution and they have little chance of going to school. The resulting lack of education further hinders their ability to improve their situation in life. Drug and alcohol abuse add to their vulnerability.

HIV and AIDS affect children in the following ways:

- They may live with HIV infection themselves.
- They may live with the infection, illness and loss of their parents and others around them, such as friends.
- Children may not get information to protect themselves. Sex and sexuality education in schools is probably not adequate to prepare children for life.

- Children with HIV or AIDS may be denied the opportunity to go to school.
- Children orphaned by AIDS often have nobody to take care of them.

Children with HIV or AIDS need to be protected from discrimination and harm. They should have the same opportunities as other children to learn and to grow.

In this chapter we will study children's in terms of the Constitutional and our law, and how these rights have been affected by HIV/AIDS.

2. Children's rights

The Namibian Constitution and the *United Nations Convention on the Rights of the Child that Namibia* ratified on 30 September 1990, guarantee the rights of Namibian children.

Children are not only entitled to the children's rights specified in Article 15. They are entitled to *all* the rights guaranteed by the Bill of Rights, such as the rights to life, dignity and equality although due to their age, some rights such as the right to vote and the right to be elected to public office are not immediately applicable to them.

The Constitution provides special protection for children. Most of the special rights for children are contained in Article 15. These rights include the following:

- The right to a name and to a nationality.
- The right to know and be cared for by their parents, subject to legislation which considers the best interests of the child.
- The right to protection from economic exploitation, or from work that is hazardous or interferes with their education, or is harmful to their health or physical, mental, spiritual, moral or social development.
- No children under the age of 14 are allowed to work in a mine or factory.
- Children of farm workers may not be involved in employment schemes on farms.
- No preventative detention is permissible for children under 16 years of age.
- Children have the right to education, and primary education is compulsory (Article 20).
- The family is protected as the natural and fundamental group unit of society (Article 14).
- No slavery or forced labour (Article 9).

Important case

In *S v Jeremia*, a case in which a woman tortured her stepchild to death, the High Court emphasised the duty of society to protect children. The Court said:

"If the Courts, the society at large and those institutions responsible for the protection of children fail to act promptly and decisively by taking appropriate steps timeously and concertedly in disclosing and stemming child battering, abuse and maltreatment, we may stand accused of inaction and remissness tantamount to dereliction of duty."

2.1 Guiding principle: the best interests of the child

The Constitution mentions that legislation dealing with childcare must consider the "**best interests of the child**". This is also the standard that is used by the *Convention on the Rights of the Child* (CRC). Article 2 of the CRC reads as follows:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

We must use the “best interests of the child” as the guiding principle whenever we do something that affects children. Because it is difficult to determine the “best interests of the child”, all actions and options must be carefully considered.

3. Children in need of care

Most children live in families who love and care for them. It often happens, however, that children are abused in their families, that they run away from home, or that their families are too poor to provide for their needs. These children are in **need of care.**

Children under 18 years of age are regarded as children under the Children’s Act. When it becomes clear that a child is in need of care, the Children’s Act provides that the commissioner of child welfare (a magistrate) must hold an enquiry to determine how best to protect the child. Under the Act, children are in **need of care** when:

- They have been abandoned or have no visible means of support.
- They have no parents or guardians, or the parents or guardians are unfit (unable) to look after them.
- The parent has committed an offence in respect of the child, such as assault or a sexual offence.
- The child’s parents or guardian cannot control them.
- They beg, or have run away from home.
- They live away from home in circumstances that are not in their best interests.
- They are in a state of physical or mental neglect.

When a person is **unfit** to look after a child, it means that legally the person is incapable of looking after the child. A parent or guardian can be declared **unfit** to look after a child if:

- The child is neglected or abandoned. (Nobody is looking after the child.)
- The parent or guardian does not feed or clothe the child.
- The parent or guardian mistreats or injures the child.

Important point

Being poor or having HIV or AIDS does not mean that parents or guardians cannot look after their children. All the circumstances will be considered to see if a child is in need of care.

Guidelines

Children affected by HIV or AIDS may be in need of care when:

- The child is *living with* HIV or AIDS and the parents cannot look after its health requirements, or have abandoned the child.
- HIV or AIDS *affect* the child. For example, the parents have AIDS and they cannot look after it because they are too ill.
- The child is *orphaned* and there is nobody to look after the child.

Example

The AIDS Law Project in Johannesburg had a case in which a mother with HIV came for help after a social worker had removed her three-year-old twins. The social worker claimed that the mother had HIV and was not looking after her children.

The Project represented the mother in the Children's Court. It was proved that the mother was healthy, was caring for her children and was earning money through informal work.

The Court found that removing a child from the parents should be the last option. When decisions are made about removing children, discrimination and prejudice about HIV/AIDS should not be a deciding factor.

Important point

It is not a valid reason to remove a child or to put the child under the supervision of a social worker just because the parent has HIV or AIDS. The child must be in need of care.

3.1 Reporting that a child is in need of care

Any person who thinks that a child is in need of care, such as neighbours, teachers, social workers, doctors or nurses must report this fact to:

- a social worker at the Ministry of Health and Social Services,
- a magistrate at the Children's Court,
- a police officer at the Police Station, or
- the medical superintendent at the hospital.

When there is evidence that a child has been abused, a magistrate may order the police to take such a child to a place of safety where the child will stay until the children's court has decided what to do.

4. Care options in terms of the Children's Act

The Children's Act sets out how children who are in need of care should be treated. After an enquiry, the Children's Court may order that:

1. The child must be sent back to his parent or guardian, but under the **supervision** of a social worker.
2. The child must be put in **foster care** with another family.
3. The child must be placed under the control of an **approved agency** that will supervise the child.
4. The child must be sent to a **children's home** or a **school of industries**.
5. The child must be put up for **adoption**. In such a case, a child is placed permanently with another family.

In addition, the court may order the parent (or parents) of the child in need of care to **contribute** to the maintenance of the child while the child is in foster (or other) care.

4.1 Supervision

When the children's court decides that a child is in need of care but there is no reason why the child should be removed from the home, the court can allow the parent or the caregiver to take the child home. The court may impose certain **conditions** on the parent or caregiver, such as that the child must go to school, or must be taken to the clinic every three months. The court will also say that the child must be supervised by a social worker, that is, the social worker must regularly visit the family and see how the child is doing.

If the parent does not care for the child or meet the court's conditions, the child may be removed from the parent.

4.2 Foster Care

Foster care refers to the situation when, following a court order, a child is put in the **temporary care** of another person who agrees to look after the child. This may happen when the child's parents have died and the court is looking for a place where to put the child permanently.

Because fostering is temporary, the requirements that the foster parents have to meet are not as strict as with adoption.

Children are not tested for HIV before being put in foster care. However,if the child's HIV status is known, the child is under 14 years of age and it is in the child's best interests, the foster parents may be informed of the fact so as to ensure better medical treatment.

Foster parents are entitled to foster parent allowances. When a child is adopted, the foster care grant falls away.

4.3 Approved agency

A court may put the child under the supervision of an approved agency, which will look after the child when it is sent back to the parent or guardian, even though the child is placed in the control of another person. The approved agency has to look after the moral, physical and material well-being of the child.

4.4 Institutional care

If the Children's Court cannot find a person to look after the child, the child may be placed in institutional care (at a children's home or a school of industries) until he or she is placed with a family, or reaches the age of 18.

4.5 Adoption

When the Children's Court orders that a child be placed permanently under the care and custody of a person (or couple) who is not the child's real parents, we say that the child is **adopted**. The law regards the adopted child as the child of the new parents (called adoptive parents) and they are the child's new legal guardians.

Adoption usually happens when the child has no parents, or when the parents or the mother of a child cannot look after the child. It also happens that after their marriage, a husband may adopt a child born out of wedlock to his wife. The mother (or the parents) of the child must consent to the adoption. Once consent is given, the child will be given up for adoption, and the Children's Court will decide who will become the child's new parents.

The Court will look at the following factors to decide if the person who applies for adoption is suitable:

- The applicant's reputation and standing in society.
- The financial situation of the applicant. For example, can the applicant maintain and educate the child?
- The interests and welfare of the child.
- Whether the parents or the mother of the child consent to the adoption. (If the parents are not married, only the mother has to consent.)

Under the Children's' Act, the following people may adopt a child:

- A husband and wife as a couple.
- A widow or widower.
- An unmarried or divorced person.
- A married person whose husband or wife is the parent of the child.

Two unmarried people are not allowed to adopt a child together. This prevents lesbians and gays **as couples** from adopting a child. But they can do so if one of the partners adopts the child, because the law allows for unmarried, divorced or widowed persons to adopt children. Only the adoptive partner will be the legal guardian of the child.

Adoption is **permanent**. It is seldom that an adoption is cancelled, but it could be cancelled if the natural parents did not consent to the adoption, or if the adoptive parents were somehow deceived, for example, they were not told of a mental illness. Also, if an adoption is not in the child's best interests, it can be reversed.

When a child is adopted, the child is regarded as the child of the adoptive parents. The adopted child can inherit from the parents, with or without a will.

5. The impact of HIV and AIDS on the options of care under the Children's Act

The five options mentioned above do not always provide adequately for children with HIV or AIDS and it often happens that orphans are taken into extended families. Older brothers and sisters may shoulder the responsibilities of parents. They will often leave school to look after younger brothers and sisters.

Other problems experienced include:

- More and more children are orphaned by AIDS as parents become infected and die. UNAIDS estimated that there were more than 47 000 children in Namibia orphaned by AIDS at the end of 2001. Namibia may not be able to provide enough formal care for these children and the courts will probably not cope with all these children.
- Despite the care options, it may be better for some children to stay in their communities and in extended families, rather than be put in foster care or children's homes.
- Working through the Children's Courts is a formal process that takes a long time before a decision is made.
- There aren't enough social workers to look after all the children in need of care and people don't know where to find them.
- People don't know what Children's Courts are or where to find them.

Important points

- It was estimated at the end of 2001 there were 47 000 Namibian children, under the age of 15, orphaned by AIDS. (UNAIDS Country Fact File, 2002 Update.)
- Older brothers or sisters often leave school to care for their younger brothers and sisters after their parents have died of AIDS. The older children often cannot complete their education, thus hindering their own progress.

6. Children's health rights

In Article 95, called the Principles of State Policy, the State is required to actively promote and maintain the welfare of the people through consistent planning, to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health. This requirement also applies to children.

In addition, the *Convention on the Rights of the Child* (CRC) recognises:

- The right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.
- States have to take appropriate measures to

- reduce infant and child mortality,
- ensure necessary assistance and medical health care,
- combat disease and malnutrition, and
- ensure appropriate antenatal and postnatal health care for mothers.

With appropriate care and treatment, the possibility of HIV infection from mother to child can be greatly reduced. The right of the child to the highest attainable standard of health demands that Namibia should implement prevention of mother-to-child transmission of HIV programmes as soon as possible on a national scale and not only to the 250 women targeted in the pilot studies of the Ministry of Health and Social Services.

Important case

The South African Constitutional Court ordered the South African government and the Departments of Health of the nine provinces to provide Nevirapine to pregnant mothers to reduce the risk of HIV transmission from mother to child. In the case *Minister of Health and Others v Treatment Action Campaign and Others*, the Constitutional Court held that the government policy to provide Nevirapine to pregnant women only at research sites was unconstitutional because it violated the right to access to health care, and also the rights of children to health care services, of the women who cannot access services at the research sites. With regard to children's rights, which are guaranteed under the South African Constitution, the Court said:

"The provision of a single dose of Nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are 'most urgent' and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are 'most in peril' as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to Nevirapine."

This is a case that would be seriously considered by the Namibian courts if they were to be faced with a case about the Namibian programme dealing with mother-to-child transmission.

Important points

Under the CRC, all children, including those with HIV or AIDS, have the right to basic health care services and medical treatment and care, including reproductive health services. Furthermore, the government must take steps to prevent mother-to-child transmission of HIV, by providing information, anti-retroviral therapy and formula feed to pregnant mothers living with HIV.

Children also have the right to be given **information** that will promote their social, spiritual and moral well-being, and physical and mental health.

Sex and sexuality education is very important in this regard, because it helps children to learn about physical anatomy, and to understand their feelings for other people (be that a person of the same or of the opposite sex). Children learn how to practise safer sex to prevent HIV and other sexually transmitted infections.

7. Children's rights to education

The Namibian Constitution and the *United Nations Convention on the Rights of the Child* (CRC) ensure that children have the right to education. In Article 20, the Bill of Rights recognises the right to education, stating that primary education is compulsory. The State has to provide schools at which primary education will be free of charge.

Children will not be allowed to leave school until they have completed their primary education or until they are 16 years old.

The right to education is recognised under the CRC and compulsory, free primary education is provided for.

Education must be aimed at:

- The development of a child's personality, talents, and mental and physical abilities to their fullest potential.
- The development of respect for human rights and fundamental freedoms, and the principles of the UN.
- The development of respect for parents, culture, language, social values, national values and also the values of other cultures.
- The preparation of a child for a responsible life in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples, regardless of their ethnic, national or religious origins.
- The development of respect for the natural environment.

From the above it is clear that children should receive HIV/AIDS education, not only to protect themselves, but also to foster tolerance and understanding of those who are infected with HIV.

Under the *National Strategic Plan on HIV/AIDS (Medium Term Plan II)*, the education sector is required to integrate HIV/AIDS-related information into all curricula of formal and informal educational institutions in order to stem the epidemic.

In the *Policies and Guidelines for HIV/AIDS Prevention and Control*, the MOHSS states that:

> *"It is a right of all children in Namibia to be given information on how to protect themselves against HIV/AIDS. This information should be given in homes, schools, churches, and in the community."*

The Ministry of Basic Education, Sport and Culture (MBESC) has included education about HIV/AIDS and sexually transmitted infections in the curriculum, also touching on sexual behaviour. The curriculum also aims to help children develop appropriate attitudes and behaviour towards people living with HIV or AIDS. This education starts at Grade 5. It seems that not all schools provide this education to the same extent.

Schools are also required to have teachers who are appointed as HIV/AIDS coordinators for the particular schools. They are responsible for coordinating HIV/AIDS education and awareness among the children and the teachers.

During the week 24-28 June 2002, the MBESC held a National AIDS Awareness Week in all schools countrywide, during which learners were informed about the disease. Children were encouraged to produce plays and to take part in other awareness-raising activities.

8. Children's rights to confidentiality

Children have the right to medical confidentiality, just like any other patient. However, as their parents must consent to medical treatment on their behalf, which includes consent for an HIV test, the results of this test will be given to the parents who have the right to decide whether to give the results to the child or not.

A parent or guardian must consent to medical treatment or operations on a child. If they cannot be traced, or if the child has no parents, the Children's Act allows the following persons to consent to treatment:

- The medical superintendent of a hospital may give consent for an **emergency operation** on the child when the child's life is in danger or when the child will suffer serious physical injury if the operation is not performed.

- A medical doctor in the employment of the government who thinks that a child is **sick or filthy** may examine that child. If the child needs treatment, the doctor may order the person who has custody over the child to take him or her to hospital for treatment.
- The Minister of Health and Social Services may consent where treatment or an operation is **necessary** and the parents cannot be found or refuse treatment.

8.1 Children's homes, places of safety and confidentiality

A children's home or place of safety does not have to know a child's HIV status unless it is in the best interests of the child. This is to prevent discrimination against a child with HIV.

A children's home or a place of safety may not refuse to admit a child with HIV or AIDS and the child may also not be expelled from the home or the place of safety because the child has HIV.

Staff at children's homes and places of safety should follow **universal precautions** at all times, which makes it unnecessary for the staff to know each child's HIV status. It may be in a child's best interests, however, to disclose the HIV status.

8.2 Discrimination against children with HIV or AIDS at school

- Schools may not **refuse** to admit a child simply because of the child's HIV status. This is unfair discrimination and contrary to the Constitution.
- A child may also not be **expelled** from a school because of HIV.
- Schools cannot **request** information on a child's HIV status. Only when it is in the child's best interests should this information be made known to the school.
- Schools should have **policies** in place to prevent HIV transmission at school, particularly during sport or on the playground.
- Schools should also practise **universal precautions** to prevent HIV infection.

The Ministry of Basic Education, Sport and Culture and the Ministry of Higher Education, Training and Employment Creation, in cooperation with the AIDS Law Unit of the Legal Assistance Centre are in the process of finalising an HIV/AIDS policy for the education sector, which will provide the principles by which learners and students with HIV/AIDS should be treated. This policy accepts the importance of human rights in the response to HIV/AIDS.

9. Social assistance for children

9.1 Grants to support children

The Ministry of Health and Social Services provides three types of social assistance for the support of children, including children infected and affected by HIV. These are:

1. Foster parent allowances
2. Maintenance grants
3. Place of safety allowances

9.1.1 Foster parent allowances

Foster parent allowances are given to the foster parents of a child who is put in their care and custody under an order from the Children's Court. The amount of N$200 is paid per month per child. If there is more than one child being fostered by the same family, an additional N$100 per month per child is payable for the other children.

Applying for foster parent allowances

- Apply at any social pension office.

- You will need to produce the following:
  - Your personal particulars.
  - A Namibian identity document or passport of the parents and the child.
  - The child's birth certificate.
  - The court order putting the child in foster care.

9.1.2 Maintenance grants

A maintenance grant of N$100 per month is payable for the maintenance of a child who has lost one parent and who is being cared for by other people. Anybody who takes full-time care of the child and with whom the child lives can apply for the grant. There is a means test for this grant: if the person who is looking after the child has an income of more than N$500 per month, he or she will not qualify for the maintenance grant.

Applying for maintenance grants

- Apply at any social pension office.
- You will need to produce the following:
  - Your personal particulars.
  - A Namibian identity document or passport of the parents and the child.
  - The child's birth certificate.
  - Proof of your monthly income.

9.1.3 Place of safety allowances

Children who are kept at a place of safety receive an allowance of N$10 per day.

10. Points for discussion

- Is it better to put children orphaned by AIDS in foster care with financial assistance, in an orphanage, or with relatives?

  Considerations include:
  - Do the relatives have money and space to look after additional children?
  - Where will we find enough foster parents?
  - Where will we find enough orphanages? What will the costs be of keeping children in orphanages?
  - What are the alternatives to not providing for these children?
  - What are the best interests of the children under these circumstances?
- The HIV epidemic has put many thousands of children in need of care. Do you think the children's courts can cope with all the children? How could the social system be changed to make better provision for children affected by HIV or AIDS?
- Should gay and lesbians couples be allowed to adopt children?
- Should prospective adoptive parents and children who will be adopted be tested for HIV?

11. References and resource materials

Laws

Constitution of the Republic of Namibia
Children's Act No 33 of 1960
Education Act / Schools Act

Health Act

Policy documents

Convention on the Rights of the Child (CRC), 1989

Republic of Namibia, National Strategic Plan on HIV/AIDS (Medium Term Plan II) 1999-2004

Ministry of Health and Social Services: Policies and Guidelines for HIV/AIDS Prevention and Control, June 2001

Draft National Policy on HIV/AIDS for the Education Sector, June 2002

Cases

S v Jeremia 1993 NR 227 (HC) at 229DE

Minister of Health and Others v Treatment Action Campaign and Others Constitutional Court Case No CCT 8/02, (unreported), delivered on 5 July 2002

Reports, manuals and other useful materials

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Chapter 12

Prisoners' rights

1. Introduction

We often think that prisoners have no rights because they are no longer free to move about or to 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 the right to dignity. Some of their rights, such as the right to liberty and the right to freedom of movement, are limited by virtue of the fact that they are 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. It 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."

It is necessary to distinguish between different classes of prisoners.

These classes are:

1. Convicted prisoners.
2. Awaiting-trial prisoners and those prisoners who still have to be sentenced.

The different classes of prisoners have different rights. In this chapter we will focus on the rights of prisoners and how these rights are affected by the HIV/AIDS epidemic.

2. Prisoners' rights

2.1 Constitutional rights

Rights that apply specifically to prisoners start 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 only be arrested for a good reason and following the correct 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. Many of their rights have been limited by their custody in prison, but many other rights operate without limitation. For example, **sentenced** 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 abovementioned 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 jail.

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) and it may lead to discrimination against these prisoners, as well as other possible violations of their rights, such as being subjected to physical violence.

Awaiting-trial prisoners are prisoners who have been charged with a crime and who are in custody, but whose cases have not been finalised in court. Some awaiting-trial prisoners have been convicted, but are waiting for the court to sentence them. The Prisons Act stipulates that awaiting-trial prisoners should be separated from sentenced prisoners.

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 for a case to be heard 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 yourself or your spouse.
7. An accused can only be charged with a crime that existed 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, and ensure that innocent people are not found guilty. The HIV status of an accused person should not play a role in deciding a person's guilt.

Important point

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

Example

Jane is accused of murder. She shot a man and the police found the pistol, with which the man was shot, in her hand. People know Jane shot the man, but she is still presumed to be innocent, because the evidence may show that she acted in self-defence as the man was trying to rape her. If this evidence is true, Jane will be found not guilty of murder.

Guidelines

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

On the one hand, having HIV or AIDS may be a mitigating factor (ie making the sentence lighter), for example where an unemployed man with HIV has stolen bread to feed his sick child.

On the other hand, having HIV or AIDS may be an aggravating factor (ie making the sentence heavier), for example where a person who knows he has HIV, rapes a woman.

When sentencing a convicted person, the magistrate or judge can impose a sentence of correctional supervision or community service when there are reasons why a person should not be sent to prison.

Health considerations can be one such reason, but there is no rule that ill-health will automatically be a reason not to send someone to prison.

Important case

In *S v Cloete*, the Supreme Court in South Africa changed a person's sentence for fraud into correctional supervision after he 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."

2.1 Statutory rights of prisoners

There is legislation dealing with the rights of prisoners and people awaiting trial. 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 confessions made by an accused if the confessions were not made voluntarily, such as when a person was tortured by the police to admit that he had stolen a car.

The **Prisons Act**, on the other hand, deals with the care of prisoners and disciplinary matters in prisons. The Minister of Prisons and Correctional Services 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/AIDS. These include information and education on HIV/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 power to the Ombudsman.

3. Prison policies on HIV/AIDS

During 2000, the AIDS Law Unit of the Legal Assistance Centre worked with members of the police and of the Ministry of Prisons and Correctional Services on a policy on awaiting-trial prisoners and HIV/AIDS, but this policy has not yet been finalised due to delays on the part of the government.

The main obstacle is giving condoms to prisoners. The government representatives feel that as sodomy is a crime, the police and prison wardens should not hand out condoms to prisoners, because they would be encouraging illegal acts between men.

This is a clear example of the discrimination that men who have sex with men face, and the shortsightedness of government in its HIV/AIDS prevention programme. For the government, the main issue is sex between men, but it loses sight of the fact that when prisoners leave the prison, they will have sex with other people as well, be they female or male, encouraging the spread of HIV and AIDS.

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 he or she 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 State 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."

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 inside the prison than outside, because of crowded conditions, lack of exercise and clean air, etc.
- As the Ministry of Health and Social Services does not provide anti-retroviral therapies to patients in the public health system, so too the Ministry of Prisons and Correctional Services does not give this treatment to prisoners.

4.2 The right to consent to treatment and HIV testing

Testing a prisoner for HIV without his consent and knowledge is unlawful. The policy of the Ministry of Health and Social Services is to require informed consent and to provide pre-and post-test counselling before an HIV test may be done. The Ministry of Prisons and Correctional Services follows these guidelines.

Prisoners undergo a health examination after being admitted to prison. This can include testing for contagious diseases such as hepatitis and tuberculosis 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 a violation of his rights, 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. The Court said that informed consent means:

"Generally speaking, it is axiomatic 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 consent of the prisoner.

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 only be separated from other prisoners on medical grounds. When there is a possibility that other prisoners may be 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 caused by AIDS are also not infectious, with the result that there are no medical grounds for separation because of HIV.

4.5 HIV/AIDS education and provision of condoms in prisons

Theoretically, prisoners face the same risks of HIV infection as other Namibians outside prison. In fact, conditions in prisons usually mean that there is a higher risk of HIV infection in prison. Whether the authorities like it or not, there is sexual activity between inmates. Inmates also get tattoos and other practices take place that 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 the provision of condoms. However, the prison authorities 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:

- The prison authorities have a duty to protect the prisoners in their care. The Ministry could be sued if a prisoner could prove that he or she was infected whilst in prison.
- Medical treatment in prisons should be equal to that provided by the State outside prison. People have access to HIV information and condoms outside prison and so it stands to reason that these should also be provided inside prison as well.
- This stance 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 are of 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 particularly at risk of HIV, 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 condoms.

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 her or his physical condition.

HIV/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 while in prison, the seriousness of the crime, and the time 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 the 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. Points for discussion

- Do you think condoms should be made available to prisoners?
- What can prisoners do to get adequate HIV/AIDS services?
- While Sakkie was being interrogated and beaten by prison wardens, he confessed that he knew of his HIV infection at the time he had sex with Maria. Can this confession be used against him in his trial for attempted murder?

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World Health Organization:	www.who.org

Chapter 13

Insurance

1. Introduction

People take out insurance for various reasons. With life insurance, a person insures his or her life or the life of another person. When the insured person dies, a sum of money is paid out to the beneficiaries (the person/persons who will get the sum of money from the insurers). Life insurance can also have a component that will pay out money if the insured person becomes disabled before the normal retirement age.

"Short-term insurance" is for the insurance of items such as houses, household property and cars. This insurance is called short-term because a person has insurance cover only while he or she is paying the premiums, usually on a monthly basis.

HIV/AIDS is only of importance with regard to life insurance. It is when one applies for life insurance that the insurers (the companies such as Sanlam, Metropolitan and Old Mutual) require an applicant to go for an HIV test. Many people find out for the first time that they have HIV when they go for an HIV test for insurance. Life insurers do not generally give life insurance to people who test HIV positive. There are some insurers who have policies for persons with HIV, but either the premiums are so high that very few people can afford them, or the amount that will be paid out is limited.

Testing for HIV when applying for life insurance can cause many problems: often there is no pre-and post-test counselling and the results are not treated with confidentiality. People that test positive for HIV and are not given insurance, cannot get a home loan because they don't have life insurance.

Taking an HIV test for an insurance policy is not optional: without taking the test you will probably not get life insurance.

Guidelines

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

1. You will be asked to take an HIV test.
2. You can only be tested with your informed consent.
3. You may refuse to take the test.
4. You have the right to receive pre-and post-test counselling.
5. The results must be treated with confidentiality.

It is no wonder that people ask if it is fair for life insurers to refuse insurance to people with HIV or AIDS. In this chapter, we will try to address these issues.

Important point

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

2. Insurance: what is it?

An insurance policy is a contract (an agreement) between an insurance company (such as Old Mutual) and a person. It is meant to protect that person and her or his family from financial difficulties if something serious like an accident happens or someone dies.

Everybody must die, and most people hope that they will only die when they are old. But we insure ourselves because we think that we may die sooner, when we have financial commitments and young children to care for. With insurance, we try to protect our financial security (and the financial security of our dependants) by paying an insurance company to take on the risk. This means that if a person is disabled or dies, his or her insurance company will pay the insured person (or his or her dependants) a sum of money to cover the loss of income when the event happens. In return, the insured person pays a monthly premium.

Before agreeing to offer a life insurance policy, the insurance company works out how likely it is that the person to be insured will become disabled or die – in other words, the insurance company assesses the risk and then works this into the premium that has to be paid by the insured person. For this purpose, the insurance company will ask many questions about the person's health (including HIV status) and will also ask if the person smokes and uses alcohol.

Insurance policies may be especially important to families where there is only one breadwinner or where there are young children.

Important words

Cover:	Another word for insurance. For example, "She has life cover."
Insured:	The person who takes out the insurance policy.
Insurer:	The insurance company.
Beneficiary:	The person/s nominated by the insured to receive the benefits when the policy pays out. It may be the insured, his or her dependants, or even other people like nephews and nieces.
Policy:	The insurance contract between the insured and the insurer.
Premium:	The money that the insured pays to the insurance company, usually every month.

Risk:	The uncertain event in the future for which one takes out insurance. Examples are theft of property, an accident or death.
Broker:	The person who sells the insurance policy.

Example

Rosa has two children. She is employed, but she worries that if she dies unexpectedly, her children will not be looked after. She decides to insure her life for N$250 000. This means that if she dies, her children will be paid N$250 000 by the insurance company. This will help them financially. They will be able to use the money to pay for studying or to buy a house.

3. Different types of insurance contracts

There are two main types of insurance:

1. Indemnity insurance, also known as short-term insurance.
2. Non-indemnity insurance, also known as life insurance.

3.1 Indemnity insurance

With indemnity insurance, the insured person insures things such as a house or car. The insurance company will pay money to the insured if the event against which insurance is taken out actually happens. For example, if you have insured your car against theft, the insurer will pay you if your car is stolen.

When the insurance contract is concluded, the insurer and the insured agree on the maximum amount that will be paid out should the event happen. Your premiums are based on this amount.

The actual amount that the insurer will pay out depends on the value of the loss. For example, if your house is broken into and belongings valued at N$25 000 are stolen, the insurer will pay N$25 000. It will not pay out the full amount for which your house and its contents are insured.

3.2 Non-indemnity insurance

Non-indemnity insurance is also called life insurance. The insurer will pay out should the insured be disabled or die. If the insured is disabled, the insurer will pay money to him/her. If the insured person dies, the money will be paid to his or her beneficiaries. The amount the insurer will pay out depends on the contract: if you want a bigger amount to be paid out, you will have to pay higher premiums.

Example

Non-indemnity insurance:

- if you insure your life for N$200 000, your beneficiaries will get this amount if you die.
- If you insure yourself against disability for N$250 000, you will be paid this amount of money if you are disabled.

4. How insurance companies operate

Insurance contracts are **voluntary**: the insured person decides to apply for insurance and the insurance company can decide whether to accept the application or not. An insurance contract is an **agreement** between the insurer and the insured, just like any other contract.

Before the insurer can decide whether to give the insurance, the insurance company needs information from you to assess the **risk** to the company. This assessment helps companies to decide on the amount of the premium.

Insurance companies require an applicant to answer a long list of questions, in which they check the applicant for serious diseases (such as cancer or TB) or habits (such as smoking or alcohol use) that may affect the life expectancy of the applicant (ie how long the applicant is likely to live). They may also require the applicant to go for medical examinations and tests, including an HIV test.

The principle on which insurance works is that the majority of people, who are likely to remain well, pay for the few people who die or become disabled.

Example

Smoking is a high-risk activity, because the smoker has a higher chance of dying of cancer or lung disease than a non-smoker. A smoker will therefore be charged a higher premium so that the insurance company will not make a loss if the smoker dies shortly after taking out insurance.

4.1 HIV screening

Applicants for life insurance and disability insurance are screened (checked) for HIV and other potentially life-threatening conditions, such as high blood pressure and respiratory infections. People are screened for HIV because:

- People with HIV will probably die or be incapacitated at a younger age than people who do not have HIV.
- The risk of insuring people with HIV is too great for insurers to take because the chances are that a person with HIV will die within a few years.
- Insurers have to look after the people already insured by making sure that high-risk people, such as people with HIV, will not disadvantage them.
- Insurance companies want to keep the premiums for people without HIV low, by not making them pay for people with HIV or AIDS.

As a result, insurance companies protect themselves by:

- Requiring an HIV test before granting an insurance contract.
- Putting clauses into contracts that **exclude liability** (legal responsibility) or **limit liability** if an insured person dies of an AIDS-related disease. These are called **exclusionary clauses.**

5. The duty to disclose

An insurance company needs to **assess** the risk of insuring the person. The company requests information from the applicant in a long questionnaire that the applicant must complete.

These answers are **material facts**. They are important because they are crucial to the insurance company's decision to give an applicant insurance cover. Insurance companies regard HIV as a material fact that must be disclosed.

Important point

There is a **legal duty** on the applicant to disclose all material facts when answering the questionnaire as this may affect the insurance company's assessment of the risk. All questions must be answered truthfully; otherwise the insurance company may refuse to pay out.

Important case

In the case, *Wilke NO v SWABOU Life Assurance Company Limited*, the High Court found that SWABOU Life did not have to pay out a policy because when he was completing the questionnaire on which the insurance policy was based, the person whose life was insured failed to mention 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 he 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. For example, the insurance company must tell the applicant beforehand that they will not pay out if a person has HIV or AIDS because if the insurance company does not do so, the insured person will think he or she has full cover, even if this is not the case. This would be fraud on the part of the insurance company.

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. This duty to disclose also rests on the insurer. There are serious consequences when an applicant does not disclose all the material facts:

- The applicant commits a **crime** if he or she lies in response to a question. The applicant can be charged with fraud.
- The insurer may declare the contract **null and void** if the insurer thinks the answer would have affected their assessment of the risk. (This means that the contract is deemed never to have existed.)
- 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.

When a material fact is *not* disclosed, the insurance company will not have to pay out under the policy, even if there is a death or serious damage to property.

Important points

- A person should always think very carefully about every question on the insurance application form.
- If unsure how to answer, a person should ask for help to fill in the form.

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

Many people find out their HIV status when applying for insurance. People are often tested **without adequate pre-and post-test counselling** and without giving **informed consent**. 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 that they have HIV in this way immediately experience their first form of discrimination when the insurance company refuses to grant them insurance.

Guidelines

Procedure followed by most insurance companies when testing for HIV prior to granting insurance cover:

1. **Consent form**
   The applicant is asked to complete an application form for insurance, which will probably include a consent form for an HIV test.

2. **Doctor's details**
   The applicant has to provide details of her or his personal doctor. The results of the HIV test will be sent to this doctor.

3. **The HIV test**
   A doctor or the laboratory chosen by the insurance company will do the HIV test. The applicant will be told where to go for the test.

4. **Test results**
   The results of the HIV test are usually sent to a doctor employed by the insurance company. This doctor will open a file for the applicant. The file will include all medical information relevant to the application, including the results of the HIV test.

5. **Positive test result**
   If the applicant is found to be HIV positive, the application will most likely be rejected, unless the person is applying for life cover specifically aimed at people with HIV or AIDS.

   In South Africa, the details of applicants who have been rejected for life insurance are entered in the Life Register, kept by the Life Offices' Association. People who have been denied life insurance because of HIV or AIDS are also entered into this register. Once entered, other insurers can use this information to see if they would insure the applicant. The LOA claims that the information is encoded so that personal information cannot be made available.

   Namibia does not have a Life Register, but many Namibian life insurers are voluntary members of the South African Life Register and can get information on a subscription basis. This means that many Namibians are listed in this register, which will prevent them from getting life insurance if their applications have once been unsuccessful.

6. **Positive test result – informing the applicant's doctor**
   If the test results are positive, the applicant's personal doctor will be informed. This doctor is expected to contact the applicant to give the results. The insurance company will not tell the applicant directly.

7. **Negative test result**
   If the results are negative, and all the other conditions of the insurance company are satisfied, the application for insurance will be successful. The applicant's doctor is not contacted if the results of the HIV test are negative.

8. Exclusionary clauses

Insurance policies have **exclusionary clauses** in which the insurer excludes its liability under certain circumstances. (The insurer says that it will not pay out if the excluded thing happens.) Most companies have exclusionary clauses dealing with HIV and AIDS. For example, a clause may read that the insurer will not pay out if the insured dies of an AIDS-related illness.

Exclusionary clauses are often vague, giving insurance companies wide powers to decide if a death is in some way HIV- or AIDS-related, because then they do not have to pay out.

If you believe an insurance company is refusing you insurance benefits unfairly, you should contact the AIDS Law Unit for help.

Examples

- **Having HIV or AIDS at the time of death**

  The clause may say that the company will not pay if the insured has HIV or AIDS at the **time of death**. But a person who has HIV will not necessarily die of an AIDS-related condition – he could die in a car accident. Sometimes the insurance company will still refuse to pay out, even if the cause of death has nothing to do with AIDS.

- **The insurance company decides on the cause of death or disability**

  Some exclusionary clauses say that the insurance company will not pay out if the **company** decides that the insured has died (or become disabled) because of HIV or AIDS.

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

9. Insurance companies and confidentiality

Breaches of confidentiality often occur when insurance companies arrange HIV tests for people. Applicants for insurance have a right to confidentiality and can make a civil claim if the insurance companies disclose this information unlawfully. It is, however, difficult to find out who gave out the information because many people are involved in the application procedure like the chief medical officer (the doctor of the insurance company), the broker, the company's accountants and the filing clerks in the insurance company. Any one of these people could learn of your HIV status and unlawfully tell others.

Important points

- People are entitled to confidentiality with regard to their medical condition. A person's consent is needed before this information may be told to someone else.
- If a person can prove that an insurance company has leaked this information, he or she can institute a civil claim against the company.

10. Insurance policies and the insured's doctor

An insurance company can only find out that an insured has died or become disabled as a result of HIV or AIDS if somebody informs the company. The best person to provide this information to the insurance company is the insured person's doctor.

Doctors are under an **ethical and legal duty** not to give out confidential information (for example, about HIV status), unless the patient clearly gives the doctor **permission to disclose** this information.

To get past this duty of confidentiality, insurance companies often ask the insured person for permission to contact the insured person's doctor after the person has died or become unable to work. This is so that the insurance company can get any information that is necessary to finalise the claim – this may include information about the insured's HIV status, general health and the cause or suspected cause of the insured person's death or incapacity. Insurance companies ask the insured

person to sign an **authorisation form** that will allow his or her doctor to give the confidential information to the insurance company.

Important points

- The insured person usually gives **permission** for the insurance company to ask confidential information from his or her doctor when signing the insurance contract. This authorisation clause may be included in the insurance contract.
- There may a separate form, called the **client authorisation form**, which authorises the doctor to release the information.
- Once the contract with the authorisation clause or the client authorisation form has been signed, the insurance company has the right to ask the information and the doctor must give the information required.
- Before signing, the person applying for insurance should ask the insurance company if the policy includes an authorisation clause or a client authorisation form.
- Always get advice before signing anything!

11. Cancelling a policy

Many insurance contracts allow a person to cancel a policy. This is called **surrendering** the policy. If a policy had a cash value, the insured person can claim back the **value** of the contributions (ie the premiums paid every month).

When a contract is cancelled, **administration costs** are deducted from the amount that is paid to the insured. Administration costs may be high.

Often a policy can only be cancelled after a **certain period** (for example, after one or two years). This period is usually mentioned in the policy. If the policy is cancelled before the end of this period, the insured will lose all contributions.

Surrendering a policy should be carefully considered because the insured person often loses a lot of money. On the other hand, a policy will not pay out if the insured person contracts HIV and HIV is excluded by the policy.

Important points

- Get advice before surrendering a policy.
- Find out if HIV and AIDS are excluded under the exclusionary clauses. Consider what the effect of being HIV positive will have on the policy at the time of death of the insured person.
- To take out a new policy after a policy has been surrendered, it is necessary to re-apply. For the same benefits, you will have to pay more because you are older.
- Surrendering a policy can be useful if you need money urgently but have no cash available.
- It is also possible to borrow money against a policy. The policy will then be used as security by the bank.

12. Insurance and home loans

Before a bank will give somebody a home loan, the bank needs to be sure that the person applying for the home loan earns enough money to repay the loan. The bank also wants to know that the buyer has enough assets to repay the loan if he or she can no longer make the monthly payments.

When a person does not have enough assets to cover the value of the loan, a bank will require the buyer to take out life insurance for the same amount as the loan. The bank will ask the buyer to cede (transfer) this life cover to the bank, so that the bank will be able to recover the loan if the buyer dies or becomes disabled by claiming the proceeds of the life insurance policy.

Because most people with HIV are refused life insurance, it becomes very difficult to get home loans. The banks argue that the life cover is necessary to reduce the amount of risk. On the other hand, they also admit that if a person is unable to afford the bond repayments, the bank has the right to repossess the house and recover the loan. In such a case, it is quite clear that life insurance is not needed.

Guidelines

1. When buying a house, try to persuade the bank to give you the bond (the loan) without life cover. Some banks are willing to grant a bond for a limited amount of money without life insurance.
2. Ask somebody – a parent, a business partner or a friend – to stand as surety for the bond. They will become responsible for repaying the loan if you cannot.
3. Get legal advice before you make any decisions.

13. Points for discussion

- What can Lisa do to make sure that insurance companies do not abuse her rights when she applies for insurance?
- A person 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 had HIV at the time of death. Do you think the insurer will have enough reason not to pay out?
- Is it unfair discrimination if banks refuse someone a loan because he has HIV? What can we do to challenge this policy?
- Ndapanda has found out that she has HIV. She has had an insurance policy for five years, but knows that the policy excludes people who die of AIDS. She wants to know what to 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

Ministry of Health and Social Service: Policies and Guidelines for HIV/AIDS Prevention and Control, June 2001

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(1) SA 203

Reports, manuals and other useful materials

AIDS Law Project and Lawyers for Human Rights: HIV/AIDS and the Law: A Trainer's Manual (First Edition), July 1997.

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

Chapter 14

Criminal law

1. Introduction

HIV and AIDS have implications for the criminal law. People 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 and killed – purely because they have HIV. Rape survivors and victims of sexual assault cases often have to face the fear that they may be infected with HIV.

“Wilful transmission” is when a person knows that he or she is HIV positive and has unprotected sex with another person, knowing that there is a risk of HIV transmission. Should the wilful transmission of HIV be made a criminal offence?

Efforts to prevent the spread of HIV and AIDS are often hampered by the 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 chapter, we will address issues such as these so that we can better understand how HIV and AIDS influence the criminal law, and how HIV and AIDS challenge the rules of criminal law.

2. An overview of criminal law

Criminal law consists of rules and procedures made to regulate our behaviour. Criminal law also prescribes the punishment that the State can impose if we break the law. This threat of punishment is a means to ensure that we obey the law.

Our criminal law comes from common law and from statute law. New crimes are created by statute law and old crimes are repealed. Common law crimes such as murder and theft have not been created by statute, but have been part of our law for many centuries. Now that Namibia has a Constitution, the common law and all common law crimes must be in line with the Constitution. If not, they can be declared unconstitutional by the High and Supreme Courts and scrapped.

2.1 How does criminal law work?

To set the criminal law in motion, there must be a **violation** of the law. The police will **investigate** the violation and **arrest** the person accused of doing wrong. The accused will be **charged** with the crime (the illegal act) and the prosecutor will **prosecute** the accused in **court**.

The crime that has been committed could have its **origin** in statute law (like the crimes of drunken driving and illegal hunting) or it may be a common law crime (like murder or theft).

Before an accused can be **convicted** (found guilty) of a crime, the State must **prove** that all the elements of the crime have been met and that the accused is guilty **beyond reasonable doubt**.

If the accused is convicted, he or she is **sentenced** to a fine or to a prison sentence, depending on how serious the crime is. Sometimes a person is sentenced to community service.

Example

The law says you may not take someone else's property without the owner's permission. If Abed takes a cell phone without the owner's permission, the owner can report the matter to the police, who will arrest Abed. The State will then prosecute Abed for theft. If theft is proved beyond reasonable doubt, the magistrate will convict Abed of theft and will sentence him to a fine or to imprisonment.

3. The rights of an accused person

People do not lose their human rights just because they are *accused* of having committed a crime. Our Constitution says that people are presumed innocent until proven guilty beyond reasonable doubt by a court of law. This means that an accused person is only guilty once she or he is found guilty by a court of law. This **presumption** means that an accused must be treated as if she or he 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; he or she has not yet been *convicted* of the crime.

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

3.1 Testing an accused for HIV

Despite their arrest and detention, accused people still have rights to privacy, autonomy and dignity and so they cannot be forced to take an HIV test. Our law also recognises that an accused cannot be forced to give bodily evidence (like a blood sample, or a hair) without their consent. But the Criminal Procedure Act does say that a sample can be taken against the wishes of a person if the accused **resists** the taking of a blood sample.

Important points

- A sample of semen can prove whether an accused charged with rape had sexual intercourse with somebody.
- A blood sample may show that a person was driving under the influence of alcohol.

3.2 Bail proceedings

The purpose of bail is to balance an accused person's rights to personal liberty with the need for that accused to stand trial.

All accused people have the right to apply for bail and most accused people will be granted bail. With serious crimes, it becomes more difficult to get bail. For instance, under the new Combating of Rape Act, the complainant (the rape survivor) in a rape case has the right to be present at a hearing in which bail is considered for the accused and she has the right to present any relevant information or evidence through the prosecutor. Under these circumstances, it may be more difficult for the accused to get bail.

It often happens that the accused cannot afford to pay the bail amount which means that the accused has to await trial in custody. Our courts have said that bail must not be fixed at such a high amount that bail is effectively denied.

4. Sentencing and the rights of guilty people

Once an accused has been found guilty of having committed the crime, the **presiding officer** (the 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 if there are circumstances that will make the sentence lighter (called **mitigating circumstances**) or heavier (**aggravating circumstances**).

It is not a crime to have HIV and so the HIV status of an accused should not affect their guilt. But a person's HIV status may have an effect on the sentence that is given. The Combating of Rape Act stipulates that where a rapist, 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 jail 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 who is already ill with HIV may become worse as a result of imprisonment.
- A person with HIV or AIDS may need medical care.
- A person with AIDS may need to be near family, friends and support groups.

Example

A convicted rapist's knowledge that he has HIV at the time of the rape is an aggravating factor for sentencing purposes. But a person with HIV who steals food

for his young children after being unlawfully fired from his work because of his HIV status, can use HIV as a mitigating factor because it can help to explain his crime.

5. The role of criminal law in the prevention of HIV and AIDS

Some crimes, such as rape and sexual abuse, **directly** increase a person's chances of becoming infected with HIV, particularly if the sexual act resulted in tearing and bleeding and if the accused person has HIV. This is a serious problem in Namibia where we have high rates of rape and sexual abuse, including the abuse of children.

Sex work and sodomy are two crimes where people's vulnerability to HIV and AIDS is **indirectly** increased. Because sex work and sodomy are crimes, it becomes more difficult to reach sex workers and men who have sex with men with HIV prevention and safer sex messages. We say that sex workers and men who have sex with men are being **marginalised** by criminal laws and they are put at higher risk of HIV infection.

We will discuss rape, sodomy and commercial sex work in more detail to point out how the criminal law affects HIV prevention work and sometimes puts people more at risk of HIV infection.

5.1 Rape

The new Combating of Rape Act defines rape as:

"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 men and women can be the complainants or the accused persons in a rape case. (Under the previous definition of rape, the requirements were that a man had to have 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 it is therefore possible that more people can be charged with rape under its provisions. This broader definition became necessary to address the many cases of rape and sexual abuse in our society.

Example

John wants to have sex with Lydia, but she does not want to. John beats her up and then he has sex with her. Lydia could charge him with rape.

Important terms

Definition of 'sexual act'

The Act describes sexual act as:

- the insertion of the penis into the vagina, anus or mouth of another person,
- the insertion of any other part of a person, or of any part of an animal or an object into the vagina or anus of another, except if this is for sound medical reasons, or
- cunnilingus (oral sex on a woman) or any other form of genital stimulation.

This definition is much broader than the previous definition of rape, which required only the insertion of the penis into the vagina of a woman.

Definition of "coercive circumstances"

This definition includes the following coercive stances, but is not limited to these:

- physical force to the complainant or another person,
- threats of physical force.
- threats to cause harm, other than bodily harm,
- when the complainant is under 14 and the accused is more than three years older,
- unlawful detention of complainant,
- complainant affected by physical or mental disability, intoxicating liquor or drugs or sleep, to such an extent that the complainant is incapable of understanding the nature of the act or cannot indicate unwillingness for the act,
- false representation that the accused is somebody else,
- fraudulent misrepresentation of the sexual act (for example, the complainant may have believed the accused was medically examining her), or
- intimidation of the complainant by other persons.

5.1.1 Compulsory testing of accused rapists

The Combating of Rape Act is silent on the question 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 it is requested by the complainant and ordered by a magistrate. Such a test would give the rape survivor some peace of mind and would help the complainant to make decisions about taking post-exposure prophylaxis (PEP) to prevent HIV infection. Whether our policy makers would come to the same conclusion remains to be seen.

5.1.2 Bail and sentencing

The Combating of Rape Act gives complainants an opportunity to oppose the granting of bail when the accused has 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 released on bail.

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

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

Important points

- Women have the right to say NO to sex, and to unsafe sex, even in a marriage or a relationship.
- Sex without the consent of one of the parties is a violation of the autonomy of that person and is a criminal offence.
- Educational campaigns directed at men and women to make them aware that women have the right to refuse sex will reduce the risk of HIV transmission.

5.2 Sodomy

Namibian common law prohibits anal sex between two males, even if the sex is between two consenting adult men. This sexual activity is called **sodomy.**

There is a high risk of HIV infection with unprotected anal sex because of the possibility of tearing and bleeding during sex.

Because sodomy is a crime, few men who practise this form of sex are willing to be open about their sexual behaviour. This fact makes it very difficult to target HIV prevention and education campaigns at men who have sex with men. As a result, there are still many men in Namibia who have not been reached with HIV/AIDS prevention messages and who do not know how to prevent themselves against HIV infection.

Important point

- Not only **gay** men who practise unprotected anal sex are at risk of HIV. **All** men who have unprotected sex with men are at risk of infection.
- Men who have sex with men **and** with women put their partners (both women and men) at risk of HIV infection.
- By providing men who have sex with men with HIV/AIDS prevention education, women can be protected as well. This is also why we strongly advocate HIV prevention and education campaigns in prisons, including the provision of condoms, 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 campaigns.
- Because sodomy is a crime, it is more difficult for gay men and men who have sex with men to protect themselves from HIV.

5.3 Commercial sex work

The Combating of Immoral Practices Act prohibits some activities related to commercial sex work, such as prostitution (when a person sells sex to another person) and soliciting (making requests for sex).

It can be argued that some of the provisions of this Act are unconstitutional because the Act does not respect the freedom to practise any profession or to carry on any trade, neither does it respect the rights to privacy and equality contained in the Bill of Rights.

However, because of the illegality of commercial sex work, people involved in this profession are very vulnerable to HIV and AIDS.

Important points

- Sex workers cannot insist that clients use condoms for fear of their clients harming them, or for fear of losing their clients.
- If sex workers are harmed, they are afraid to report these crimes because they fear that the police will charge them with contravening the Combating of Immoral Practices Act.
- Because of the high risk of HIV involved with sex work, the clients of sex workers can transmit HIV to their partners (either men or women) and can in this way spread the infection into their own communities.
- The illegality of commercial sex work makes it difficult to run HIV and 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. There is a close link between STIs and HIV infection: the presence of an STI increases the chances of HIV infection.

Decriminalisation of sex work would help to control the spread of HIV and AIDS by allowing prevention campaigns and a proper support network.

The Gender Research and Advocacy Project of the Legal Assistance Centre is working on the decriminalisation of commercial sex work.

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

One of the most crucial questions with regard to HIV/AIDS is the question whether a person who has HIV can be charged with a crime if he or she has infected another person.

The answer to this question depends on whether the person with HIV knew of the HIV infection and knew what to do to prevent the transmission of HIV. Proving beyond reasonable doubt that a person wilfully infected another person with HIV is very difficult. It also has a lot to do with social factors such as fear, denial, prejudice and ignorance, which may cause a person with HIV to have unsafe sex. The complainant must have been HIV negative before the incident and must have become infected with HIV as a result of the sexual intercourse.

We have not had any criminal cases dealing with the question whether a person has deliberately passed on HIV. Some years ago a woman claimed that a man infected her with HIV and the HIV test results proved this. The man was charged with assault with intent to cause grievous bodily harm or attempted murder. It later transpired that the man's HIV test results were falsified, and the case was dropped.

In a South African civil case, a woman successfully claimed damages from a man who had infected her with HIV. He knew he was HIV positive. In *Venter v Nel*, the Court awarded damages for past medical expenses and future medical expenses, as well as for general damages because of reduction in life expectancy, stress, and 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.

We will discuss whether the existing criminal laws are sufficient to deal with this situation or whether new criminal laws should be enacted to criminalise the wilful transmission of HIV.

7. Existing crimes

Let us consider a few common law crimes to determine whether they could be used to prosecute a person for wilful transmission of HIV.

Remember that the onus is on the State to prove the following factors in order to obtain a conviction in a criminal case:

- The accused knew of his or her HIV status at the time of the sexual act.
- The accused knew how HIV is transmitted and knew that without practising safer sex the other person could be infected.
- The accused intentionally or negligently had sex with the other person, despite the above knowledge.
- The other person was HIV negative before the incident.
- The other person became infected as a result of the incident.
- There must be no justification for the act. (For example, self-defence can be a defence to the charge of murder.)

7.1 Murder and culpable homicide

7.1.1 Murder

The definition of murder is:

"The unlawful and intentional killing of another human being."

The elements of murder are:

i. **Act**: The act must result in the death of another human being, like a gunshot wound in the head. It is difficult to think of the sexual act as an act that causes death. In this case it is rather the **infection** with HIV that results in the eventual death of an AIDS-related condition.

ii. **Unlawfulness**: Unlawfulness is more difficult to prove, especially if the sex was consensual (if the other party agreed to have sex). If the sex was the result of a rape, unlawfulness is easier to prove.

iii. **Intention**: The accused must have known of his or her HIV infection and must have deliberately infected the other person, or must have known that there was a possibility of HIV transmission and still proceeded. It may be difficult to prove the necessary intention, particularly if condoms were used. It is also difficult to determine what possibility of HIV infection is required for intention to be proved. Even oral sex with an infected person carries a risk of infection.

iv. **Causal link**: There must be a link between the sexual act and the death. The link is HIV infection, which eventually turns into AIDS. A difficulty in charging a person with murder is that the person who was infected must be dead before the accused can be charged with murder. With HIV infection, the normal course of the disease is normally years, with the result that it becomes more difficult to prove murder.

v. **Justification**: There must be no justification for the act. The accused will probably rely on consensual sex as an excuse. However, if the complainant did not know of the HIV infection of the accused, it cannot be said to be **informed consent**, because a vital fact was withheld. And even if the complainant had consented to sex knowing the accused had HIV, it is not **valid consent** because our law does not allow us to consent to serious injury or to being killed.

Proving that one person has infected another is made more difficult by the following:

- It does not mean that when a person is HIV positive, he or she will automatically infect every person with whom they have sex.
- It is difficult to prove when the HIV was transmitted. Any previous sexual partner could have infected the complainant.

7.1.2 Culpable homicide

With **culpable homicide**, all the elements of murder must be present, except that intention is substituted by **negligence**.

The definition of culpable homicide is:

"The unlawful and negligent killing of another person."

Negligence: There is a reasonable possibility of killing another person, but there are ways to prevent this harm from happening, for example by driving within the speed limit. With HIV, it must be shown that the accused did not foresee the harm and failed to take the precautionary steps to prevent HIV infection. Again, this element requires that the accused must have known of her or his HIV infection and also that the accused knew what steps to take to prevent HIV transmission.

As we can see from the above, it would be very difficult for the State to prove beyond reasonable doubt that all the elements of the crime had been committed so that a person can be convicted of murder or culpable homicide.

7.2 Assault

Another charge with which a person who wilfully transmits HIV could perhaps be charged is assault, or assault with intent to cause grievous bodily harm. Unlike murder and culpable homicide, the complainant does not have to be dead for the crime to have been committed. But proving this would be as difficult as proving murder.

Assault is defined as:

> *"The unlawful and intentional application of force to another person, or threatening that person with an application of force."*

The elements of the crime are:

i. Application of force or threat of force: Application of force has a wide definition, with the result that almost any harm caused to another person is seen as an assault. If X slaps Y, it is an assault. Taking blood without consent is an assault. Similarly, doing something through which HIV can be transmitted can constitute an offence and a person could be charged with assault.

ii. Unlawful: See the discussion under murder.

iii. Intention: See the discussion under murder. For assault with intent to cause grievous bodily harm, the intention must be "to cause grievous bodily harm." This element is normally met by looking at the weapon or the place on the body where the wound was inflicted. HIV would meet the criterion of "grievous bodily harm".

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 does not succeed in doing so.
- It is very difficult to prove the various elements of the different crimes when charging a person with conduct that puts others at risk of HIV infection.

The *Policies and Guidelines for HIV/AIDS Prevention and Control* recommends that wilful transmission for HIV from one person to another should be treated as **attempted murder**.

Guidelines

Procedure to follow if somebody wants to take legal action against a person who has allegedly infected her or him with HIV:

1. Find out all the facts of the case.
2. Get a statement from the complainant.
3. If the client has been infected as a result of rape or another crime, help the client to lay criminal charges against the person responsible.
4. Get advice from an organisation, like the AIDS Law Unit.

8. Do we need for a new criminal law to criminalise wilful transmission of HIV?

From the discussion on the use of existing crimes to deal with wilful transmission, it is clear that there may be difficulties in using the existing common law crimes. But there are also other policy considerations that should influence the deliberations:

- Criminal law may not be the best way to control voluntary sexual behaviour. For example, despite the fact that sex work and sodomy are crimes, people still practise them.
- With such a new criminal law, all people with HIV would be potential criminals.
- A new law may marginalise groups of people (who are already vulnerable to HIV) even further, such as sex workers and men who have sex with men.
- The position of women is not clear under a new law of this nature. On the one hand, a new law would better protect women from infection by their partners. On the other hand, most women are aware of their HIV/AIDS status, having been tested at antenatal clinics. Rather, they may be too fearful of the consequences to tell their partners, even if it was the partner who infected them. Under a new law, such women could be prosecuted for not telling and assaulted (or deserted) for telling.
- People may not want to find out their HIV status if there is a new criminal law. This would sabotage efforts to encourage voluntary testing and counselling for HIV.

We have already mentioned that the *Policies and Guidelines for HIV/AIDS Prevention and Control* recommends that wilful transmission for HIV from one person to another should be treated as **attempted murder**. This is in line with the United Nations *International Guidelines on HIV/AIDS and Human Rights*, in which it is recommended that specific offences for the deliberate and intentional transmission of HIV should not be created. Rather, general criminal offences should be used to deal with wilful transmission of HIV/AIDS.

9. The role of criminal law in HIV/AIDS prevention

Criminal law has a role to play in stopping people from harmful behaviour relating to HIV and AIDS, but it is difficult to think that criminal law will play a large role in slowing down the HIV epidemic.

- HIV is transmitted mainly through consensual sexual intercourse between partners who are not aware of their HIV status. There is no crime involved in this behaviour.
- The HIV epidemic is largely a public health issue and not a criminal law issue. The public health system and public health programmes should deal it with.
- If people know they can be prosecuted for HIV-related behaviour, they will not go for testing and they will not be open about their HIV status. This will hinder prevention and control efforts.
- If there is a criminal law directly relating to HIV and AIDS, people may think that the law will protect them from HIV. This could undermine prevention efforts.

For these reasons, most countries and international organisations like 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 recommends that criminal laws prohibiting sex between consenting adults such as sodomy, and sex work where there is no victimisation, should be reviewed in order to repeal these laws. In particular, these laws should not be used as an obstacle to providing HIV/AIDS prevention and care services.

10. HIV/AIDS causing criminal behaviour

It is important to realise that the discrimination, prejudice and human rights abuses that people living with HIV or AIDS face in their day-to-day lives are criminal acts and that these actions should not be tolerated. We should act against these violations, not only to stop the perpetrators, but also to send a message to the community that these abuses are wrong. People with HIV or AIDS will become stronger and live more openly and in less fear when they stand up against discrimination and other violations of their rights.

11. Conclusion

Wilful transmission of HIV is wrong and the criminal law should take its course against them. But using the criminal law, even by creating a new crime for wilful transmission, will not help in the fight against HIV and AIDS. Rather than helping to control the epidemic, this may have just the opposite effect, as people are driven away from the assistance they need to protect themselves and others.

12. Points for discussion

1. Jason has sex with Bobby. Jason knows he has HIV, but he does not tell Bobby and they do not use a condom. Can Jason be charged with a crime?
2. Christine and Festus are married. Neither of them has had an HIV test. Festus is a truck driver and has sex with sex workers along the road. Christine is not aware of this. Christine falls pregnant and goes to the clinic. She is tested for HIV with her consent. She is told she has HIV. Can Festus be charged with a crime?
3. Sarah is a sex worker. Gert meets her one day when he buys sex from her. They fall in love and start a relationship. After a few months, Gert finds out he has HIV. Can Sarah be charged with a crime?
4. How can we reduce the rate of violent crimes against women, especially crimes that may transmit HIV?
5. What can we do to help sex workers protect themselves against HIV or AIDS?
6. What is your opinion of the role of criminal law in HIV/AIDS prevention?
7. Jonathan is HIV positive. He decided to tell his family. After he told his family, his brother got angry and started beating him, telling Jonathan to take his clothes and never come back to the house. How can we stop this kind of behaviour?

13. 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

UNAIDS International Guidelines on HIV/AIDS and Human Rights, 1998

Ministry of Health and Social Services, Policies and Guidelines for HIV/AIDS Prevention and Control, June 2001

Cases

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Reports, manuals and other useful materials

AIDS Law Project (ALP) and Lawyers for Human Rights: HIV/AIDS and the Law: A Trainer's Manual (First Edition), July 1997.

AIDS Legal Network: ALQ – The AIDS Legal Quarterly (quarterly magazine).

Black Sash and Education & Training Unit: Paralegal Manual (Update Edition), January 2001.

South African Law Commission (SALC): Aspects of the Law Relating to HIV/AIDS, First Interim Report, Disposable Syringes, Needles and other Hazardous Material; Universal Work Place Infection Control Measures (Universal Precautions); National Compulsory Standard for Condoms; Regulations relating to Communicable Diseases and the Notification of Notifiable Medical Conditions; National Policy on HIV Testing and

Informed Consent, February 1997.

SALC: Simplification of Criminal Procedure, Discussion Paper 94, (Project 73), 2000.

SALC: The application of the Bill of Rights to criminal procedure, criminal law and the law of evidence and sentencing, Discussion Paper 89, (Project 73), 2000.

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SALC: Aspects of the Law Relating to HIV/AIDS, Fifth Interim Report, The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour, June 2001.

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:	www.grnnet.gov.na/Contact_us/Ministries
AIDS Law Project:	www.hri.ca/partners/alp/
AIDS Legal Network:	www.aidslegal.co.za
South African Law Commission:	www.law.wits.ac.za/salc/salc.html

Chapter 15

Social assistance

1. Introduction

Most countries provide social **welfare** to provide for the needs of the population with regard to medical care, and financial assistance for the poor, the aged and the vulnerable members of society.

Namibia also provides social **assistance** to its citizens in the form of old-age pensions, disability grants and medical treatment.

When regular payments are made to insure a person against death or illness, for example, it is known as social **insurance**. Payments made in terms of the Social Security Act are a good example. Monthly payments are made and claims can be submitted to the Social Security Commission for disability, death, sick leave and maternity leave. Another example is the Employees Compensation Act under which employees can claim compensation for injuries sustained at work.

The Constitution, under the Principles of State Policy, requires the State to promote and maintain the welfare of the people by the enactment of legislation to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged receive social benefits and amenities that are just and affordable, with due regard to the resources of the State. It also provides that senior citizens must receive a regular pension adequate for the maintenance of a decent standard of living.

2. Forms of social assistance available

Different kinds of social assistance are available to people who need help. Not all of the assistance comes from the government. Some non-governmental organisations (NGOs) provide food, clothing, blankets, or other forms of support such as moral support and counselling.

Example

Organisations such as Catholic AIDS Action and the AIDS Care Trust provide counselling and emotional support to people with HIV or AIDS, and give assistance with food parcels, home and hospital visits.

The Ministry of Health and Social Services provides social assistance to those who need it. For example, when people become too sick to work, they can apply for social security.

The types of assistance offered by the Ministry are:

- old age pensions,
- disability grants, and
- foster parent allowances

2.1 Old Age Pensions

Namibian citizens, older than 60 years of age, are entitled to a pension. People who qualify should apply at their local social pension office for a pension.

2.2 Disability grants

A person is entitled to a disability grant if a physical or mental disability prevents him or her from working or earning an income. The Ministry provides a disability grant in the amount of N$200 per month per person.

A person with HIV or AIDS does not automatically qualify for a disability grant. Being unable to work is the main criterion.

Guidelines

Applying for a disability grant

Applications are made at a social pension office. The following information is needed:

1. Namibian identification card or passport.
2. Proof of birth.
3. Some sort of disability that prevents the applicant from working.
4. A doctor's report saying that the applicant is unable to work or to support him or herself. The medical report must be from a doctor employed by the government.
5. Proof that no one else is supporting the applicant, for instance when the applicant is married, she or he should be able to show that the spouse cannot support the applicant.

The Ministry must keep all the information the applicant provides them confidential, especially a person's HIV status. If the Ministry discloses this information, the Ministry can be sued for damages.

3. Grants to support children

The Ministry of Health and Social Services provides three types of social assistance for the support of children, including children infected and affected by HIV. These are:

- foster parent allowances,
- maintenance grants, and
- place of safety allowances .

3.1 Foster parent allowances

Foster parent allowances are given to the foster parents of a child who is put in their care and custody under an order from the Children's Court. The amount of N$200 is paid per month per child. If there is more than one child being fostered by the same family, an additional N$100 per month per child is payable for the other children.

Guidelines

Applying for foster parent allowances

Applications are made at a social pension office. The following information is needed:

1. Personal particulars.
2. The foster parent's identity document, or the passport of the parents and the child.
3. The child's birth certificate.
4. The court order putting the child in foster care.

3.2 Maintenance grants

A maintenance grant of N$100 per month is payable for the maintenance of a child who has lost one parent and who is being cared for by other persons. Anybody who takes full-time care of the child and with whom the child lives can apply for the grant. There is a means test for this grant: if the person who is looking after the child receives more than N$500 per month, he or she will not qualify for the maintenance grant.

Guidelines

Applying for maintenance grants

Applications are made at a social pension office. The following information is needed:

1. Personal particulars.
2. Proof of income.
3. The applicant's Namibian identity document, or the passport of the parents and the child.
4. The child's birth certificate.

3.3 Place of safety allowances

Children who are kept at a place of safety receive an allowance of N$10 per day.

4. Social insurance

In Namibia, certain legislation has been enacted to provide social insurance.

4.1 Employees Compensation Act

Under this Act, employees who earn under N$72 000 per year can claim for injuries sustained while at work. Their dependants can also claim for loss of support in the event of the employee's death.

The Employees Compensation Act also pays out to people who have become disabled as a result of an accident at work.

People infected with HIV through their work are not able to claim compensation under this Act.

4.2 Social Security Act

All employers and all employees who work more than two days per week must be registered with the Social Security Commission. Monthly contributions by members are paid into the funds created by the Act, namely: the Maternity Leave, Sick Leave and Death Benefit Fund, the National Medical Benefit Fund and the National Pension Fund.

The last two funds are not yet in operation.

Under the Maternity Leave, Sick Leave and Death Benefit Fund, employees who have been members of the fund for six months or more are entitled to:

- Death benefits of N$2 500 when an employee dies.
- Sick leave if the person is sick for more than a month.
- Maternity leave for pregnant women
- Disability benefits, depending on whether the disability is temporary or permanent.

5. Other social assistance

5.1 Medical care

Many people are unable to pay for medical care. The government helps people (including people with HIV or AIDS) to receive basic health care services in different ways. Basic health care services are available at clinics or hospitals. People who access these services have to pay a small amount for treatment and medication.

Guidelines

Organisations that may help persons with HIV/AIDS to apply for social assistance:

1. Catholic AIDS Action
2. AIDS Care Trust
3. Lironga Eparu
4. AIDS Law Unit, Legal Assistance Centre

6. References and resource materials

Laws

Constitution of the Republic of Namibia

Social Security Act No 34 of 1994

Employees Compensation Act No 30 of 1941

Policies

Namibian HIV/AIDS Charter of Rights, 2000

Ministry of Health and Social Services, Policies and Guidelines for HIV/AIDS Prevention and Control, June 2001

Reports, manuals and other useful materials

AIDS Law Project and Lawyers for Human Rights: HIV/AIDS and the Law: A Trainer's Manual (First Edition), July 1997.

Community Law Centre: Socio-Economic Rights in South Africa (A Resource Book), October 2000.

Legal Resources Centre (Durban): A Guide to Disability Grants (booklet), 1998.

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:	www.grnnet.gov.na/Contact_us/Ministries
AIDS Law Project:	www.hri.ca/partners/alp/
AIDS Legal Network:	www.aidslegal.co.za
AIDS Consortium:	www.aidsconsortium.org

Chapter 16

Thinking about the future

1. Introduction

HIV causes a lot of anxiety. One way to deal with the infection is to be aware of what course the disease is likely to take and to plan for the future.

If you have HIV, the chances are very good that there will be times when you are too sick to work. There may also be times when it is impossible to make important decisions. For these reasons, it is important to have somebody who can make these decisions on your behalf. It is also important to consider the effect of the early death of a family member on the rest of the family – particularly on young children.

In this chapter, we will discuss a few issues that need to be considered by a person living with HIV or AIDS. 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. Decisions about assets: property and money

There are two important documents that are used to regulate financial affairs when a person is no longer able to do so herself. A **power of attorney** authorises another person to take financial decisions on your behalf when you can no longer do so yourself. With a **will**, the person who is making the will can say how her or his property should be divided after death.

2.1 Power of attorney

A power of attorney is a legal document that must be in writing. The word “attorney” does not mean the person must be a lawyer – the person may be anybody whom you trust, such as your spouse, your partner or a close friend. With a power of attorney, you appoint somebody to do things when you cannot be present or if you are too ill to do things yourself. For example, you can authorise your sister to sell your house if you sick in hospital.

A power of attorney is useful when a person with HIV is too ill to do tasks like pay the rent, or collect disability benefits.

There are **two types** of powers of attorney:

1. A **special** power of attorney, in which you authorise a person to do just one thing on your behalf, like sell your car. The special power of attorney comes to an end after this thing is done.
2. A **general** power of attorney, which allows the person you have authorised to do all things on your behalf. This person can do anything from buy a house in your name to collect your monthly pension. Because the powers are so wide, it is very important that you trust the person. For this reason, many people grant a general power of attorney to a legal practitioner. A general power of attorney is convenient because you do not have to sign a special power of attorney for every activity.

A power of attorney is only valid while the person is **mentally competent**. You are mentally competent when you know and understand the consequences of your acts, and you act freely and voluntarily. If the person becomes mentally incompetent, the power of attorney falls away.

When a person becomes mentally incompetent, a person may apply to the High Court to appoint a **curator**. This curator will manage the affairs of the person who is mentally incompetent. As the curator has to report to the Master of the High Court, the chances of this person abusing her or his powers are much smaller. If the curator does abuse his or her powers, the Master of the High Court can ask the Court to remove the curator.

Guidelines

1. If you want your representative to handle your **banking matters** on your behalf, you should request the bank to authorise a specific person to act on your behalf. The bank will need positive identification of your representative to prevent fraud, and will only allow the representative to do what is allowed by the power of attorney.
2. An **affidavit** is used to authorise your representative to do a **specific** task on your behalf (special power of attorney) or to do **general** tasks on your behalf (general power of attorney).
3. For a **valid** power of attorney, **two witnesses** (over 14 years of age) and a commissioner of oaths must sign with you. You must be of **sound mind** (ie not mentally incompetent) when you sign the power of attorney.
4. By signing a power of attorney you give a lot of power to your representative. Make sure that you **trust** that person.
5. The power of attorney must be carefully worded to say exactly what you want the representative to do. Get help from a legal practitioner or a paralegal if you are not sure how to word the document.
6. Your instructions may not be illegal or against public morals.

Example

SPECIAL POWER OF ATTORNEY
Authority to operate Bank Accounts

Date:.....

To: The Bank Manager

Bank: .....

Branch: .....

I, ...
(full names of account holder)

authorise

.....
(insert full names and identity number of authorised person)

to operate the following accounts:

....
(type of account) (account number)

.....
(signature of account holder)

The authorised person may deposit and withdraw funds, apply for cheque books, get bank statements, stop payment of cheques, cede any of my rights in the accounts as security, close or transfer the accounts and generally do anything else related to the accounts; subject, however, to the following restrictions:

(List restrictions, if any)

.....

.....

....
Signature of account holder Signature of first witness to account holder's signature

....
Signature of authorised person Signature of second witness to account holder's signature

Example

GENERAL POWER OF ATTORNEY

I, the undersigned,

Name: .....

Identity Number: .....

Nominate and appoint: .....

Name of Person who is to be the attorney: .....

Identity Number: .....

To be my attorney and agent for managing and conducting my business in the Republic of Namibia, with full power and authority for me, and in my name and for my account to carry out these actions:

1. To collect and receive any money on my behalf and to invest this money in the best possible manner, or to use this money in paying any account on my behalf.
2. To open and operate any banking account in my name and to draw, sign and endorse cheques on my behalf.
3. To deal with all legal actions and demands to do with me, my property and my affairs in any court or other body in the Republic of Namibia.
4. To buy or sell movable property (eg a car or furniture) or immovable property (eg a house) on my behalf, and sign all the necessary documents to achieve this.
5. To choose the address where I will receive all important documents, and generally to do, carry out and deal with any act, deed, issue or thing that the attorney may decide is necessary to represent my concerns.

Signed and dated at: .....

on the ..... day of ..... 20.....

in the presence of these witnesses.

As witnesses:

1.....

2. .....

.....
Signature of Grantor
(Person giving Power of Attorney)

2.2 Inheritance and succession

A **will** is a written legal document in which the testator (the person who is making the will) says what must happen to her possessions after her death. In the will, the testator says how her **estate** (all her possessions) must be divided after her death. The people who will get the possessions are called the **heirs**.

It is important to think carefully about how property should be divided. This is why a will should be written when the person making the will is mentally competent.

2.2.1 Intestate succession

If a person doesn't have a will at the time of his or her death, it is said that the person died **intestate** (without a testament, or a will). This means that the law will divide that person's assets up in a formal, prescribed way, which may not be what he or she wanted.

The law of intestate succession in Namibia is very confusing. It still distinguishes between different Namibian people on racial grounds. There are different rules for "coloured", "black" and "white" estates. This state of affairs is in violation of the right to equality and should be addressed by Parliament. We will discuss these in turn.

"White" and "coloured" estates

The estates of "white" and "coloured" persons who die without a will are dealt with under the laws of intestate succession. Intestate estates from the Rehoboth "Baster" community are distributed under the Administration of Estates (Rehoboth Gebiet) Proclamation.

The Master of the High Court oversees succession of "white" estates, whether in or out of community of property.

Black estates

In the case of a “black” person’s death, the nearest relative must go to the Magistrate’s Court with the death certificate to be appointed as the executor. Once appointed, the executor must divide the property under the customary law of the deceased person.

When a “black” person is married under civil law (ie in a church or in a Magistrate’s Court), either in community of property or out of community of property (ie with an antenuptial contract), the “black” estate will be regarded as a “white” or “coloured” estate and the estate will follow the intestate succession rules of the “whites” or “coloureds”.

“Black” people who marry north of the “Red Line” (which includes Owambo, the Caprivi and the Kavango) are automatically married out of community of property. Only if they enter into an antenuptial contract (a written agreement made before they marry and registered in the Deeds Office) can it be said they are married out of community of property with an antenuptial agreement.

When getting married in the church or the Magistrate’s Court, “black” people north of the “Red Line” may tell the **marriage officer** (the magistrate or pastor, minister or priest) that they want to be married in community of property. The marriage officer must write this request in the **marriage register**, and the parties will then be married in community of property. When “black” people are married in community of property, the consequences flowing from their marriage will be the same as for “whites” and “coloureds”. Their intestate estates will also be divided in the same way as those of “whites” and “coloureds”.

When “black” people are married under civil law south of the “Red Line”, their estates are dealt with in the same way as those of “whites” and “coloureds”.

Important point

On the death of a “black” person who is not married or who is single, her or his estate will be divided according to the applicable customary laws, unless she or he has drawn up a will.

The rules of intestate succession with regard to “white” estates

In short, intestate succession under the common law works as follows:

2.2.1.1 With descendants

Married in community of property

If the deceased and the spouse were married in community of property, the surviving spouse automatically gets half of the estate. This is called a **half share** of the estate.

The deceased’s half share of the estate is divided between the surviving spouse and the children, if any. The spouse will inherit either a **child share**, or to so much, as together with the spouse’s share in the joint estate, is not more than N$50 000,00, whichever is the greater amount.

This means that the spouse will inherit either a child share or N$50 000, whichever is the greater **plus** the spouse’s half share.

Important point

A **child share** is calculated by adding the children and the surviving spouse, and then dividing the total estate by that number. For example, if there are two children and a spouse, there are three child shares.

Example

The deceased and spouse were married in community of property. They have two children. The estate is worth N$600 000. The spouse’s half share is N$300 000.

The deceased’s half share is divided as follows:

A child share is: N$300 000 divided by three (wife and two children) = N$100 000 each.

The wife gets the larger of a child share or N$50 000, and in this case, will inherit the N$100 000.

The surviving spouse gets N$300 000 (one half share) and inherits N$100 000 (one child share) for a total of N$400 000.

Each child will inherit N$ 100 000.

Married out of community of property

If there is an antenuptial contract, the estate will be distributed in terms of the antenuptial contract. Otherwise, the surviving spouse will inherit the larger of a child share or N$50 000,00. If the estate is worth less than N$50 000, the spouse will inherit everything.

Example

The deceased wife leaves N$400 000. She was married out of community of property and has three children.

A child share is N$400 000 divided by four (husband and three children) = N$100 000.

The husband and each child inherit N$100 000.

2.2.1.2 With no descendants, but a parent, or brothers and sisters

If the deceased was married in or out of community of property and leaves no children, but a spouse and a parent or a brother or sister, the spouse's inheritance will be the greater of either a child share or N$50 000. (The surviving spouse still gets the half share of the joint estate if married in community of property.)

Parents count as one child share and they inherit in equal shares. Where the one parent is dead, the half of the share of the estate that should have gone to the dead parent is divided between the children of the dead parent in equal shares.

2.2.1.3 With no descendants, parents, or brothers and sisters

The surviving spouse inherits the whole estate.

Important points

1. The following are **not** regarded as spouses for the purposes of intestate succession and they will **not** inherit under intestate succession:
   - A customary law husband or wife.
   - A common law wife or husband (where the parties are not legally married).
   - A partner in a gay or lesbian relationship.
2. To provide for them, the other spouse or partner must make a will, specifying what people should get.
3. **Adopted children** are regarded as children of the deceased and can inherit when the deceased died intestate.
4. **Children born out of wedlock** can inherit intestate from their mothers, but not from their fathers. With a valid will, the father can make sure that illegitimate children can inherit.
5. If a person dies without a will, that person dies intestate and any property must be divided between family members. With a will, it is possible to leave

more property to a specific person, and money or property can be left to people who are not family members, like a friend or a partner.

2.2.2 Testate succession

When a person dies, leaving a valid will behind, we say that the estate must be divided under the rules of **testate succession**.

3. Making a will

3.1 Who can make a will

- Any person who is 16 or older can make a will. The person making the will is called the **testator**.
- The testator must be **mentally capable** of making a will (the person must understand the consequences of the will, and must intend the consequences) in order for the will to be a valid will. A person who is drunk or mentally ill is deemed not to be mentally capable of making a will.

Tip: It is easier to prove that a testator was mentally capable of making the will if it is dated. If more than one will exists, dating the wills shows which will is the most recent. The most recent will is the will that should be given effect to.

3.2 Who can inherit under a will

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

The following people **cannot** inherit under a will:

- A person who kills the testator.
- The person who writes the will or the spouse of the person who writes the will. If Kristina writes her mother's will, she cannot inherit from her mother.
- A person who signs the will as a witness, or his or her spouse.
- The person who signs the will on behalf of the testator (if the testator cannot personally sign), or his or her spouse.

3.3 The contents of a will

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

- **Illegal (against the law)**

You cannot, for example, 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. If the person you appoint as your executor signs your will as a witness, the appointment will be without effect.

4. Guardianship of minor children

The law prescribes who will take care of minor children and make decisions about their lives. This is called **guardianship**. Guardianship stops when the child turns 21.

The Married Persons Equality Act gives parents equal guardianship over children if the parents are married. This means that both parents have the right to make decisions about a child's welfare, for example about the child's school education.

Sometimes the court awards guardianship to one of the parents, usually after divorce. On the death of that parent, the guardianship would normally go back to the other parent.

When a child is born outside of marriage, the mother is automatically the guardian of the child. If the mother dies, her parents become the guardian. This position seems to discriminate against the fathers of children born out of wedlock and may be challenged on constitutional grounds.

4.1 The role of the court with regard to guardianship

The Court is the **upper guardian** of all minor children. If one or both parents die, the High Court has the power to make whatever decision is necessary *"in the best interests of the child"*.

The law dictates who will be the guardian a child after the death of a parent. The surviving parent is usually the guardian. But in cases where one parent has died, the surviving parent may want to name the guardian of her or his children in the will. The Court will give effect to this appointment, but if there is a dispute about the guardianship of the children, the Court will decide who the best guardian is.

Important points

- The High Court looks at the best interests of the child to decide who should be the guardian of the child.
- When parents do not look after a child properly, for example if a child is sexually abused or neglected, the High Court can give guardianship of that child to another person, even if the parents are alive.

5. Formal requirements for a valid will

As a will is a formal legal document, in must comply with strict rules for it to be valid. The will must be properly **executed** to be valid.

1. The will must be in **writing**. It can be done on computer, on a typewriter or 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 she or he 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 or she signs. The witnesses must be at least 14 years old.
4. If the testator can't sign (for example when the testator 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 the witnesses. Each person must sign their full signature.
7. The last page must be signed **as close as** possible to the end of the will. This stops anyone trying to add something in a space that is left at the end of the will.
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 best to get help from a legal practitioner, a bank or building society, or a paralegal.

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 and whether you are married in or out of community of property.
3. If married, your spouse's name and ID number.
4. The names, sexes and ages of your children, and whether they are single or married.
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 the will and who will be responsible for winding up (finalising) the estate and making sure that the estate is distributed 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 on 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.

As witnesses:

.....

TESTATOR

1. .....
2. .....

6. Future medical treatment

It is important that people with HIV or AIDS think about and plan for their future medical treatment. Their views on medical treatment should be respected. People with HIV or AIDS could tell their families what they want to happen, or they could write their wishes down to be referred to when they are no longer able to act. They could also appoint somebody to make decisions for them if they are too sick to do so themselves.

6.1 Euthanasia

Euthanasia is also known as “mercy killing”. It involves the ending of the life of a person who is terminally ill and in pain.

Our law does not allow “active” euthanasia. In other words, we may not do anything to cause the death of another person even when asked to do so. Our law allows the following:

- A doctor may stop life-saving treatment of a person who is medically dead (ie switch off a heart-lung machine).
- A doctor is sometimes allowed to stop feeding a person who is in a vegetative state (for example, someone who has been in a coma for a long time).
- A person of 18 or older may refuse medical treatment, even if this means that he or she may die more quickly. A doctor must respect the person’s wishes. When a patient of 18 or older does not want medical treatment, but only treatment for pain, the doctor may prescribe painkillers to ease the pain, even if the doctor knows that the drugs will shorten the life of the patient. Painkillers may not be given with the intention to kill the patient.

The following forms of euthanasia are **prohibited**:

- A person is not allowed to give a terminally ill person something that will help them to kill themselves, even if they ask for help.
- Nobody may do anything to kill a terminally ill person (like giving them an injection) even if they ask for help.
- A person may not do anything to kill a terminally ill person if that person does not or cannot ask for help, even if that person feels sorry for the patient.

Important cases

In *Clarke v Hurst,* the wife of a man who had been in a vegetative coma for more than three years asked the court to allow her, as the curator of her husband, to order the hospital to stop feeding her husband through a tube. His brain was almost destroyed. The court allowed the application saying that:

"The gross damage to the brain which has led to the destruction of this (cognitive and conative capacity) is irreparable. In short, the brain has permanently lost the capacity to induce a physical and metal existence at a level which qualifies as human life. In these circumstances I am of the view that, judged by society's legal convictions, the feeding of the patient does not serve the purpose of supporting human life as it is commonly known and the applicant, if appointed as curatrix, would act reasonably and would be justified in discontinuing the artificial feeding and would therefore not be acting wrongfully if she were to do so."

In *S v De Bellocq,* a young married woman gave birth to a baby that had a disease called toxoplasmosis. She had studied medicine and realised that her baby was irreversibly brain damaged, and would never be able to have a normal life. In an emotional state, she drowned the baby in the bath. The court found her guilty of murder, but it also found extenuating circumstances. She was not sent to prison.

6.2 Living wills

A living will is a document in which a person indicates what medical treatment must be given when he or she is too sick to tell other people what to do. In the will, the person making the will can appoint another person to make decisions on behalf of the patient when he or she is no longer able to do so.

A living will is a way to tell the family and the doctor what to do. For example, in a living will, it is possible for a person to request that a doctor does not keep him or her artificially alive by tube feeding or with a heart-lung machine.

6.2.1 Reasons for having a living will

- The patient has control over medical decisions taken, even after he or she has lost the mental competence to make decisions.
- A trusted person can be appointed to make important decisions, for example, when to turn off life-support machines.
- The patient can request the presence of a person who is not legally regarded as family, such as a gay or lesbian partner.

Important points

- A living will is not like other wills. It is a document that tells other people how we want to be treated while we are still alive, not when we are dead.
- It contains instructions about the treatment that a sick person wants when he or she is too ill to explain it personally.
- Our courts have used living wills as a way of finding out what the patient's wishes are.

At the moment, living wills are not recognised by our statute law. No case has yet dealt with the question of whether living wills are valid, but our courts can use the living will to determine the wishes of a patient. What the courts have said is that we should respect the wishes of the patient made when he or she was in good health.

A strong constitutional argument on the legal validity of a living will could be made based on the rights to autonomy, dignity and privacy, and the right to be free from torture or cruel, inhuman or degrading treatment or punishment.

Nonetheless, our law does not allow **active euthanasia** and the law will not uphold unlawful wishes in a living will.

Example

Patience writes a living will when she is in good health. She says that she does not want to be kept alive by life-saving treatment if she is brain-dead. She also says that if she is in a lot of pain, she would like to be given only palliative care (care that relieves pain) even though this may speed up her death. Her wishes are lawful and the living will is good evidence of her wishes. The doctors and the courts should respect her wishes.

Andrew writes a living will when he is in good health. He says that if he becomes terminally ill and is in great pain, he would like the doctor to end his life by giving him a lethal injection. His wishes are not lawful and a court cannot recognise this living will.

Guidelines

Make copies of a living will and hand a copy to your family doctor, put one in your hospital file and keep one at home in a safe place that your family knows about.

Example

LIVING WILL

1. I, (full names) .....

   Identity number .....

   of (address) .....

   make this Living Will after careful consideration and while in sound mind, to state my wishes in case I become unable to communicate and cannot take part in decisions about my medical care.

2. I do not wish to be kept alive by medical treatment if I have a physical illness with no likelihood of recovery, and/or if my mental functions become permanently impaired, and/or if I become permanently unconscious with no chance of regaining consciousness.

3. I request that medical treatment be kept to the minimum needed to keep me comfortable and free from pain, even if this should hasten the moment of death. I expressly do not consent to be kept alive artificially and/or to be provided any form of tube feeding.

4. I have informed this doctor/clinic of this Living Will:

   (Name) .....

   (Address) .....

   (Contact telephone for doctor/clinic).....

5. I give consent to any person to apply for a court order to ensure that this Living Will is followed if any medical, health authority or institution, and/or family member or partner refuses to follow my wishes.

6. I wish to be kept alive for so long as it is reasonable to enable the following person(s) to be with me before I die, even if this means temporarily going against the wishes stated earlier in this Living Will.

   (Name).....

   (Address) .....

   (Telephone numbers) .....

7. I appoint this person (name) .....

   (Address) .....

   (Telephone numbers) .....

   to take part in decisions about my medical care on my behalf, and to represent my views about them, if I am unable to do so. I wish (name) ..... to be consulted about or involved in those decisions. Further, I wish those caring for me to respect the views (name) ..... expressed on my behalf unless they go against or are in conflict with my wishes in this Living Will.

8. This document remains effective until I make clear, while in sound mind, that my wishes have changed.

9. This declaration is signed and dated by me and confirmed by the two witnesses below.

(Signed) ..... (date) .....

Witnesses:

Signature	Signature .....
Name	Name .....
Address	Address .....

7. Donating human organs or tissue

It is possible to donate body tissue, body parts, including organs, for research purposes or for organ transplants after one's death. The *Anatomical Donations and Post-Mortem Examinations Ordinance* defines **tissue** as any human tissue, including any flesh, organ, bone, body fluid or tissue or product derived from it.

Any person who is legally able to write a will can also donate human tissue.

Persons with HIV or AIDS can donate their organs for medical research purposes, to find a cure for AIDS. For this to happen, consent must be given before death. Consent can be given in:

- a will,
- a written document signed in front of two witnesses who are 18 or older,
- verbally, in front of two witnesses who are 18 or older.

8. Death certificates

The doctor who attends to a person when he or she dies must complete a death certificate after the death.

This certificate states the following:

- That the person has died.

- The date of death
- The cause of death:
  - Natural causes, eg illness.
  - Unnatural causes, eg murder.

It is not necessary for a doctor to note AIDS as the cause of death on a death certificate.

9. Finalisation of the affairs of the deceased

The estate must be finalised by the Master of the High Court after the death. The death must be reported to the Master within 14 days after the death and a copy of the death certificate handed in. The Master's office will give the family different forms to fill in to help wind up the estate of the deceased. If the estate is worth less than N$15 000, a family member or some other representative can wind up the estate on their own. If the estate is worth more than N$15 000, the Master's Office usually says that an executor must be appointed to do the work. If no executor has been appointed in the will, the Master will appoint one.

10. Points for discussion

- Should euthanasia be legalised? What about active euthanasia?
- Should living wills be legalised?

11. 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 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 and Law Society of Namibia, Wills, Testaments and Estates in Namibia: Your questions answered, June 2002

South African Law Commission: Report on Euthanasia and the Artificial Preservation of Life, Project 86, November 1998 (including proposed End-of-Life Decisions Act).

AIDS Law Project and Lawyers for Human Rights: HIV/AIDS and the Law: A Trainer's Manual (First Edition), July 1997.

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: www.grnnet.gov.na/Contact_us/Ministries

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

Chapter 17

Protecting the rights of people with HIV or AIDS

1. Introduction

When a person or an institution (like a hospital or a clinic) violates the rights of any person, including a person with HIV or AIDS, the person whose rights have been violated has various ways under the law to protect her or his rights and to address the wrongs that have been committed.

Our law does not allow people to take the law into their own hands to correct the wrong. For example, if somebody steals something from a person, the victim of the crime cannot go to the house of the alleged thief to take the item back. The matter should be reported to the police. The police will investigate the crime and press criminal charges against the alleged thief if they think that an offence was committed.

There are different ways for people to resolve disputes other than only through the courts. In the case of negligence or the professional misconduct of a health care worker or a lawyer, the matter can be reported to the relevant professional body to investigate the allegation of misconduct by one of its members.

These bodies are created under laws that give them disciplinary powers against their members. They can impose a fine, or even remove their member's names from the register, which would prevent these professionals from practising in Namibia.

Throughout this manual we have discussed various remedies to legal problems. In this chapter, we will draw the different processes together. We also hope to give useful tips to the reader to use when faced with a violation of their rights.

2. Looking after the interests of people with HIV or AIDS in court

2.1 Confidentiality in court

In terms of our Constitution, all people are entitled to a fair and public hearing in a court of law. This is so that no one can be convicted in a secret court without receiving a fair trial. However, if a person with HIV wants to bring a case against somebody, a public hearing will automatically mean that the person's identity will be made known to the public, as well as the fact that the person is HIV positive.

Our court proceedings allow for cases to be heard **in camera**, in other words, the public is excluded from the hearing. This often happens when children are involved in a case.

When a person with HIV wants to bring a case to court, he or she can apply to the court to have the matter heard in camera, or the person can ask the court to make an order so that the complainant will not be identified. If this is allowed, the court will order newspapers not to publish the name of the complainant. The complainant's real name will also not be used in court.

Example

In the South African case of *C v The Minister of Correctional Services,* the Court ordered the media not to disclose the name of the complainant. The matter was still heard in open court. The Court said:

"There is no doubt that, whether a person is HIV positive or not, whether that person has AIDS or not, is in most circumstances a highly personal matter. Such a person should be protected as far as is possible where the publication may impact upon his or her whole life. In referring to 'whole life' I include that person's position in the workplace and in the community in which he or she moves. It would seem that this is a case where, although the matter is apparently of great public concern, it may be published and reported without disclosure of the plaintiff's name.

The interest that the community at large has in knowing precisely what is happening in the courts of law, will be achieved if this court sits with open doors but subject to the plaintiff's name not being published."

2.2 Finalising cases sooner

Court cases normally take a long time to finish, particularly civil trials. Our courts recognise that it may be important to speed up the trial. When people with HIV or AIDS are involved in the case, it may be particularly necessary. Waiting for the matter to go to court can increase the complainant's stress.

The rules of our courts allow for hearings to be heard on an urgent or semi-urgent basis. Complainants can ask their legal practitioners to apply to court to have the matter heard sooner than would have been the position otherwise.

3. Protecting constitutional rights

3.1 The courts

The Supreme Court of Namibia is the highest court in Namibia. The High Court, Labour Court and Magistrate's Courts must follow all its decisions.

If a person thinks that her constitutional rights have been infringed, for instance if a hospital refused to treat her because she is lesbian, she can take the matter to the High Court, which will hear and decide the matter. This ruling of the High Court will stand, unless the Supreme Court, on appeal, decides the case otherwise.

Magistrate's Courts cannot decide on constitutional matters. They have to follow the decisions of the High Court or the Supreme Court.

3.2 The Ombudsman

The Office of the Ombudsman was established by the Constitution. The Ombudsman is an independent body set up to investigate the following complaints:

- Complaints regarding violations of fundamental rights and freedoms, and abuses of power by officials in the employment of the government.
- Complaints regarding the functioning of the Public Service Commission and administrative organs, the Defence Force, Police Force and Prison Services
- Complaints regarding the use and exploitation of natural resources.
- Complaints regarding corruption and misappropriation of public monies.

The Ombudsman has the power to:

- Investigate complaints.
- Take appropriate action to correct the situation by, amongst others:
  - negotiation and compromise,
  - referral of the complaint to the superiors of the complainant,
  - referral of the matter to the Prosecutor-General for criminal prosecution,
  - referral to a competent court for a decision or an interdict, or
  - reviewing laws to determine their constitutionality.

3.2.1 Making a complaint to the Ombudsman

The Ombudsman can be contacted by telephone, fax or in writing.

Address:

The Office of the Ombudsman
c/o Robert Mugabe Avenue and Fidel Castro Street

Private Bag 13211
Windhoek
Tel No: (061) 207 3111
Fax No: (061) 22 6838 or 22 0550

4. The right to administrative justice

Under the Constitution, administrative officials and institutions have to act fairly and reasonably. They must also comply with the common law and the legislation governing their actions. This means that a person who has to take an administrative decision must consider a request, consider all the information, and give reasons for a decision.

A person who feels aggrieved by an administrative decision can ask the High Court, or a tribunal set up under the particular legislation, to reconsider the matter.

It would be best to refer the matter to a legal practitioner, but it is also possible to contact the particular Ministry for information regarding an appeal.

4.1 Procedures to follow when complaining about government officials

1. In writing, ask for the reasons for the decision.
2. Ask for the particular body's rules to appeal against the decision, and act accordingly.
3. If the Ministry does not respond, report the matter to the Ombudsman or a legal practitioner for appropriate action.

5. Complaining to professional bodies

When a person's complaint is against a member of a professional body, complaints should be made to the particular professional body.

If a person has a complaint, she or he should write a letter to the relevant body, setting out the particulars of the complaint as well as the contact details of the complainant. The professional body will give the complainant all the necessary information about how to make a formal complaint against the professional person.

In Namibia, we have the following professional bodies:

- Nursing Board
- Medical Board
- Dental Board
- Psychology Board
- The Law Society of Namibia

Complaints about a medical aid scheme can be made to the Registrar of the Namibian Association of Medical Aid Funds (NAMAF). Complaints about insurance companies or against insurance brokers (the people who sell the life insurance) can be made to the company that employs the insurance broker, or to the Life Assurer's Association of Namibia.

Addresses:

Nursing Board of Namibia
37 Schonlein Street
Windhoek West
Windhoek
Tel no: (061) 24 5586
Fax no: (061) 24 5586

Medical Board of Namibia
112 Robert Mugabe Avenue
Windhoek
Tel no: (061) 23 4034
Fax no: (061) 22 4455

Dental Board

Psychology Association of Namibia (PAN
Tel no: (061) 22 4849

The Law Society of Namibia
Namlex Chambers
333 Independence Avenue
P O Box 714
Windhoek
Tel no: (061) 23 0263 / 23 0088
Fax no: (061) 23 0223

Namibian Association of Medical Aid Funds
The Registrar
(NAMAF)
First Floor, Hidas Centre
Nelson Mandela Avenue
Klein Windhoek
Windhoek
Tel no: (061) 25 7211 / 25 7212
Fax no: (012) 25 7213
Email: namaf@iwwn.com.na

Life Assurer's Association of Namibia
Suite 302
Third Floor, City Centre Building
Independence Avenue
Windhoek
Tel no: (061) 25 2563
Fax no: (061) 25 2563ing your rights at work

6. Employees' rights at work

The Labour Act regulates labour matters, including matters relating to basic conditions of employment, unfair dismissals and unfair disciplinary actions, and discrimination.

The Labour Act covers all employees in Namibia, except people employed by the Namibian Police and the Namibian Defence Force. The Act stipulates that the provisions of the Act dealing with discrimination and harassment at work cover NDF and Nampol members.

6.1 Labour complaints

Complaints regarding issues in the workplace, whether arising from unfair disciplinary actions or unfair dismissals, should be reported to the District Labour Court. District Labour Courts are situated at Magistrate's courts. A trade union representative will normally represent the employee in these proceedings. The District Labour Court will refer the case to a labour inspector, who will call a meeting between the employer and the employee, where they will try to resolve the problem. If this does not work, the matter will be heard in the District Labour Court.

When most of the workers in a particular workplace become members of a trade union, this trade union can apply to be recognised as the exclusive bargaining agent on behalf of the employees. Once recognised as a bargaining agent, the trade union must represent all workers, even those who are not union members, when negotiating with the employer.

In the bigger industries like the mining and fishing sectors, employers and trade unions can form collective agreements for the particular industry. These agreements form part of the contracts of employment of the employees. Such an agreement is binding upon the employers and the employees concerned. A collective agreement must include procedures for settling disputes, including referring the matter to a conciliation board or to mediation or arbitration.

The labour commissioner may register exclusive bargaining agents and collective agreements.

Guidelines

Procedures to settle industrial disputes

1. Either the employer or the employees (trade unions) may report a dispute to the labour commissioner and to all the other parties involved.
2. If the employer wants to change a condition of employment, the employer must restore such a condition of employment if the notice of dispute is received within 30 days of the change.
3. Once the commissioner is satisfied that the parties have tried their best to resolve the dispute, the commissioner must form a conciliation board. Members of the conciliation board are appointed by agreement. The conciliation board has certain terms of reference to resolve the dispute.
4. If the parties come to an agreement, with or without the conciliation board, they prepare a memorandum of agreement setting out the basis of the settlement, and, if the parties wish, they may hand a copy to the commissioner for registration as the collective agreement.
5. If the dispute is not resolved, the matter may be taken to the Labour Court, or by agreement to arbitration, if the dispute is about the rights of workers.
6. If the dispute is about interests, the matter must be taken to arbitration.
7. Parties in dispute of rights have a right to industrial action, either a strike in the case of workers, or a lock-out in the case of the employer. They must give at least 48 hours notice before the action is taken.
8. Industrial action may not be taken if the matter has been referred for arbitration or when essential services will be interrupted.

6.2 The Labour Court

Even if there is a collective agreement, disputes between trade unions and employers can be referred to the Labour Court.

The Labour Court can hear cases of unfair discrimination and harassment. The Labour Act provides that the Labour Court can also hear cases involving unfair discrimination and harassment involving the Namibian Defence Force and the Namibian Police.

The Labour Court has powers to:

- declare actions unfair,
- order a party to stop the discrimination,
- award damages to any person who has suffered an injustice, and
- hear appeals from the District Labour Court.

Labour court decisions are binding on all other employers.

6.2.1 Appeals from the Labour Court

A full bench of the High Court (three judges) can hear appeals from the Labour Court.

Guidelines

Procedures to follow when an employee has a complaint against an employer

1. Follow the employer's disciplinary and grievance procedures.
2. Speak to the trade union representative.
3. If there is no trade union, register a complaint at the nearest District Labour Court. The clerk of the court will give the complainant a complaint form to complete. The complainant will also have to buy a N$25.00 revenue stamp to put on the complaint form.
4. A complaint against an employer must be filed within one year of the incident taking place. Under exceptional circumstances, the District Labour Court can be asked to allow the late filing of a complaint.
5. The District Labour Court will refer the matter to the labour inspector. The labour inspector will convene a meeting between the parties at which they will try to resolve the issue, but if they cannot, the matter will proceed to the District Labour Court.

Contact details for labour complaints:

District Labour Courts are situated at Magistrate's Courts.

To contact the Labour Commissioner:

Office of the Labour Commissioner
249 - 582 Borgward Street
Khomasdal
Windhoek
Tel no: (061) 21 2309 / 21 2362
Fax no: (061) 21 2334

To contact the Employment Equity Commissioner:

Office of the Employment Equity Commissioner
249 - 582 Borgward Street
Khomasdal
Windhoek
Tel no: (061) 21 0049
Fax no: (061) 25 8267

To contact the Labour Court or the High Court:

The Registrar
Luderitz Street
Private Bag 13179
Windhoek
Tel no: (061) 292 1111
Fax no: (061) 22 1686

7. Making a criminal case

One person can lay a criminal charge against another person who has broken the law. For example, Erastus can lay a criminal charge if Lydia breaks a window of his house. The State can also charge somebody with a crime, for example when a person exceeds the speed limit.

Criminal cases are reported to the police, who will investigate the matter and arrest the person who is accused of having committed the crime. When the investigation is completed, the case will be referred to a State prosecutor who will prosecute the accused in the criminal court.

7.1 Report the matter to the police

If a crime has been committed, the matter should be reported to the police at the charge office closest to the scene of the crime. The police will take a **statement** from the complainant, in which the complainant will set out the details of the case. The police will give the complainant a **case number**, which is proof that the matter has been reported to the police.

The police may not refuse to take a statement from a complainant, even in the case of domestic violence. The police have a duty to protect the public and to investigate crimes.

7.2 Investigation of the crime

The matter will be referred to an **investigating officer**, who will investigate the crime. The investigating officer will open a case **docket** (file) for the case and the case will also get a **criminal record** (**CR**) **number**, which is used to trace the file. In the case of an assault, a rape or sexual abuse, investigation includes taking the complainant to the hospital as soon as possible so that a doctor can examine the complainant and write a report of the examination. This report will be used as evidence in the court.

Remember: Get the name of the investigating officer, his or her telephone number and the CR number. This is important to have when you enquire about the progress in the matter.

7.3 The criminal court case

Once the investigation has been completed, the police hand over the docket to the public prosecutor to decide if there is enough evidence to prosecute. Serious cases such as rape and murder are referred to the Prosecutor-General's office for a decision to prosecute.

Once the case goes to court, the complainant and witnesses will get a subpoena (a formal notice) to appear in court on a specific day. The prosecutor will discuss the matter with the complainant and the witnesses, and the prosecutor will also explain the court procedures to them.

The complainant is allowed to read the statement that was made to the police before giving evidence in court. The court will hear the case of the complainant first: the complainant and all the prosecution's witnesses will be called to testify *before* the accused is called to testify. The accused can also call witnesses.

Guidelines

How to make a statement to the police

1. The complainant should tell the police everything that happened, using a translator if necessary.
2. It is important for the complainant to tell the truth. The complainant will be asked to swear that the contents of the statement are the truth. In court, the Court will decide if the evidence in court is the same as the written statement.
3. The complainant should read the statement. If the contents of the statement are different from what you told the police officer, ask the police officer to correct the statement.
4. Only sign the statement when the contents are correct and you are happy with it.
5. Get a copy of the statement. You are entitled to a copy.

8. Making a civil case

When a person suffers damages as a result of the actions of another person, the person who was wronged (the **plaintiff**) can claim damages (**compensation**) from the person who caused the wrong (the **defendant**).

A civil claim can be made in respect of the following:

Assault
If one person is assaulted by another person, the plaintiff can claim damages from the person who assaulted them for pain and suffering, medical expenses, etc. The plaintiff can also make a criminal case against the person who assaulted them.

Loss of earnings
If the person who was assaulted is not able to work as result of the assault, the plaintiff can claim damages from the person who assaulted her.

Damage to personality rights
Personality rights include feelings, dignity and privacy. If someone violates these, the plaintiff can claim compensation from the defendant. For example, if a doctor discloses a person's medical status, that doctor can be sued for damages because the rights of the patient have not been respected.

Breach of contract
When a contract is broken (**breached**), a person can sue for financial damages suffered. For example, if Judith buys a car and pays the money but the car is not delivered, she can sue to recover her money and the costs to get the car back, ie she can claim her lawyer's fees as well.

Defamation
When somebody publishes a book or an article in a newspaper, or says something about a person in public which causes harm to the other person, the plaintiff can sue for damages.

Pain and suffering
One can claim for damages if somebody causes pain and suffering, for example by driving through a red traffic light and hitting another car, injuring the other driver.

Damages could be claimed for:

- Disfigurement (if the body is scarred).
- Emotional and psychological shock.
- Disability, if the plaintiff becomes incapacitated (unable to use her or his body or parts thereof).
- Damage to health.

Guidelines

Making a civil claim

1. It is better to use a legal practitioner; civil claims can be very complicated.
2. Make a statement to the legal practitioner.
3. The legal practitioner will write a letter of demand to the person who caused the damages. In the letter, the legal practitioner sets out the case and asks for compensation to be paid to the plaintiff.
4. If compensation is not paid, the legal practitioner will issue summons and the case will go to court.
5. If a crime has been committed as well, for example, the defendant stabbed the plaintiff with a knife, criminal charges will be made against the defendant as well. The police will investigate the matter and the prosecutor will prosecute if there is enough evidence.

8.1 Which court should be used?

Civil claims can be made in a Magistrate's Court and the High Court.

Magistrates' Courts can hear cases where the amount claimed for damages suffered is not more than N$25 000. The High Court hears cases that involve larger amounts of money. The High Court can also hear appeals from the Magistrates' Courts and reviews the proceedings in the magistrate's court to see if the correct procedures have been followed.

Important point

Use a legal practitioner for cases in the magistrates' courts and the High Court, because the procedures are complicated.

9. Breaching a contract

People enter into a contract when one person (called a **party**) undertakes to do something in exchange for something else, usually money. The contract comes into operation if the other party accepts the offer. A contract can be in writing or verbal (spoken). For example, Builder A undertakes to build a house for B for N$180 000. The contract comes into operation if B accepts the offer.

Similarly, when a patient goes to the doctor for an examination or an operation, if the patient and the doctor agree on the examination, the operation and the fees involved, we can say that there is a contract between them.

When one of the parties does not fulfil what it has undertaken to do under the contract, the contract is broken. This is called a **breach of contract**. For example, if the builder does not finish building the house, he is in breach of contract.

9.1 Steps in case of a breach of contract

1. Ask the person in writing to do what he or she is supposed to do under the contract, ie to complete the building or to pay for the services rendered.
2. If there is no response to this, the matter can be taken to court.

9.2 Remedies for breach of contract

The following remedies are available in case of breach:

- **Specific performance** – this is when the court orders a person to do what he or she undertook to do. Specific performance can only be ordered if it is still possible to complete the contract.
- A court can **interdict** a party to the contract to stop doing something or to order that party to do a particular thing to complete the contract.
- In most cases, a court will order the payment of **damages**. By doing this, the court tries to compensate a person for losses suffered because the other party did not complete the contract.
- The final remedy is to **cancel** the contract **and claim** damages. Before a contract can be cancelled, the party who wants the contract to be completed must call on the other party to carry out its undertakings under the contract. If this does not work, a court can order cancellation of the contract and payment of damages to the party who suffered the losses. When a contract is cancelled, none of the parties need to complete the contract anymore.

10. Other ways to resolve disputes

It is often possible to settle disputes without going to court. This is done to save time and costs.

The most important ways of alternative dispute resolution are:

Negotiation
The parties discuss the matter between themselves to see if they can come to an agreement, acceptable to both parties, on how to resolve the dispute. The parties often settle court cases before the matter proceeds to court.

Mediation
The parties ask a third party to listen to both sides of the problem and to make suggestions on how the problem can be settled. Mediators do not judge the matter – they help the parties to come to some acceptable position.

Arbitration
The parties agree to get an outsider to decide both the dispute *and* what procedures should be followed with regard to the hearing and the evidence that can be led. Both parties agree that the decision of the arbitrator will be final. There will be no appeal against the decision of the arbitrator.

11. Taking a statement

When somebody looks for help because of a problem, it is better to take a statement to refer back to at a later stage.

Important point

Always write down all the information about the problem accurately.

11.1 Contents of a statement

A good statement includes the following details:

1. The personal details of the person or complainant
2. An accurate description of the problem, including the date of the incident and who was involved.
3. Advice given to the person.

Guidelines

1. Personal information that is required:

- Full names
- Postal and residential address
- Contact numbers, and the best times to call
- Identity number
- Employer’s name, address and telephone number (if relevant)
- Employment details
- Age or date of birth
- Marital status, and whether married in or out of community of property
- Number of children and their ages
- Doctor’s name and address (if necessary)
- Hospital card number (if necessary)
- Any other relevant details

2. Description of the problem

- Write down the details of the problem in the correct date order.
- Write down everything that is relevant, particularly the names of the people involved in the incident and the steps already taken by the complainant to improve the situation.
- Include information that may not be necessary immediately because it may be useful later on. The details needed depend on the problem. For example, where a doctor refused to treat a patient, it is necessary to mention the name of the doctor, the date and time, the illness complained of, and the name of the hospital.
- Before the complainant leaves, make sure that you have all the information you need. Also make sure that you know how to contact the person.

3. Tips for giving advice

- Listen carefully to the facts of the case and ask question if things are not clear.
- Tell the person what his or her rights are. If the complainant has no case, tell them so.
- Explain what steps can be taken to help him or her.
- Listen to what the complainant wants to do and what he or she wants you to do. Write this down.
- Never do anything on behalf of the complainant if that is not what he or she wants.
- Write down what advice was given and what you advised them to do.
- Always write down everything that you do in connection with the case. For example, if you make a telephone call, write down the details of the call and what was discussed during the call.
- Keep copies of all letters that you write.
- Keep photocopies of all documents to do with the person's problem, for example medical certificates. Staple these to the person's statement.
- Remember that the information you receive is confidential.

Example

STATEMENT

Date: .....

Person's name: .....

Person's address:.....

.....
..

Identity number:.....

Age or date of birth:.....

Work address: .....

.....
..

Contact phone number:.....

Marital status:..... (In/out of community of property)

Number and ages of children:.....

Doctor's name and address (if necessary):.....

.....
..

Hospital card number (if necessary):.....

Description and full details of the problem (what happened to the person):

.....
..

.....
..

Advice/suggestions given to person:

.....
..

.....
..

Action taken on behalf of person:

.....
..

12. Making an affidavit

An affidavit is a written statement of the facts of a complaint. The complainant swears that the contents of the statement are true before a **commissioner of oaths**. An affidavit is also called a **sworn statement**.

An statement is almost the same as an affidavit, except that there are formal words indicating that it is an affidavit, and it also includes the name and details of the commissioner of oaths.

The following people are commissioners of oaths:

Legal practitioners, clerks of the court, magistrates, postmasters, bank managers, members of the Namibian police.

Important point

Never make a wrong statement in an affidavit. Affidavits can be used in court and the person who took the oath may be charged with the crime of **perjury** (lying under oath) if the court finds out that he or she lied in the affidavit.

Example

AFFIDAVIT

1. I .....(Name of person)
   do hereby make oath and say:
2. I am an adult ..... (married or unmarried).....(male or female)
   and I live at ..... (Address)
3. The statement (give the information of the case) .....
   .....

_____
Signature of Deponent

(Sign here, but only in front of a Commissioner of Oaths)

The provisions of Regulation R.1258 published in Government Gazette No 3619 of 21 July 1972 having been complied with, I hereby certify that the deponent has acknowledged that he or she knows and understands the contents of this affidavit which was signed and sworn to before me at ..... (place) this ..... day of ..... (month), 20.....

_____
Commissioner of Oaths

FULL NAMES:
CAPACITY:
ADDRESS:

13. Advising somebody about where to go for help (referral)

It often happens that other institutions, such as NGOs, churches or government offices, can offer constructive help. In such a case, advise the person about where to go to and which person to contact. This is called **referring** a person.

When a person is referred, include this fact in the statement so that records can be kept of all the people that come to see your organisation.

The following institutions are often used when referring a person:

- Woman and Child Protection Units
- Ministry of Health and Social Services
- Churches
- Trade unions
- Magistrates' Courts
- Labour inspectors, Directorate: Legal Aid, Office of the Ombudsman, The Rainbow Project, Lifeline/Childline.

Guidelines

1. Take a statement before referring a person.
2. Write down the name of the person to whom the complainant is referred.
3. Try to make an appointment before referring the person.
4. Write a letter explaining why the person is referred.
5. Tell the person to come back if the other person cannot help or is unwilling to help.

14. Points for discussion

- Frans is HIV positive. His neighbour found out and told the community in which Frans is living. The people in the community refuse to talk to Frans and he is not allowed in the cuca shop. What can he do?
- Lydia goes to a clinic because she feels ill. The nurse refuses to treat her because she is lesbian and Lydia has HIV. What can Lydia do?
- John's colleagues at work found out that he is HIV positive. They demand that he should be taken off the medical aid scheme and the pension fund because, according to them, he will cause their benefits to increase. What can John do?

- Mathew is in jail. He has HIV. The doctor told the prison commander who in turn told the prison wardens. Soon all the inmates also knew. Mathew is not allowed to get exercise like the other prisoners. Advise him.
- Rosalia found out that she has HIV. She is sure her boyfriend infected her. What can she do under the circumstances?
- What comments could you make about the cartoon below?

15. References and resource materials

Laws

Labour Act No 6 of 1992

Constitution of the Republic of Namibia

Cases

C v Minister of Correctional Services 1996 (4) SA 292 (T)

Reports, manuals and other useful materials

AIDS Law Project (ALP) and Lawyers for Human Rights: HIV/AIDS and the Law: A Trainer's Manual (First Edition), July 1997.

AIDS Legal Network (ALN): ALQ – The AIDS Legal Quarterly (quarterly magazine).

Black Sash and Education & Training Unit: Paralegal Manual (Update Edition), January 2000.

Community Law Centre: Socio-Economic Rights in South Africa (A Resource Book), October 2000.

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:	www.grnnet.gov.na/Contact_us/Ministries
AIDS Law Project:	www.hri.ca/partners/alp/
AIDS Legal Network:	www.aidslegal.co.za
South African Law Commission:	www.law.wits.ac.za/salc/salc.html
Treatment Action Campaign:	www.tac.org.za

Annexures

1. Chapter 3: Bill of Rights, Namibian Constitution
2. Chapter 11: Principles of State Policy
3. Namibian HIV/AIDS Charter of Rights
4. Ministry of Health and Social Services: Policy on HIV/AIDS: Confidentiality, Notification, Reporting and Surveillance
5. Ministry of Labour: Guidelines for Implementation of National Code on HIV/AIDS in Employment
6. Ministry of Health and Social Services: Policies and Guidelines for HIV/AIDS Prevention and Control
7. Universal declaration of Human Rights, 1948
8. UNGASS declaration, 2001

Constitution of the Republic of Namibia

CHAPTER 3 Fundamental Human Rights and Freedoms

Article 5 Protection of Fundamental Rights and Freedoms

The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

Article 6 Protection of Life

The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

Article 7 Protection of Liberty

No persons shall be deprived of personal liberty except according to procedures established by law.

Article 8 Respect for Human Dignity

(1) The dignity of all persons shall be inviolable.

(2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9 Slavery and Forced Labour

(1) No persons shall be held in slavery or servitude.

(2) No persons shall be required to perform forced labour.

(3) For the purposes of this Article, the expression “forced labour” shall not include:

(a) any labour required in consequence of a sentence or order of a Court;

(b) any labour required of persons while lawfully detained which, though not required in consequence of a sentence or order of a Court, is reasonably necessary in the interests of hygiene;

(c) any labour required of members of the defence force, the police force and the prison service in pursuance of their duties as such or, in the case of persons who have conscientious objections to serving as members of the defence force, any labour which they are required by law to perform in place of such service;

(d) any labour required during any period of public emergency or in the event of any other emergency or calamity which threatens the life and well-being of the community, to the extent that requiring such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation;

(e) any labour reasonably required as part of reasonable and normal communal or other civic obligations.

Article 10 Equality and Freedom from Discrimination

(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.

Article 11 Arrest and Detention

(1) No persons shall be subject to arbitrary arrest or detention.

(2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.

(3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.

(4) Nothing contained in Sub-Article (3) hereof shall apply to illegal immigrants held in custody under any law dealing with illegal immigration: provided that such persons shall not be deported from Namibia unless deportation is authorised by a Tribunal empowered by law to give such authority.

(5) No persons who have been arrested and held in custody as illegal immigrants shall be denied the right to consult confidentially legal practitioners of their choice, and there shall be no interference with this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security or for public safety.

Article 12 Fair Trial

(1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.

(c) Judgments in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require.

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

(e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such person's testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.

(2) No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Article shall be construed as changing the provisions of the common law defences of "previous acquittal" and "previous conviction".

(3) No persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed.

Article 13 Privacy

(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

(2) Searches of the person or the homes of individuals shall only be justified:

(a) where these are authorised by a competent judicial officer;

(b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied.

Article 14 Family

(1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 15 Children's Rights

(1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.

(2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub-Article children shall be persons under the age of sixteen (16) years.

(3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating in any way from Sub-Article (2) hereof.

(4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.

(5) No law authorising preventive detention shall permit children under the age of sixteen (16) years to be detained.

Article 16 Property

(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

Article 17 Political Activity

(1) All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of Government. All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.

(2) Every citizen who has reached the age of eighteen (18) years shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein.

(3) The rights guaranteed by Sub-Article (2) hereof may only be abrogated, suspended or be impinged upon by Parliament in respect of specified categories of persons on such grounds of infirmity or on such grounds of public interest or morality as are necessary in a democratic society.

Article 18 Administrative Justice

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Article 19 Culture

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

Article 20 Education

(1) All persons shall have the right to education.

(2) Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge.

(3) Children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, whichever is the sooner, save in so far as this may be authorised by Act of Parliament on grounds of health or other considerations pertaining to the public interest.

(4) All persons shall have the right, at their own expense, to establish and to maintain private schools, or colleges or other institutions of tertiary education: provided that:

(a) such schools, colleges or institutions of tertiary education are registered with a Government department in accordance with any law authorising and regulating such registration;

(b) the standards maintained by such schools, colleges or institutions of tertiary education are not inferior to the standards maintained in comparable schools, colleges or institutions of tertiary education funded by the State;

(c) no restrictions of whatever nature are imposed with respect to the admission of pupils based on race, colour or creed;

(d) no restrictions of whatever nature are imposed with respect to the recruitment of staff based on race or colour.

Article 2 Fundamental Freedoms

(1) All persons shall have the right to:

(a) Freedom of speech and expression, which shall include freedom of the press and other media;

(b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;

(c) freedom to practise any religion and to manifest such practice;

(d) assemble peaceably and without arms;

(e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;

(f) withhold their labour without being exposed to criminal penalties;

(f) move freely throughout Namibia;

(g) reside and settle in any part of Namibia;

(h) leave and return to Namibia;

(i) practise any profession, or carry on any occupation, trade or business.

(2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Article 22 Limitation upon Fundamental Rights and Freedoms

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

Article 23 Apartheid and Affirmative Action

(1) The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.

(2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.

(3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

Article 24 Derogation

(1) Nothing contained in or done under the authority of Article 26 hereof shall be held to be inconsistent with or in contravention of this Constitution to the extent that it authorises the taking of measures during any period when Namibia is in a state of national defence or any period when a declaration of emergency under this Constitution is in force.

(2) Where any persons are detained by virtue of such authorisation as is referred to in Sub-Article (1) hereof, the following provisions shall apply:

(a) they shall, as soon as reasonably practicable and in any case not more than five (5) days after the commencement of their detention, be furnished with a statement in writing in a language that they understand specifying in detail the grounds upon which they are detained and, at their request, this statement shall be read to them;

(b) not more than fourteen (14) days after the commencement of their detention, a notification shall be published in the Gazette stating that they have been detained and giving particulars of the provision of law under which their detention is authorised;

(c) not more than one (1) month after the commencement of their detention and thereafter during their detention at intervals of not more than three (3) months; their cases shall be reviewed by the Advisory Board referred to in Article 26 (5)(c) hereof, which shall order their release from detention if it is satisfied that it is not really necessary for the purposes of the emergency to continue the detention of such persons;

(d) they shall be afforded such opportunity for the making of representations as may be desirable or expedient in the circumstances, having regard to the public interest and the interests of the detained persons.

(3) Nothing contain in this Article shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Articles 5, 6, 8, 9, 10, 12, 14, 15, 18, 19 and 21 (1)(a), (b), (c) and (e) hereof, or the denial of access by any persons to legal practitioners or a Court of law.

Article 25 Enforcement of Fundamental Rights and Freedoms

(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;

(b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Sub-Article (a) hereof shall apply.

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.

CHAPTER 11 Principles of State Policy

Article 95 Promotion of the Welfare of the People

The State shall actively promote and maintain the welfare of the people by adopting, *inter alia,* policies aimed at the following:

(a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; further, the Government shall seek, through appropriate legislation, to provide maternity and related benefits for women;

(b) enactment of legislation to ensure that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength;

(c) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices;

(d) membership of the International Labour Organisation (ILO) and, where possible, adherance to and action in accordance with the international Conventions and Recommendations of the ILO;

(e) ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law;

(f) ensurance that senior citizens are entitled to and do receive a regular pension adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities;

(g) enactment of legislation to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the State;

(h) a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State;

(i) ensurance that workers are paid a living wage adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities;

(j) consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health;

(k) encouragement of the mass of the population through education and other activities and through their organisations to influence Government policy by debating its decisions;

(l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.

Article 101 Application of the Principles contained in this Chapter

The principles of state contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.

Namibian HIV/AIDS Charter of Rights
December 2000

Preamble

Recognising that people living with HIV/AIDS continue to face discrimination and prejudice which preclude them from access to services and benefits,

And further recognising that a rights-based approach to HIV/AIDS which outlaws discrimination on the basis of HIV status is central to an effective public health response to HIV/AIDS,

And further recognising that people living with HIV/AIDS should be involved at all levels of decision-making regarding the design and implementation of HIV/AIDS programmes and policies,

And further recognising that people living with HIV/AIDS should be empowered and empower themselves to effectively participate in decision-making processes,

And further recognising that the responsibility to effectively prevent the transmission of HIV is not limited to people living with HIV/AIDS, but rests on Namibian society as a whole and that all persons should empower themselves through education and information to gain knowledge about sexually transmitted diseases including HIV/AIDS, that will protect others and minimise the risk of HIV infection and reinfection,

And further recognising that an effective response to the AIDS epidemic requires commitment at a political level to implement an effective HIV/AIDS prevention strategy; prevent discrimination and stigmatisation on the basis of HIV status; promote openness and transparency regarding the disease; and provide adequate information that will enable every person to make informed choices and to take responsibility for his or her own choices,

NOW THEREFORE this Charter sets out those basic rights which all people enjoy or should enjoy and which should not be denied to persons affected by HIV or AIDS, as well as certain duties.

1. Equal protection of the law and equal access to public and private facilities and benefits

- HIV status cannot be considered as a ground on which to deprive any person of his or her basic human rights.
- Respect for the inherent dignity of all persons and the right to equal protection of the law requires that persons living with HIV/AIDS should have equal access to public and private services, benefits and opportunities. HIV testing should not be required as a precondition for such access.
- Public measures should be adopted to protect persons living with HIV/AIDS, including children and adolescents, from discrimination in employment, housing, education, childcare and custody and the provision of medical, social and welfare services.

2. Liberty, autonomy, security of the person and freedom of movement

- All persons, including persons living with HIV/AIDS, have the same rights to liberty, autonomy, security of the person and freedom of movement in Namibia and should have the same rights between countries.
- Segregation, isolation or quarantine of persons in prisons, schools, hospitals or elsewhere merely on the grounds of HIV/AIDS is unjustified and should therefore not be permitted.

- Persons living with HIV/AIDS are entitled to autonomy in decisions regarding marriage and reproductive health. Adequate counselling, information and education in this regard should be made available to all persons to enable them to make informed decisions.

3. Privacy and confidentiality

Confidentiality in the context of the AIDS pandemic is a concept that is widely misunderstood and is often quite incorrectly labelled as a veil of secrecy that undermines efforts to control the spread of HIV. In the context of HIV/AIDS, confidentiality means that health care workers are ethically and legally required to keep all patient information to themselves. This means that any information about the patient's illness or treatment can only be given to another person with the patient's consent.

It is crucial to distinguish between the promotion of open discussion about HIV/AIDS and non-discrimination at a community and society level on the one hand, and the need for confidentiality on the other. Both of these contribute positively to the public health interest in reducing transmission and in providing care and support. Therefore:

- Persons living with HIV/AIDS have the right to confidentiality and privacy about their health and HIV status. This right endures after death. Information about HIV status may not be disclosed to a third party without the consent of the person with HIV/AIDS, unless legally required.
- The sharing of information about HIV status by the person living with HIV with others remains a matter of individual choice. However this practice should be encouraged through appropriate counselling and education, and through the creation of a supportive environment and appropriate services to those affected by this disclosure.
- It should be explained to patients that in order to optimise treatment and care it may be necessary to disclose personal health information to other health care workers but that this will only be done with prior consent of the patient.

4. Counselling and testing

- Voluntary and confidential counselling and testing for HIV should be encouraged.
- The establishment of affordable and accessible voluntary confidential counselling and testing facilities is essential. These facilities should provide quality pre- and post- test and ongoing counselling by qualified and competent counsellors.
- Testing should be done only with informed consent.

5. Partner notification and reporting

- Health care workers and counsellors are obliged to maintain confidentiality regarding a person's HIV status.
- Disclosure by a health care worker of a person's HIV status without that person's consent should only take place to an identifiable sexual partner at risk in accordance with the following criteria:
  - The HIV-positive person in question has been thoroughly counselled as to the need for partner notification;
  - The HIV-positive person has refused to notify or consent to the notification of his/her partner(s);
  - A real risk of transmission to the partner(s) exists;
  - The HIV-positive person is given reasonable advance notice of the intention to notify;

– Follow up is provided to ensure support to those involved, as necessary.

- Reporting of HIV-positive results to any health information system should take place on an anonymous basis.
- Reporting of HIV-positive results should be undertaken for the sole purpose of gathering epidemiological data to facilitate the management of the HIV/AIDS epidemic.

6. Gender

All females and males are potentially at risk of HIV infection and are affected by HIV/AIDS. Disproportionate numbers of women and girl-children are infected with HIV. The predominantly subordinate position of women and girl-children in society makes them especially vulnerable to the risk of HIV infection. This is exacerbated by the high prevalence of domestic violence against and sexual abuse of women and girl-children. Therefore:

- The empowerment of women should be promoted through appropriate programmes aimed at raising the status of women and eliminating adverse social, economic and cultural factors that put women at risk of infection as well as aimed at strengthening men's sense of responsibility in relation to the prevention of transmission.
- Women and men should be equal partners in decision-making and matters of family planning and reproductive health. This includes the right to demand and to take appropriate precautionary measures to prevent transmission of HIV.
- Appropriate counselling and information regarding transmission of HIV should be made available to persons living with HIV/AIDS who wish to exercise the right to marry and or found a family.
- Women with HIV should have access to adequate information to enable them to make informed decisions regarding their reproductive health.

7. Children, adolescents and HIV/AIDS

- Children and adolescents enjoy the same rights as adults in respect of access to information, privacy, confidentiality, respect, informed consent and means of prevention.
- Quality health care, information and education should be made available to all children and adolescents, including those living with HIV/AIDS. This should include information relating to HIV/AIDS and STD prevention and care, inside and outside school, which is tailored appropriately to age level and capacity and enables them to deal positively and responsibly with their sexuality and rights.
- Children and adolescents should be ensured adequate access to user-friendly, confidential sexual and reproductive health services. These services should include information on HIV/AIDS and STDs, sexual health advice, counselling, HIV testing and prevention measures including free access to condoms and social support services. The provision of these services to children/adolescents should reflect an appropriate balance between the rights of the child or adolescent to be involved in decision making according to his or her evolving capabilities and the rights and duties of parents or guardians for the health and well being of the child.

8. Supportive and enabling environment for vulnerable groups infected and affected by HIV/AIDS

- A supportive and enabling environment for vulnerable groups should be promoted by identifying and addressing underlying prejudices and inequalities through advocacy, community dialogue, policy formulation and implementation, specially designed social and health services and support to community groups.

- Associations comprising members of different vulnerable groups should be established and supported for purposes of peer education, empowerment, positive behavioural change and social support.
- The development of adequate, accessible and effective HIV/AIDS related prevention and care, education, information and services by and for vulnerable groups should be supported. Such groups should be actively involved in the design and implementation of these programmes.

9. Children orphaned by AIDS

- Children orphaned by AIDS, regardless of their HIV status, who have lost one or both of their parents due to HIV/AIDS, are entitled to love and care, and a nurturing environment that would enable them to realise their full potential.
- The rights of the child should be respected; children orphaned by AIDS should not be discriminated against. It is recognised that children orphaned by AIDS should be cared for and supported within their communities and that all decisions should be made in their best interests.
- Information on services, grants and benefits for children orphaned by AIDS should be made freely available.
- People employed in child care agencies as well as informal and formal adoptive and foster care parents and persons providing services to children should receive training in order to deal effectively with the special needs of HIV-affected children, including psycho-social support and protection from mandatory testing, discrimination, abuse and abandonment.

10. Prisoners

- Prisoners should not be discriminated against on the basis of their HIV status. No compulsory HIV testing of prisoners should be carried out. Prisoners living with HIV/AIDS should not be isolated or quarantined.
- Prisoners living with HIV/AIDS are entitled to special care equal to that afforded to other prisoners with serious illnesses.
- Prisoners should be provided with information on HIV/AIDS and preventative measures, such as condoms, as well as with adequate counselling facilities.
- Information in the possession of the prison authorities regarding the HIV status of a prisoner should not be disclosed to any third party without the informed consent of the prisoner.

11. Adequate standard of living

- All persons, including those living with HIV/AIDS, have the same right to a standard of living adequate for the health and well being of themselves and their families, including food, clothing, housing and medical care and necessary social services.

12. Access to education

- Persons living with HIV/AIDS should have equal access on a non-discriminatory basis to institutions of primary, secondary and tertiary education as well as to scholarship schemes.

13. Access to appropriate information and sex education

- Culturally appropriate formal and non-formal education programmes and information on HIV/AIDS should be accessible on a continuous basis to all to enable people to make informed decisions about their life and sexual practices. Education should also promote respect, tolerance and non-discrimination in relation to persons living with HIV/AIDS.
- Appropriate information regarding parent to child transmission, breastfeeding, treatment, nutrition, change of lifestyle and safer sex should be freely available.

14. Access to health care and appropriate treatment

- HIV status should not be considered as a ground for depriving any person of their right to the highest attainable standard of physical and mental health. To this end, persons living with HIV/AIDS should have access on a non-discriminatory basis to adequate health care and appropriate and affordable treatment and drugs so that persons living with HIV/AIDS can live as long and as successfully as possible.
- Ethical guidelines and codes of conduct for health care workers and counsellors should be implemented and reinforced to guarantee the rights to privacy, confidentiality and dignity of persons living with HIV/AIDS. These guidelines and codes of conduct should require health care workers and counsellors to treat any person living with HIV/AIDS without discrimination.
- Community efforts to provide home based care to people who are living with HIV/AIDS should be supported. Caregivers should be properly trained to render effective care and counselling.
- Women with HIV who are pregnant should have access to adequate information regarding mother-to-child transmission and to affordable treatment to reduce the risk of mother to child transmission.
- Rape survivors should have access to adequate information about HIV/AIDS and to affordable and timely prophylactic treatment.

15. Research and clinical trials

- Persons living with HIV/AIDS should have access to clinical trials conducted only in terms of acceptable research protocols, which adequately protect the rights of research subjects prior to, during and after the trials.
- The results should be made available to the community for timely and appropriate action.

16. Employment

Discrimination on the basis of HIV status in access to and continued employment, conditions of employment and employment benefits is contrary to the provisions of the Labour Act. Therefore:

- People living with HIV/AIDS have the right to work and should not be excluded from employment solely on the basis of their HIV status.
- Both employers and employees have a mutual responsibility to prevent discrimination in the workplace on the basis of HIV status.
- There should be no compulsory testing for HIV in the workplace. Voluntary testing for HIV on the request of the employee should be done by a suitably qualified person in a health facility with the informed consent of the employee in accordance with normal medical ethical rules and with pre- and post-test counselling.

- Persons living with HIV/AIDS have the legal right to confidentiality about their HIV status in any aspect of their employment. An employee is under no obligation to inform his or her employer of his/her HIV status.
- Employees living with HIV/AIDS should continue to work under normal conditions in their current employment for as long as they are medically fit to do so. When, on medical grounds, they are unable to continue with normal employment, the normal rules regarding incapacity should apply.
- Employers, in consultation with employees, should develop and implement appropriate workplace policies on HIV/AIDS.
- Employers should provide a safe and healthy working environment for employees, including the provision of the necessary equipment and information and the implementation of universal precautions to prevent transmission of HIV in the workplace.
- Where an employee accidentally contracts HIV in the course and scope of his or her employment, he or she shall be entitled to employee's compensation.

17. Insurance and medical aid

- Persons living with HIV/AIDS and those suspected of being at risk of having HIV or AIDS, should be protected from arbitrary discrimination in insurance and medical aid. Insurers and medical aid administrators should explain to the insured or medical aid member what influence HIV/AIDS would have on the validity and effect of the contract of insurance or medical aid.
- If HIV testing is required for life insurance or medical aid, the insurer or medical aid administrator should provide access to adequate pre- and post-test counselling. The insurer or medical aid administrator requiring the test should ensure that the results are treated with confidentiality.
- Insurers and medical aid administrators should continue to explore, in consultation with people living with HIV/AIDS, the development of new products that would provide appropriate cover for people living with HIV/AIDS.
- Insurers and medical aid administrators should be encouraged to play an effective role in HIV/AIDS prevention and education campaigns.

18. Media

- Media programmes should be designed to challenge attitudes of discrimination and stigmatisation associated with HIV/AIDS.
- The media and the advertising industry should be sensitive to HIV/AIDS and human rights issues and should reduce sensationalism in reporting and the inappropriate use of language and stereotypes, especially in relation to disadvantaged and vulnerable groups.
- The public has the right to balanced and informed coverage, information and education on HIV/AIDS, STDs and related issues.
- HIV/AIDS media programmes should be designed to be accessible to all people, including those with audio-visual disabilities.

19. Cultural and traditional practices

- It is recognised that some cultural and traditional practices militate against effective preventive action and place people, especially women and young people, at risk of HIV infection. These practices and traditions should be identified and steps should be taken to address them by way of formal and non-formal education and/or legislation.
- Traditional Authorities should play an important role in HIV/AIDS prevention strategies.

- Traditional healers and traditional birth attendants should be provided with appropriate education and information about HIV/AIDS and its transmission.
- Dialogue and collaboration between traditional and non-traditional health providers on the care and management of HIV/AIDS should be promoted.

Ministry of Health and Social Services Policy

HIV/AIDS: Confidentiality, Notification, Reporting and Surveillance

1. Introduction

Namibia ranks as one of the three countries most affected by HIV/AIDS in the world with an overall prevalence of 20% among sexually active adults. This means that one in five Namibians aged 15-49 is infected and likely to die within the next seven years. Over 11 600 new cases of HIV infection were reported in 1997, bringing the total number of cases reported to almost 50 000. Recognising that reported cases are by far the minority of those that actually occur, both the Ministry of Health and Social Services and UNAIDS/WHO estimate that the actual number of Namibians living with HIV/AIDS exceeds 150 000 out of a population of 1.6 million.[1] AIDS has already caused life expectancy at birth in Namibia to fall from 58.8 years in 1995 to 55.8 in 1998. When costs associated with the rapidly increasing burden of medical care are added to the cost of years of productive economic life forgone, the financial burden of the epidemic is staggering. It is estimated that the indirect costs of HIV/AIDS added to the direct costs of medical care will mean a loss of over N$8 billion to the Namibian economy by the year 2001, which is an equivalent of 20% of the GDP.[2]

HIV/AIDS is an unprecedented public health emergency. Attempts to curb the spread of the epidemic have been hindered by the level of stigma and discrimination faced by people affected by HIV/AIDS as people will not seek counselling, testing, treatment and support if this means facing discrimination or other negative consequences. If we are to enjoy any success in curbing the spread of the HIV/AIDS epidemic, we have to work towards creating a more supportive environment where people with HIV/AIDS will not face discrimination and stigmatisation as it is only in such an environment that public health goals of prevention through behavioural change, care and health support can be achieved.

A deepening realization of the enormous scale of the HIV epidemic and of its impact on development, security and well being in Namibia has led to a consideration of how to:

- Encourage more people to test for HIV and inform sexual partners about the result in order to prevent further infections;
- Improve epidemiological surveillance of HIV and AIDS; and
- Create greater openness about HIV/AIDS and acceptance of people living with HIV/AIDS.

The success of each of these strategies depends on a greater acceptance of the need for disclosure – by people with HIV to their sexual partners and, with the consent of people with HIV, by health professionals to health authorities.

This, in turn, raises the following questions for consideration:

- How can the Government of the Republic of Namibia and communities create an environment where people feel more confident about disclosing their HIV status to their sexual partner(s) and caregivers?
- How can the Government of the Republic of Namibia create an environment where people are not afraid that disclosure of private information by health professionals to the Ministry of Health and Social Services for epidemiological data gathering purposes will lead to breaches of confidentiality and discrimination?

In order to address these questions a task force comprising expert opinion on HIV-reporting and disclosure was convened in 1999. The task force comprised representatives of the Ministry of Health and Social Services, the Office of the Attorney General, people living with HIV/AIDS, UNAIDS, WHO

and AIDS service organisations including the Legal Assistance Centre, AIDS Care Trust of Namibia, Positive Nation, Lifeline/Childline, Catholic AIDS Action and NANASO.

In order to secure the input of as broad a range of stakeholders as possible, a consultative process was initiated which took the form of a number of meetings and workshops with stakeholders as outlined below.

This process commenced at the beginning of June 1999 when the task force facilitated an information meeting for AIDS service organisations at the offices of NANASO on the issues of HIV/AIDS reporting, notification and confidentiality. This meeting was attended by representatives of NANASO, Lifeline/Childline, the YWCA, Catholic AIDS Action, AIDS Care Trust, KAYEC and the AIDS Law Unit of the Legal Assistance Centre.

Also during June 1999, Positive Nation, a self-help group of people living with HIV, met with the Minister of Health and Social Services on two occasions to discuss their concerns about disclosure, confidentiality, testing, counselling and treatment. At the request of the Honourable Minister, Positive Nation drafted a set of guidelines on confidentiality, testing, counselling and treatment, which were fed into the consultative process for consideration.

On 2 August 1999, a workshop was organised jointly by the AIDS Law Unit of the Legal Assistance Centre and Positive Nation on HIV/AIDS testing, confidentiality, counselling and treatment. The purpose of this workshop was to afford people living with HIV/AIDS, nurses, doctors, counsellors, AIDS Service organisations and the Ministry of Health and Social Services to discuss and provide input on the draft guidelines on testing, confidentiality, counselling and treatment, compiled by Positive Nation in response to the Minister's request.

At the workshop the need was identified to hold further consultative meetings with stakeholders in order to fashion a set of guidelines that are representative of the views of the various stakeholders. To this end the taskforce organised a further consultative meeting in October 1999 with stakeholders, which was co-hosted by the AIDS Law Unit of the Legal Assistance Centre and the National AIDS Co-ordination Programme of the Ministry of Health and Social Services.

This consultative process gave rise to the following recommendations being made by participating stakeholders:

1. Confidentiality must be maintained at all times as it is crucial for an effective public health response to the HIV/AIDS epidemic in Namibia;
2. Mandatory notification of family and care givers is not desirable – people living with HIV should however be effectively counselled about the benefits of sharing information with a view to assisting them to make a voluntary disclosure of their status;
3. Provision should be made for non-consensual notification of sexual partners provided that the decision to disclose should only be made in accordance with the following criteria:
   - The HIV-positive person in question has been thoroughly counselled;
   - Counselling of the HIV-positive person has failed to achieve appropriate behavioural changes;
   - The HIV-positive persons has refused to notify, or consent to the notification of his/her partner(s);
   - A real risk of transmission to the partner(s) exists;
   - The HIV-positive person is given reasonable advance notice;
   - The identity of the HIV-positive person is concealed from the partner(s), if this is possible in practice;
   - Follow up is provided to ensure support to those involved, as necessary.
4. Reporting is necessary to provide information about the rate and distribution of infection. It is therefore recommended that reporting of HIV test results be provided for in a manner that protects the confidentiality of the HIV-positive person
5. Sentinel Surveillance is likewise an important means of information gathering to enable health authorities to plan for the epidemic and to assess intervention strategies. It is therefore recommended that provision be made for continued sero sentinel surveillance

utilising anonymous, unlinked testing. It is further recommended that attention be given to increasing the number of sentinel surveillance sites and target groups.

6. Attention must be given to the standardisation of counselling skills and to the provision of adequate counselling facilities

7. Provision must be made for the establishment of voluntary counselling and testing sites

2. Situation Analysis

2.1 Confidentiality: What is it and why is it important

Confidentiality in the context of the AIDS pandemic is a concept that is widely misunderstood and is often quite incorrectly labelled as a veil of secrecy that undermines efforts to control the spread of the human immuno-deficiency virus (HIV). It is therefore useful to examine the concept of confidentiality with a view to determining its precise content in the context of HIV/AIDS and to assess its usefulness as a tool to contain the pandemic.

Confidentiality can best be described as a concept encompassing a duty that prevents the repetition to others of knowledge about another person.[3] The Latin roots of the word suggest that in its very essence confidentiality entails that something is given in trust. Thus, for confidentiality to arise, there must be a relationship between the subject to whom the knowledge pertains, and the bearer of the knowledge, of such a nature as to import a duty on the latter not to repeat it (or to repeat it only in specified circumstances or on specified conditions).[4]

The right to respect for human dignity is entrenched in Article 8 of the Namibian Constitution, which provides that: *"The dignity of persons shall be inviolable."* Confidentiality is an essential tool for upholding human dignity.

In the medical context, confidentiality is reflected in the Hippocratic Oath taken by all medical practitioners on their admission to the profession, which requires them to treat information acquired from a patient in a professional capacity as "sacred secrets" about which they must "keep silence".

Doctors, nurses, psychologists, dentists and other health care workers are thus ethically and legally required to keep all patient information to themselves. This means that any information about the patient's illness or treatment can only be given to another person with the patient's consent.

The only recognised exception to this rule is in one closely defined situation. This is where there is an identifiable third party at risk; where the patient, after appropriate counselling does not personally inform the third party; and the doctor has informed the patient that he or she intends breaking the confidentiality under the circumstances.

In South Africa, the Appellate Division has upheld the right of a patient to confidentiality in the case of Jansen van Vuuren v Kruger.[5] In this case the patient, McGeary, approached his doctor, the defendant, for an HIV test. He was informed some days later that the test had proved positive for antibodies to the virus. McGeary was concerned that his right to privacy and confidentiality be respected and his doctor gave him an assurance that it would indeed be respected. The very next day, the doctor enjoyed a game of golf with two medical colleagues, both of whom knew McGeary socially and had treated him in the past. During the course of the game, the doctor mentioned to both of his colleagues that McGeary had tested positive and within days the news had spread to much of the town, as a result of which McGeary felt victimised and ostracised, causing him much psychological stress. He then instituted action against the doctor concerned for damages for breach of confidentiality. In the trial court his claim was rejected. On appeal however the Appellate Division upheld McGeary's claim and held that the duty of a physician to respect the confidentiality of his patient was not merely ethical but also a legal duty.

The court emphasised that the reason for enforcing medical confidentiality was two-fold. "On the one hand," the court stated, "it protects the privacy of the patient. On the other it performs a public interest function." With regard to the latter the court endorsed the decision of the English court in X v Y [6] which reiterated the relevance of the protection of confidentiality to public health as follows:

> *"In the long run, preservation of confidentiality is the only way of securing public health; otherwise doctors will be discredited as a source of education, for future patients will not come forward if doctors are going to squeal on them. Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward they cannot be counselled and self-treatment does not provide the best care …"*[7]

Although the Namibian courts have not yet been requested to pronounce on confidentiality in the context of HIV/AIDS, it is submitted that the judgment of the South African Appellate Division in the Jansen van Vuuren case will have significant persuasive value.

In Namibia, public understanding of the concept of confidentiality has been undermined by some confusion over the need to combat denial and silence – to "normalise" HIV/AIDS – and the need to guarantee confidentiality. Many fail to recognise that these are very different issues, which do not run counter to each other. It is crucial to distinguish between the promotion of open discussion about HIV/AIDS and non-discrimination at a community and society level on the one hand and the need for confidentiality on the other. Both of these contribute positively to the public health interest in reducing transmission and in providing care and support.

It is generally recognised that if attempts to contain the epidemic are to be successful, human rights must be respected and that respect for individual human rights enhances the prevention and containment of HIV rather than impeding it.

In responding to the epidemic, Namibian decision-makers have recognised the right to privacy of people living with HIV or AIDS and have, more importantly, recognised the fact that the protection of individual privacy in the context of HIV/AIDS benefits public health.

This is reflected in the National Policy on HIV/AIDS adopted by Cabinet in 1992, which provides that it is the duty of every health professional to ensure that breaches of confidentiality do not occur. This policy does however make provision for the sharing of information relating to HIV status in certain defined circumstances. Paragraph 4.1.3.6 states that *"While it is accepted that health professionals have a duty to protect the confidentiality of health information, they may under certain circumstances share such information with others who, in their considered opinion, need to know. However, every effort should be made to obtain the informed consent of the patient. This applies notably to the sharing of information with other health professionals and especially with sexual and needle-sharing partners."*

More recently, in 1998, the Minister of Labour promulgated guidelines in terms of the Labour Act, No 6 of 1992, for the implementation of the National Code on HIV/AIDS and Employment, which are to be followed and adhered to by all employers and employees for the purpose of the application of the relevant provisions of the Labour Act in respect of HIV/AIDS in employment.[8]

This National Code on HIV/AIDS and Employment was formulated after consultation between government, employer organisations and employee organisations and is premised on "the fundamental principles of human rights embodied in the Constitution of the Republic of Namibia".[9] Confidentiality regarding HIV/AIDS in the workplace is guaranteed in the National Code, which provides that:

> *"Persons with HIV/AIDS should have the legal right to confidentiality about their HIV status in any aspect of their employment. An employee is under no obligation to inform an employer of his/her HIV/AIDS status. Information regarding the HIV status of an employee should not be disclosed without the employee's written consent."*[10]

Almost identical provisions are contained in the recently adopted SADC Code on HIV/AIDS and Employment.

Despite these provisions, in practice, confidentiality in the health care setting is often not respected and this, combined with the stigma and discrimination associated with HIV/AIDS results in a reluctance on the part of may people to come forward for voluntary testing for HIV.

2.2 Notification

Notification may take the form of partner notification or of notification of family and care givers.

Partner notification is the process of contacting sexual partners of an individual with a sexually transmitted infection, including HIV and of advising them that they may have been exposed to infection.

Traditionally, partner notification has been an essential component of STD prevention. It has been facilitated by the fact that most STDS are curable and that there are obvious benefits for the index patient, his or her sexual partner and for public health. In the context of HIV/AIDS however, partner notification is a more complex issue, particularly in view of the stigma attaching to HIV/AIDS, unequal relations between men and women and the fact that HIV/AIDS is incurable.

Applied on a voluntary basis where the infected patient has given explicit consent to notification of partners either by her/himself or by the health care worker, partner notification is an important way of protecting the uninfected partner, providing the information necessary to take protective action and an opportunity for education for prevention. It is also an important way of helping the already infected partner in terms of access to early treatment and care.

Public health experience has, on the other hand, shown that partner notification carried out mandatorily is a relatively ineffective means of breaking the chain of transmission. In view of the stigma attached to HIV in Namibia, there is a risk that HIV-infected people will not make use of health care and testing facilities if they know that their partners will be informed of their status without their consent.

There is currently no policy or legal provision in place in Namibia that requires mandatory notification of sexual partners, family or caregivers. In terms of the ethical guidelines applicable to medical practitioners, however, they are entitled, but not obliged, to disclose a patient's HIV status to an identifiable sexual partner at risk without the patient's consent where the patient fails to inform the sexual partner concerned of his or her HIV status despite having been adequately counselled about the need to do so.

2.3 Reporting

Reporting is the procedure though which health care workers systematically inform health authorities of each individual case of HIV infection and/or AIDS presenting in consultation at health facilities.

HIV or AIDS case reporting is necessary for effective disease surveillance as it provides information on the demographic and geographic characteristics of the population affected by the epidemic and allows government to monitor trends of recently acquired infections, to assess the burden and nature of serious morbidity associated with HIV infection for planning of care services and to raise awareness on the impact of the HIV epidemic and advocate for action in prevention and care.

HIV/AIDS is not currently a notifiable disease in terms of Namibian public health legislation. In practice however the Ministry of Health and Social Services implements a system of anonymous reporting in respect of AIDS in terms of which all facilities within the Ministry of Health and Social Services are required to maintain and submit a "Notifiable Diseases Report" on a monthly basis. The "Notifiable Diseases Tally Sheet and Monthly Report Form" makes provision for Class "A" diseases such as cholera, poliomyelitis, diphtheria and rabies, which are reportable immediately to the relevant Regional Directorate Office and Class "B" diseases such as anthrax, brucellosis, hepatitis and tetanus, which are reportable on a monthly basis. AIDS is included under Class "B" diseases on this form. The form makes provision only for recording the number of AIDS diagnoses in any one month and does not require the provision of information in respect of age, sex or name.

The Central Laboratory in the Ministry of Health and Social Services also reports on a monthly basis on the number of HIV tests conducted and the number of HIV-positive test results. No information in respect of identity, age or sex is included in these reports although the Central Laboratory does keep internal records containing information on age and sex. There does not appear to be a standard policy in place on the submission of names together with blood samples sent by facilities within the Ministry of Health and Social Services to the Central Laboratory for testing and in practice it is left to the discretion of the health care worker submitting the blood sample for testing as to whether such sample is identified by a name or by code.[11]

In the private sector it would appear to be common practice for private medical practitioners to identify blood samples sent for HIV testing to private laboratories by name rather than by code. This creates the potential for breaches of confidentiality.

2.4 Sentinel serosurveillance

Sentinel serosurveillance for HIV infection involves the routine testing of a predetermined number of persons at specific sites and within specific population groups for the purpose of gathering epidemiological data. Testing is performed on blood samples that have been collected for other purposes in a regular and consistent way, annually or biannually. Testing is unlinked and anonymous and there is accordingly no danger of breaches of confidentiality.

Anonymous unlinked antenatal screening is carried out by the Ministry of Health and Social Services on a two-yearly basis at predetermined surveillance sites, utilising blood samples drawn from women attending antenatal clinics at these sites on their first visit during pregnancy. In 1998, antenatal screening was conducted by the Ministry at 15 sites.

3. The policy framework

3.3.1 Goals

The goals of this policy are threefold; namely to:

a) encourage more people to test for HIV and inform sexual partners about the result in order to prevent further infections;

b) improve epidemiological surveillance of HIV and AIDS; and

c) create greater openness about HIV/AIDS and acceptance of people living with HIV/AIDS.

3.3.2 Policy principles

Several years of experience in addressing the HIV/AIDS epidemic have confirmed that the promotion and protection of human rights constitutes an essential component in preventing transmission of HIV and reducing the impact of HIV/AIDS. The protection and promotion of human rights are necessary both to the protection of the inherent dignity of persons affected by HIV/AIDS and to the achievement of the public health goals of reducing vulnerability to HIV infection, lessening the adverse impact of HIV/AIDS on those affected, preventing new infections, protecting the general public and empowering individuals and communities to respond to HIV/AIDS.

In general, human rights and public health share the common objective of promoting and protecting the rights and well-being of all individuals. In the context of HIV/AIDS, health and human rights complement and mutually reinforce each other. The interdependence between public health and human rights can best be demonstrated by studies showing that HIV prevention and care programmes with coercive or punitive features result in reduced participation and increased alienation of those at risk of infection. Coercive health measures drive away the people most in need of counselling, treatment and support, thereby thwarting the public health objectives of such programmes.

It is thus imperative that the national response to HIV/AIDS be premised on universally recognised human rights standards.

3.3.3 Policy objectives

The objectives of this policy are:

- The reduction of stigma and discrimination against people affected by HIV/AIDS;
- Increased social support for people affected by HIV/AIDS, as well as an increase in access to prevention and care services;
- Greater openness and commitment within relationships and within communities to address HIV/AIDS; and
- Greater knowledge and awareness within communities that leads to specific and effective HIV prevention and care strategies and programmes

3.3.4 Policy provisions

3.3.4.1 Confidentiality

People will not seek HIV-related counselling, testing or treatment if they are not assured that any information relating to their HIV status will be treated confidentially. The relationship of trust between patient/client and health care worker, caregiver or counsellor that is premised on confidentiality is thus crucial in any HIV prevention or management programme. It is accordingly imperative that confidentiality be maintained at all times.

3.3.4.2 Notification

Voluntary partner notification by the infected person him or herself should be encouraged during counselling from the outset and the benefits of such notification should be explained. These include the prevention of infection and re-infection as well as the promotion of a supportive environment for the infected person within his or her relationship. Partner notification by the infected person him or herself will also enable partners to jointly make informed decisions about their lifestyles and to plan for the future of their children. Professional and lay counsellors should be trained on how to recommend and assist partner notification. Involuntary partner notification shall only be permitted once the following steps have been complied with:

- The HIV-positive person in question has been thoroughly counselled as to the need for partner notification;
- The HIV-positive person has refused to notify or consent to the notification of his/her partner(s);
- A real risk of HIV transmission to an identifiable partner(s) exists;
- The HIV-positive person is given reasonable advance notice of the intention to notify;
- Follow up is provided to ensure support to those involved as necessary.

Involuntary notification of care and support givers and family is not desirable. Voluntary notification of support and care givers by the infected person him or herself should however be encouraged during counselling from the outset and the benefits of such notification should be explained. These include access to appropriate care, treatment, counselling and social benefits as well as the promotion of an environment where caregivers at both health care facilities and at a family level “share the care”. Professional and lay counsellors should be trained on how to recommend and assist with this notification.

3.4.4.3 Reporting

In Namibia, where an HIV test is a precondition for an AIDS diagnosis, the information needed for effective disease surveillance can be gleaned from unnamed case reporting of HIV results. A system of unnamed reporting of HIV test results is already in place, in terms of which the names and addresses of the individuals tested are removed and health authorities are provided only with information relevant for public health action including age, gender, the reason for testing, clinical symptoms and details of the requesting facility. An identifying code is employed to avoid duplication of statistics. This system of reporting should be continued.

The usefulness of information gathered from national HIV reporting will however depend upon the quality and the representativity of the data that is collected. Where voluntary testing is not widely available, or used, the results may not be representative. It is accordingly important that attention be given to the establishment of easily accessible voluntary testing and counselling services.

3.4.4.4 Sentinel serosurveillance

Sentinel serosurveillance is an important source of information for health authorities for monitoring trends in the epidemic and current sentinel serosurveillance programmes and other complimentary studies should be expanded to improve the quality of epidemiological data.

3.4.4.5 Conclusion

The fear that many people living with HIV or AIDS feel about informing spouses, partners, family, friends, colleagues and even health workers about their HIV status is fuelled by stigma, discrimination

and fear of the unknown. The fear of stigma and limited access to counselling and HIV testing have both contributed to only a small number of people voluntarily testing for HIV and an even smaller number disclosing their HIV status.

The fact that only a small number-of people know they have HIV and an even smaller number disclose that they are HIV-positive has added to the difficulty faced by government and communities in creating greater awareness of the AIDS epidemic, preventing further HIV infections and accurately monitoring HIV and AIDS on an ongoing basis.

Accurate reporting of cases of HIV or AIDS by health authorities can help government, communities and other stakeholders to estimate the size of the epidemic and to plan and monitor HIV prevention campaigns and care and support programmes.

Therefore, it is extremely important for communities, non-governmental organisations, health authorities and government to work in partnership to create a social environment where people can feel confident and safe to voluntarily inform others about their HIV status. Acceptance of people with HIV will lead to a dramatic improvement in the outcomes of a range of medical and public health interventions that aim to control and prevent HIV and will provide benefits for people living with HIV/AIDS through improved access to treatment, support and care.

Guidelines for Implementation of National Code on HIV/AIDS in Employment, 1998

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1. Introduction

1.1 With the world-wide marked increase in number of persons infected with the human immunodeficiency virus (HIV) and suffering from acquired immunodeficiency syndrome (AIDS) mainly in the economically active part of the population, the 20 to 50 years age group, the employers, employees and their organizations show a high level of anxiety in regard to the impact of the pandemic on the work environment.

1.2 From an initial response of denial, to a perception of AIDS as a medical problem, AIDS is progressively being recast as a development problem and an issue for all sectors.

1.3 Loss of employment and individual income, loss of employees without adequate availability of replacement, and a subsequent decline in production and national income can post a severe and detrimental effect on the social and economic stability and the growth of a country. This is so in view of the fact that HIV/AIDS will affect economic growth and production through the illness and death of productive people and through the diversion of resources from savings (and eventually investment) to care.

2. Options and responses

2.1 In response to the Aids pandemic and its volatile and dynamic nature, the Ministry of Labour, in conjunction with the Ministry of Health and Social Services and with the wide tripartite consultation through the Labour Advisory Council, has formulated the National Code on HIV/AIDS and Employment for HIV prevention and AIDS management. This Code is proposed as an integral part of the government's commitment to address most of the major issues related notably to the prevention of new infections as well as to the provision of optimal care and support for the workforce.

2.2 Workplace based activities that locate HIV prevention and AIDS management in a sustained and comprehensive programme of health promotion have demonstrated gains in general health indicators.

2.3 This implies a need for stronger public health approaches in the productive sectors.

3. Policy principles

3.1 The same ethical principles that govern all health/medical conditions in the employment context should apply equally to HIV/AIDS.

3.2 The gravity and impact of the HIV/AIDS epidemic and the potential for discrimination created the need for this "National Code on HIV/AIDS and Employment" to be based on the fundamental principles of human rights embodied in the Constitution of the Republic of Namibia, the provisions of the Labour Act (Act No. 6 of 1992), occupational health principles, sound epidemiological data, prudent business practice and a humane and compassionate attitude to individuals.

3.3 The interdependency of SADC countries and people, nowhere more evident than in the spread of HIV, demands equity and a shared approach to the challenges of HIV/AIDS. The Regional (SADC) nature and implications of the epidemic and the desire to harmonise national standards in dealing with HIV/AIDS motivate this Code.

4. Scope

4.1 Subject to the provisions of the Labour Act (Act No. 6 of 1992) this Code applies to:-

4.1.1 all employees and prospective employees,

4.1.2 all workplaces and contracts of employment,

4.1.3 all human resources practices forming part of policy component of any organisation.

5. Policy development and implementation

5.1 As policy development and implementation is a dynamic process, this Code shall be:-

5.1.1 communicated to all concerned,

5.1.2 routinely reviewed in the light of new epidemiological and scientific information,

5.1.3 monitored for its successful implementation and evaluated for its effectiveness in the workplace.

6. Policy components

6.1 Education, awareness and prevention

6.1.1 Information, education and prevention programmes should be developed jointly by employers and employees and should be accessible to all at the workplace. Education on HIV/AIDS should, where possible, incorporate employee families.

6.1.2 Essential components of prevention programmes are information provision, education, prevention and management of sexual transmitted diseases (STD's), condom promotion and distribution and counselling on high risk behaviour. Workplace AIDS programmes should co-operate with and have access to resources of the National AIDS Programme.

6.2 Job Access

6.2.1 There should be neither direct nor indirect pre-employment test for HIV. Employees should be given the normal medical tests of current fitness for work and these tests should not include testing for HIV.

6.3 Workplace testing and confidentiality

6.3.1 There should be no compulsory workplace testing for HIV. Voluntary testing for HIV on the request of the employee should be done by a suitably qualified person in a health facility with informed consent of the employee in accordance with normal medical ethical rules and with pre- and post-test counselling,

6.3.2 Persons with HIV/AIDS should have the legal right to confidentiality, about their HIV status in any aspect of their employment. An employee is under no obligation to inform an employer of her/his HIV/AIDS status. Information regarding the HIV status of an employee should not be disclosed without the employee's written consent.

6.3.3 Confidentiality regarding all medical information of an employee or prospective employee should be maintained, unless disclosure is legally required. This applies also to health professionals under contract to the employer, pension fund trustees and any other personnel who obtain such information in ways permitted by the law, ethics, the code or from the employee concerned.

6.4 Job status

HIV status should not be a factor in job status, promotion or transfer. Any changes in job status should be based on existing criteria of equality of opportunity, merit and capacity to perform the work to a satisfactory standard.

6.5 HIV testing and training

In general, there should be no compulsory HIV testing for training. HIV testing for training should be governed by the principle of non-discrimination between individuals with HIV infection and those without and between HIV/AIDS and other comparable medical conditions.

6.6 Managing Illness and Job Security

6.6.1 No employee should be dismissed merely on the basis of HIV status, nor should HIV status influence retrenchment procedures.

6.6.2 Employees with HIV related illness should have access to medical treatment and should be entitled, without discrimination, to agreed existing sick leave provisions.

6.6.3 HIV infected employees should continue to work under normal conditions in their current employment for as long as they are medically fit to do so. When on medical grounds they cannot continue with normal employment, efforts should be made to offer them alternative employment without prejudice to their benefits. When an employee becomes too ill to perform his/her agreed functions, standard procedures for termination of service for comparable life-threatening conditions should apply without discrimination.

6.7 Occupational benefits

6.7.1 Government, employers and employee representatives should ensure that occupational benefits are non-discriminatory, and sustainable and provide support to all employees including those with HIV infection. Such occupational

benefits schemes should make efforts to protect the rights and benefits of the dependants of deceased and retired employees.

6.7.2 Information from benefits schemes on the medical status of an employee should be kept confidential and should not be used by the employer or any other party to affect any other aspect of the employment contract or relationship.

6.7.3 Medical schemes and health benefits linked to employment should be non-discriminatory. Private and public health financing mechanisms should provide standard benefits to all employees regardless of their HIV status.

6.7.4 Counselling and advisory services should be made available to inform all employees on their rights and benefits from medical aid, life insurance, pension and social security funds. This should include information on intended changes to the structure, benefits and premiums to these funds.

6.8 Risk management, First Aid and compensation

6.8.1 Where there may be an occupational risk of acquiring or transmitting HIV infection, appropriate precautionary measures should be taken to reduce such risk, including clear and accurate information and training on the hazards and procedures for safe work.

6.8.2 Employees who contract HIV infection during the course of their employment should follow standard compensation procedures and receive standard compensation benefits.

6.8.3 Under conditions where people move for work, government and organisations should lift restrictions to enable them to move with their families and dependants.

6.8.4 People who are in an occupation that requires routine travel in the course of their duties should be provided with the means to minimise the risk of infection including information, condoms and adequate accommodation.

6.9 Protection against victimisation

6.9.1 Persons affected by or believed to be affected by HIV or AIDS should be protected from stigmatisation and discrimination by co-workers, employers or clients. Information and education are essential to maintain the climate of mutual understanding necessary to ensure this protection.

6.9.2 Where employers and employees agree that there has been adequate information and education provisions for safe work, then disciplinary procedures should apply to persons who refuse to work with an employee with HIV/AIDS.

6.10 Grievance handling

6.10.1 Standard grievance handling procedures in organisations, in labour and civil law, that apply to all workers should apply to HIV related grievances. Personnel dealing with HIV related grievances should protect the confidentiality of the employee's medical information.

6.11 Information

6.11.1 Government should collect, compile and analyze data on HIV/AIDS, sexually transmitted diseases and make it available in the public domain. Stakeholders should co-operate in making available national data for monitoring and planning an effective response to the Regional health, human resource, economic and social impact of the AIDS epidemic.

6.12 Monitoring and review

6.12.1 Responsibility for monitoring and review of the Code and its implementation should lie with the parties to the tripartite Labour Advisory Council and with the Ministry of Labour.

Ministry of Health and Social Services

Policies and Guidelines for HIV/AIDS Prevention and Control

June 2001

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Foreword

The National AIDS Control Program of the Republic of Namibia is entering a crucial phase with the implementation of its Second Medium Term Plan from 1999-2004. During that period the challenges will be enormous, with the inevitable growing burden of AIDS cases to add to the mounting number of new infections, and with prospects in the short term for effective and affordable treatments or for vaccines remaining dim. Inevitably too there are, and will be, complex social, economic, cultural, political consequences of HIV/AIDS, besides the more obvious and purely medical ones.

However, in the short history of the AIDS pandemic, much has already been learnt not least some of the factors which can improve the chances for an effective prevention and control program. These include the multi-sectoral response, promotion of positive, supportive, consistent approaches to HIV/AIDS related issues and problems.

Hence the priority accorded by the Namibian government to the development of sound policies and guide the AIDS Control Program its partners, and society's response as a whole. These policies and guidelines are indeed an essential component of the Program and try to address most, if not all, of the major issues related notably to the prevention of new infections as well as to the provision of optimal

care and support for those already infected and with AIDS. They also reflect a number of guiding principles which are based as much upon the current state of knowledge as upon good, common public health sense.

The policies reflected here should serve as guidelines in the management of this epidemic in Namibia.

Dr L. Amathila
MINISTER

Preface

The AIDS epidemic remains a dynamic and volatile (sic), and the need for flexibility and adaptability as it evolves and as more knowledge accumulates or treatment becomes available, cannot be overstressed. HIV/AIDS has already compelled individuals and societies to take a fresh look at values, attitudes, behaviours and old prejudices and, in so doing, has spelt out the need for enlightened public policy, one which would promote, support and care rather than coercion, tolerance and compassion rather than discrimination, protection of rights and dignity rather than stigmatization and exclusion. Indeed, it will continue to provoke positive responses beyond the narrow confines of HIV/AIDS issues.

This policy document addresses the following issues amongst others:

HIV/AIDS Counselling

HIV Screening and Testing

Care, management and support of those with HIV infection / AIDS disease

Wilful transmission of HIV/AIDS from one person to another

People living with HIV/AIDS

Home Based Care

Information, Education and Communication in HIV/AIDS

Condoms

Discrimination and stigmatization

Infection control

Insurance

International travel

Blood safety

Research in HIV/AIDS

All our partners in the management of the epidemic are encouraged to consult and use these policies and to suggest amendments as the knowledge of the disease increase.

Dr K. Shangula
PERMANENTSECRETARY

Abbreviations/Acronyms

AIDS	Acquired Immune Deficiency Syndrome. *Acquired* means to get. *Immune* means protected. *Syndrome* means a group of different signs of diseases.
CD4+ Cells	A cell with a surface molecule called cluster designation 4.
ELISA Test	Enzyme-linked immunoassay serologic test that detects the presence of antibodies, not the virus.
HIV	Human Immuno-deficiency Virus, a very small germ that attacks human body's immune system and makes it weak to fight illness.
IEC	Information, Education, and Communication
NACOP	National AIDS Control Program
NGO(s)	Non-Governmental Organizations
PLWHA	People Living With HIV/AIDS
TB	A bacterial disease caused by infection with mycobacterium Tuberculosis bacilli which usually attacks the lungs, causing a condition known as Pulmonary TB. TB can also affect the spine, hips, lymph nodes and virtually any other part of the body.

1. Guiding principles

In drafting the policy statements and guidelines, the National AIDS Coordinating Programme (NACOP) in consultation with other concerned parties, has adhered to a number of general principles.

1.1 The policy statements and guidelines are based as far as possible on the current body of scientific and medical knowledge, and on the relevant positive and negative experiences of this program and national AIDS programs of other countries.

1.2 They take into consideration related and relevant national policies and legislation. These include in particular the constitution of Namibia, the Labour Laws, the Public Health Act, the proposed standards for the practice of Blood Transfusion, and the Infection Control Guidelines.

1.3 They stress the rights of individuals and of society.

1.4 They equally stress the responsibilities of individuals and society.

2. The facts about HIV

AIDS or the Acquired Immune Deficiency Syndrome is the result of infection with the Human Immunodeficiency virus or HIV. Unlike most other infections, however, HIV does not immediately cause disease, and the incubation period – the time between infection and the development of signs and symptoms of illness – is very long, being on average 8-10 years. Nonetheless once someone is infected he/she is infectious and can transmit the infection to others, even though he/she is apparently well. Fortunately HIV can only be transmitted in a few ways. Extensive epidemiological and laboratory studies have demonstrated that only blood, semen, and vaginal/cervical secretions are important as far as transmission of the virus is concerned. Thus far, only three routes of HIV transmission are recognised as important:

- Sexual;
- Parenteral (through infected blood and blood products, from unscreened transfusions or the use of unsterile instruments);

- Perinatal (from an infected mother to the foetus or infant).

There is absolutely no evidence that HIV can be transmitted in any other way. In particular HIV infection cannot be acquired through the air, food, or casual person-to-person contact, be it in the work situation, in schools or in the household. These facts are particularly important and relevant when it comes to ostracism and stigmatization of HIV-infected persons.

Since the clinical signs and symptoms of HIV disease and AIDS do not manifest themselves for several years, the only way to determine whether someone is infected is to perform a blood test which detects specific antibodies to the virus.

Given the long incubation period of HIV infection the number of people with HIV disease, including AIDS, are but a fraction of the total number of those who are infected. The number of AIDS cases therefore is at best a poor reflection of the real extent of HIV infection. In Namibia the total number of recorded HIV infections, including AIDS cases, stands at nearly 68 196 by the year 1999. The latest sero survey indicates that HIV-infection among pregnant women stands at 19.3%. There is no doubt that Namibia is facing a big challenge posed by this epidemic. There is therefore a need to formulate policies and guidelines to direct the response.

3. Policies/guidelines

3.1 Counselling

A client needs to be counselled before the testing to prepare him/her for the possible outcome of the test. Counselling is also needed when discussing the results of the HIV test to the client. The objective of counselling is to prepare the client to cope effectively during and immediately after the announcement of the result of the test. Supportive counselling goes beyond the first phase and is essential to assist clients to cope with living with the virus.

3.1.1 Pre-test counselling is done before testing or screening for HIV infection. Pre-test counselling should be the responsibility of lay counsellors, health and social welfare professionals, doctors, professional nurses and pharmacists.

3.1.2 Post-test counselling is offered to prepare an individual to receive the HIV / AIDS test results as well as giving moral support after the client has received the results. It is the responsibilities of health and social workers to break the news in the most possible emphatic and supportive manner.

3.1.3 Ongoing counselling is a continuous process of psychosocial support to a person infected with HIV or to a person with AIDS or their families and close contacts. Ongoing counselling is the responsibility of both lay counsellors, health workers and social workers.

3.1.4 Counselling is one of the health and social service, provided for by the health and social service sectors to communities and should be provided according to the laws regulating health care provision.

3.1.5 Payment for private patients should be paid according to the private laws and regulations governing private practice.

3.1.6 The private sector has to charge for these services according to the state medical aid fund stipulations.

3.1.7 Government shall not subsidise voluntary counselling and testing services provided by private and NGO programs, except for mission hospitals that are already being subsidised by the Government.

3.1.8 For counselling and testing services provided to state patients in Government institutions, the state will to pay (sic) for those tests. However for private patients and for testing done in private institutions, individuals and individual institutions are responsible for the payment.

It is recommended that state patients should use the services of the National Institute of Pathology for voluntary testing.

3.1.9 Each health facility should have a health worker trained in counselling. According to the MTP the number of health workers trained in counselling should be allocated as follows:

Clinic	2	Regional Hospital	8
Health Centre	3	National Referral Hospital	12
District Hospital	5		

These people will be dedicated to the provision of HIV/AIDS related services for most of their times. The Ministry of Health and Social Services increased the number of nurses for each health facility for these purposes (registered and enrolled nurses). There will be people completely dedicated to AIDS in each health facility. There should be a separate confidential place or office, for counselling purposes only.

3.1.10 Existing client referral systems from community level through to the clinic or health centre, through to the district hospital, intermediate referral hospital, up to the national referral hospital should be used for counselling, testing and treatment of HIV/AIDS patients. Training, refresher training and supervision of community counsellors should be provided from the nearest clinic and or district hospital.

3.2 Testing and screening

Blood tests have been widely available since 1985 for the detection of HIV antibodies, and thus for the identification of HIV-infected individuals. Much public policy stems directly from the availability of such tests. It is therefore crucial to have a thorough and clear appreciation of their uses, their limitations, as well as their consequences, so as to allow a dispassionate assessment of existing, or proposed policies wherein HIV testing plays a central role.

***Definitions of terms used**:*

Testing refers to the procedure as applied to individuals.

Screening refers to the procedure as applied to population groups. Testing or screening may be voluntary or mandatory. The collection, recording and notification of data may be nominal or anonymous. Furthermore the anonymous samples may be linked (coded information allows the identification of the patient) or unlinked (all identifiers are removed and there is no possibility of identifying the individual).

3.2.1 Some limitations of antibody testing

Initial or screening tests are highly sensitive (i.e. detect most true positives) and highly specific (i.e. detect most true negatives). Even so the predictive value of a positive test (i.e. the degree of confidence that a positive result is a true positive) may be unacceptably low in populations with a low prevalence of infection. Furthermore the sensitivity and specificality of these tests depend on the technical skills of the laboratory staff, on adequate supervision and regular quality control.

Supplemental tests (previously called confirmatory tests) are commonly used as a strategy for minimising the risks of diagnosing false positives. The ones currently used include the Western Blot and the second ELISA test.

HIV antibodies are only detectable some weeks, and sometimes months, after infection. Recently infected individuals will not therefore test positive. All known HIV positivity has obvious dramatic personal and social consequences. It cannot therefore be handled or considered as just another blood test.

3.2.2 Indicators for screening and testing

3.2.2.1 Provided that appropriate procedures are followed the following may be considered as valid general indications:

- Screening of blood donors, donors of other tissues, organs, or semen;

- Differential diagnosis in a patient;
- Gathering epidemiological data to monitor the spread of HIV;
- After accidental exposure;
- To assess potential risks to patients of specific interventions such as immunosuppressive therapy.

3.2.2.2 With the exception of mandatory screening of blood and other tissue and organ donations, there should not be any justification for the systematic screening of groups, or indiscriminate testing of individuals.

3.2.3 Technical aspects

3.2.3.1 Only institutions which are recognised as fulfilling the required criteria for carrying out HIV antibody testing should perform such tests.

3.2.3.2 The initial or screening test should be highly sensitive and highly specific.

3.2.3.3 A positive initial test will necessitate an appropriate supplemental test. The one currently used is the second ELISA test or the Western Blot. Consideration will in due course be given to alternative supplemental assays which are no less specific, but are less costly and technically demanding.

3.2.3.4 Information about the HIV status shall not be conveyed to any individual until a supplemental test has been carried out.

3.2.4 Procedures

3.2.4.1 Testing or screening should, with few exceptions, be undertaken only with the informed consent of the individuals or groups concerned and with appropriate guarantees of confidentiality.

3.2.4.2 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. Such counselling will necessitate the training and availability of counsellors who can respond to the many diverse educational, cultural, and, social needs of clients.

3.2.4.3 Similarly post-test counselling should be available to all those who are tested, whether they test positive or negative. It 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. Accordingly, any institution or service where testing is carried out should ensure the availability of, and accessibility to counselling facilities.

3.2.5 Confidentiality

3.2.5.1 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.

3.2.5.2 It is the duty of every health professional entrusted with such information to ensure that breaches of confidentiality do not occur. Procedures of collection, reporting or recording of data should be such as to minimise the potential for such breaches to occur. With few exceptions, linked anonymous requests and reports or notification, as are currently practised, will offer the best safeguards, and should therefore be advocated.

3.2.5.3 While it is accepted that health professionals have a duty to protect the confidentiality of health information, they may under certain circumstances share such information with others who, in their considered opinion, need to know. However every effort should be made to obtain the informed consent of the patient. This applies notably to the sharing of information with other health professionals, and especially with sexual and needle-

sharing partners. Counselling in these cases is of paramount importance, and it should ensure that informed consent is secured in most cases.

3.2.5.4 In the case of sexual or needle-sharing partners notification of HIV status could be done either by the patient or the health professional. In the exceptional cases where such consent is not obtained the health professional may act appropriately.

3.2.6 HIV testing

3.2.6.1 In the of screening programmes (sic) for the purposes of public health surveillance, unlinked anonymous screening, which does not require individual informed consent, may be implemented, provided other recognised criteria for such screening are met.

3.2.6.2 Mandatory testing or screening of donors of blood, tissues, other organs, and semen is acceptable provided the individuals concerned are appropriately counselled.

3.2.6.3 Mandatory testing should not apply for travel, entry to educational or training institutions, employment or continuation of employment.

3.2.6.4 There is at present no sound justification for mandatory testing or screening of certain categories of patients attending hospitals, including antenatal attenders. However, with the introduction of the prevention of mother-to-child transmission program, those mothers who wish to take part in the program may have to subject themselves to the HIV test.

3.2.6.5 Individual testing may be considered and recommended for some patients by the treating physician, in which they should receive appropriate counselling. Testing should only proceed with their informed consent.

Where, or when such testing is envisaged, appropriate follow-up facilities should be readily available and accessible.

3.2.6.6 Refusal by patient to consent to testing should not be a reason for discriminating against him/her, and access to care and services should be safeguarded.

3.2.7 Voluntary counselling and testing

3.2.7.1 Voluntary testing should be promoted amongst those whose behaviours or practices place them at greater risk. This can only be achieved by education, provision of the necessary services, including professional counselling, and firm guarantees of confidentiality and non-discrimination.

The Ministry of Health and Social Services will, according to the Hospital and Health Facility Act of 1994, allow private institutions and health related NGOs, with the capacity to do both the testing and counselling, to render these services at their own expense. They should have a trained counsellor, nurse, laboratory technician and a supervising doctor. Other government sectors will also be allowed to provide these services if they have the capacity for such.

Testing should be at least done with one Elisa Test, at least three months apart, before a person is confirmed to be HIV-positive, unless the person has already got AIDS.

State patients will be eligible for INH and Cotrimoxazole to prevent development of TB, pneumocystis carinii pneumonia, and toxoplasmosis respectively, if they test HIV-positive.

They will also have access to nutrition and will get information as to where they can get food as well as other forms of support. They will also get information on the use of condoms and where to get condoms, and how to avoid getting re-infected with another strain of HIV and other opportunistic diseases. Those who test negative will get information on how to keep their negative status. This information shall include abstinence, being faithful, and condom use.

All organisations and units conducting Voluntary Counselling and Testing will have to sent their statistics to the secretariat of NACOP for planning purposes.

3.3 Care and management and support of those with HIV infection/AIDS disease

The emphasis to date has been on primary prevention of new infections. This will remain the main focus of national efforts but, in coming months and years, the need for so-called secondary prevention (prevention of complications in those with opportunistic infections) and for tertiary measures (maintaining of quality of life and providing optimal care for those with the HIV disease) will be increasingly felt.

3.3.1 In caring for HIV-infected persons and AIDS cases, it is the duty of health workers, family, and friends, relatives, employers, and media to work towards the creation of a non-discriminatory, supportive environment and to foster tolerance, and compassion.

3.3.2 NACOP will, accordingly, stress the importance and role of health professionals but also enlist the support of the whole network of friends, relatives, and others in the various sectors of government, private sector and the civil society.

3.3.3 This broad-based support will be promoted, among other means, through the gradual structured provision of information on HIV/AIDS, condoms, and Community and Home Based Care. In this respect the timely guidelines on Home Based care will be highlighted.

3.3.4 Health care workers should at all times set the example in terms of humane, compassionate care of HIV infected and AIDS cases.

3.3.5 Health care workers should therefore not refuse to treat HIV-infected patients, the more so since there are virtually no risks to them if universal infection control precautions are taken.

3.3.6 However some circumstances may justify, indeed dictate, the exclusion of some health workers from the duty of caring for HIV-infected patients. These are as much to protect the patient as to protect themselves. They include pregnancy, medical conditions such as a compromised immune status, the presence of infections such as herpes simplex and varicella-zoster infections, the presence of extensive skin lesions and other conditions. The Infection Control Guidelines address these, and other issues of care.

3.4 Wilful transmission of HIV/AIDS from one person to another

Wilful transmission of HIV/AIDS from one person to another should be regarded as attempted murder. If it can be proven in the court of law, the court should punish the perpetrator accordingly.

3.5 Prevention of mother-to-child transmission

3.5.1 All pregnant mothers, attending antenatal care, will be duly counselled and voluntary tested during their pregnancy. If she tests HIV-positive, she will get post-test counselling and will be offered AZT or Nevirapine or any other antiretroviral drug to prevent mother-to-child transmission of the virus during birth. The choice of feeding of the baby will be discussed thoroughly with the mother. Exclusive breastfeeding for the first six months will be recommended to most mothers, according to the existing breastfeeding policy. Those that will afford (sic) will be advised to formula feed.

3.5.2 Cost of Antiretroviral Drugs: The one month course of AZT or three doses of Nevirapine for pregnant mothers will be provided free of charge to those mothers who will participate in the programme. For private patients, the one month course of AZT or 3 doses of Nevirapine will be provided according to laws regulating private practice in Namibia.

3.6 People living with HIV/AIDS

3.6.1 State patients living with HIV/AIDS should be regularly medically checked on their physical and mental status as well as their viral load and CD4 cell levels. If they are found not to be medically fit or having opportunistic infections, they should be actively and intensively treated for those illnesses as inpatients or outpatients as their conditions dictate. If unfit to work, they should be referred to a medical board to determine their disability. They could then qualify for disability grants or social welfare grants.

3.6.2 Discrimination of PLWHA either at work or elsewhere is illegal according to the Labour Code on AIDS and the HIV/AIDS Human Rights Charter launched in December 2000. PLWHA are entitled to information on nutrition, access to condoms as well as other social support services such as the Drought Relief Program, Food For Work Program, Community Counselling Services and Community Based Health Care.

3.7 Home based care (HBC)

3.7.1 Home Based Care is a voluntary care rendered at home to patients who have been discharged from a Health Facility in order for them to receive palliative or other treatments at home. This care would be in a form of: supervision of taking of medicines; wound dressing; feeding; bathing; general physical care; counselling; turning patients in bed to avoid bed sores; cleaning of utensils, beddings and household items of the patient; bringing water, fuel and food to the house for the use by the patients. Home based care includes also social stimulation.

3.7.2 All persons with chronic illnesses and all persons with terminal illnesses are to benefit from Home Based Care.

Caution! This does not mean people with opportunistic infections that are treatable should be dumped at home. Only those patients referred by health professionals should be nursed at home. Patients who do not have family support at home or in the community should be nursed in the health facilities.

3.7.3 A family member, a relative, a guardian, or someone specially assigned by the government or by community leadership including the church, who has received training in the care they are giving from social workers, health workers or anyone who have received training in home based care, may render this care to patients.

3.7.4 A list of caregivers should be kept by the Regional Health Management Team of the Ministry of Health and Social Services and NACOP. Basic nursing care givers should be trained by a registered nurse in the rendering of basic nursing care.

3.7.5 The responsibility for the cost of home based care of the family taking care of their relative rests with the family. Community Based Organizations, the private sectors, and Government do also provide or support home based care services.

3.7.6 International donors may support home based care programmes of the NGOs and Government but donations should be coordinated through the regional AIDS Coordinating Committee (RACOC).

3.7.7 The AIDS patients needing home based care (HBC) should be referred from hospitals to the nearest clinic and from the clinic to the known HBC giver in the community. In case of emergency, patients should be referred directly to the nearest hospital.

3.8 Information, education and communication (IEC)

The right to information and education is a fundamental one. Its denial has far-reaching consequences, not least health-related ones. This has never been as dramatic and obvious as in the case of the HIV/AIDS epidemic. Furthermore many of the fears and hysterical reactions generated by HIV/AIDS are due as much to ignorance as to misinformation. Hence the pivotal role of information / education strategies in AIDS prevention and control programmes.

3.8.1 NACOP will constantly seek to reinforce the effectiveness of IEC programmes through improving the availability, accessibility, and relevance of information.

3.8.2 Consistent prevention messages, as well as messages which promote non-discrimination, will be developed by all sectors in NACOP.

3.8.3 Appropriate channels of communication will be used in order to reach all Namibians. The high illiteracy rate will in particular be taken into consideration.

3.8.4 The many cultural and religious specificities, including the taboos and beliefs as well as language, will also be addressed.

3.8.5 The needs of groups which are specially vulnerable, in particular women, children and youth, will be granted particular attention and NACOP will develop programmes targetting these groups and any others which may, for example, be identified through surveys.

3.8.6 Areas which are underprivileged as regards access to information in general, will be targeted as well.

3.8.7 Intersectoral collaboration has particular relevance to IEC strategies. The participation of all partners in the public and the private sectors will be encouraged and coordinated by NACOP.

3.8.8 NACOP specifically will encourage and help all other ministries to develop their own IEC programmes. Employers, trade unions, NGOs, women's associations, church organisations, parents, teachers, and peer groups (esp. youth) all have an important role to play.

3.8.9 The workplace too will be an important arena for the promotion of AIDS/STD education.

3.8.10 It is a right of all children in Namibia to be given information on how to protect themselves against HIV/AIDS. This information should be given in homes, schools, churches, and in the community.

3.8.11 Within the health sector the primary health care services will be a natural forum for accessing the public with credible and relevant information. In this respect health workers will play a vital role. The necessary training opportunities will be provided to enable them to fulfil this role.

3.8.12 The mass media have naturally a crucial contribution to make. Their importance, through the diffusion of consistent and coherent information and the promotion of a supportive climate, cannot be overemphasised. Their collaboration will therefore be actively sought.

3.8.13 The information/education needs of those who are infected will of course be suitably addressed.

3.8.14 The relevant supportive services and infrastructure necessary for the effective implementation of these programmes, such as condom supply and distribution and counselling facilities, will be reinforced.

3.9 Condoms

The subject of condoms and their use is a very sensitive one, particularly in so-called conservative and traditionalistic societies where issues pertaining to sexuality are rarely talked over – whether it is parents and children, teachers and students, clergy and the congregations, husbands and wives. With no effective treatment or vaccine currently available and none in the immediate future the prevention of new HIV infections must be one of the main objectives of any AIDS programme. In this context the promotion of condoms – and of their proper use in risk situations is one of the most effective strategies.

Over 90% of all HIV-infections in Namibia are the result of sexual transmission. It is therefore urgent to explore dynamic and innovative approaches and seize every opportunity to educate and inform about condoms, and to do so within the specific cultural, religious and socioeconomic settings.

3.9.1 NACOP will reinforce its information and education campaign and its links with Family Planning and other programmes in order to raise awareness about condoms and their

role in AIDS prevention and prevention of other sexually transmitted diseases. This will complement messages about responsible sexual behaviour and contraception.

3.9.2 The National Condom Promotion Committee will involve all those concerned, namely teachers, parents, health workers, and clergy, to develop appropriate strategies which take into account the various cultural and religious sensitivities.

3.9.3 NACOP will also ensure the availability and affordability of condoms, as well as their accessibility, through a social marketing approach.

3.9.4 Information on the use of condoms should be advertised on all media, including television, radio, newspapers, etc.

3.10 Discrimination

HIV-related discrimination is widespread and pervasive. Besides causing considerable individual trauma it is a major obstacle to the successful implementation of prevention programmes. It manifests itself in various ways and in various situations and is morally and socially unacceptable. It has no scientific or medical basis whatsoever and rather has its roots in ignorance, misinformation and misconceptions, fear, and prejudices. Furthermore it is often directed not only against those who are truly infected but also against those who are merely assumed to be infected.

3.10.1 The Government of Namibia fully subscribes to, and supports, the 41st World Health Assembly Declaration related to the avoidance of discrimination against HIV-infected people and those with AIDS.

3.10.2 NACOP will strengthen information and education programmes aimed at removing unfounded fears and myths about HIV infection/AIDS.

3.10.3 The Government of Namibia will, at every opportunity, advocate and promote measures which respect the dignity and rights of HIV-infected individuals and of those assumed to be infected.

3.10.4 Such measures will empower HIV-infected people and others at risk of HIV infection to assume full responsibility towards themselves and towards society.

3.10.5 In particular no measures should be entertained which discriminate against individuals or groups on the basis of real or assumed HIV status, with respect to access to the workplace, to educational or training institutions, to accommodation, to public places, transport, and to travel in general.

3.10.6 Determination of an individual's HIV status should not be a prerequisite of entry into work, continuation of work, promotion prospects, or training opportunities. As an employer, the Government of Namibia will not require such tests and will encourage all other sectors to do likewise.

3.10.7 There will also be no discrimination as regards access to health services.

3.10.8 Pension rights and other occupationally related benefits should not be harmed by the disclosure of one's HIV status.

3.10.9 The implementation of non-discriminatory measures will complement education, information, and counselling programmes, and will do most to enlist the support and cooperation of those who are HIV-infected or most at risk of HIV infection for responsible behaviour. They are in effect central to any successful prevention programme.

3.11 Infection control

The more sensational connotations of HIV/AIDS have tended to overshadow the fact that the virus causing AIDS is in effect very fragile and is only transmitted in certain ways. As such it is one of the least infectious agents and general infection control measures are sufficient to prevent its transmission.

3.11.1 In the health sector the existing regulations governing infection control are being implemented.

3.11.2 Both in the public and in the private sector these measures should be complemented by regular education and training programmes which ensure their continued observance, and also to allay fears and misapprehensions about transmission.

3.11.3 Both employers and employees have to assume their respective responsibilities, the ones through the provision of adequate facilities, the others through strict adherence at all times to these procedures, regardless of the HIV status of patients.

3.11.4 In workplace situations where there is a potential risk of occupational transmission through accidents, employers should ensure appropriate training and education programmes which minimise such risks. They should also develop appropriate infection control procedures. Employees and unions should also assume their responsibilities in this respect.

3.11.5 NACOP will also develop and implement training and education programmes within the health sector and also target the traditional healers and birth attendants.

3.11.6 Notwithstanding the universal application of infection control procedures, HIV-infected patients also have to assume their full responsibility and inform those who need to know, whether they are co-workers, employers or health professionals, in any situation where there may be a risk of HIV transmission.

3.12 Insurance

Insurance is in law a contract between the insurer and the insured. The natural history of HIV infection is currently such that insurance cover, be it life or health insurance, is severely compromised, adding further to the trauma and anguish of those who are HIV-infected and of their families.

3.12.1 Insurers are already responding positively to these dilemmas and concerns. They are encouraged to continue to seek innovative ways of answering the needs of HIV infected and AIDS cases.

3.12.2 A regular reappraisal of insurance risk will continue in the light of medical and scientific progress.

3.12.3 Insurers are particularly urged to assess their broader insurability role in the provision of health insurance, and to entertain humane considerations in addition to actuarial ones.

3.12.4 The rights of clients with regards to confidentiality and informed consent will be safeguarded by medical practitioners, who should also ensure the access of insurance clients to post-test counselling. These issues will be underlined by NACOP, and supported by insurers.

3.12.5 Insurance companies, like many other sectors, are already making a positive contribution to AIDS prevention programmes through support for information and education campaigns. Their continued cooperation in this field will be sought.

3.13 International travel and migration

There can be no argument about the futility of screening of international travellers as a strategy for the prevention of spread of HIV. The public health sense of restrictions on travel of HIV-infected individuals is equally debatable.

3.13.1 As stated in 4.5 there should be no discrimination against individuals on the basis of HIV status as far as travel is concerned.

3.13.2 The Namibian authorities will not impose such restrictions.

3.13.3 They will further encourage other authorities to do likewise.

3.13.4 As far as immigration is concerned NACOP will promote as wide a debate as possible so as to reach a consensus on future regulations.

3.14 Blood safety

The availability of HIV antibody tests has allowed a considerable reduction in the transmission of infection through the screening of donors. Safe blood strategies are now an essential part of all AIDS prevention programmes.

3.14.1 The Government of Namibia is fully committed to the continued provision of safe blood.

3.14.2 It will therefore continue to fully support the initiatives of the Namibian Blood Transfusion Services to improve and further develop safe blood supply.

3.14.3 NACOP will promote education and training programmes aimed at ensuring rational use of blood and blood products and the use of suitable alternatives.

3.14.4 It will also promote general health care strategies which reduce the demand for blood.

3.15 Research projects, therapeutic trials, etc

The challenge posed by the HIV virus and the AIDS epidemic has generated and will continue to generate a lot of research interest. While research into HIV/AIDS is undoubtedly necessary and is often beneficial to national programmes there is a need to coordinate activities, to appropriately channel resources, and to identify problems which are relevant to the programme.

3.15.1 All HIV-related research projects should be submitted to the Ministry of Health and Social Services's research committee for review and assessment of study proposals. In the absence of a Council for Health and Social Research, all HIV/AIDS related research projects must first be approved by the permanent secretary of the Ministry of Health and Social Services, on behalf of the Government of the Republic of Namibia, prior to commencement.

3.15.2 The absence to date of effective affordable treatment or cure has given rise to a number of claims regarding the therapeutic virtues of various remedies. NACOP will also be called to carefully assess any such claims, and any future ones, so that public or individual resources are not unduly wasted.

Universal Declaration of Human Rights, 1948

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims this **UNIVERSAL DECLARATION OF HUMAN RIGHTS** as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

End notes

[1] Namibia Human Development Report 1998, United Nations Development Programme at 24

[2] ibid at 30

[3] Mr Justice E. Cameron: Presentation on confidentiality at a Judge's Workshop on HIV/AIDS, January 1999

[4] ibid

[5] *Jansen Van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A)

[6] [1988] 2 All ER 648 (QB)

[7] at 653 a-b (Rose J)

[8] Government Notice 78 of 1998 published in Government Gazette No 1835 of 3 April 1998

[9] op cit para 3.2

[10] para 6.3.2

[11] oral communication with Linda Dodds, Central Laboratory, MOHSS, 3 August 1999

UNGASS Declaration

Resolution adopted by the General Assembly

[*without reference to a Main Committee (A/S-26/L.2)*]

S-26/2. Declaration of Commitment on HIV/AIDS

The General Assembly

Adopts the Declaration of Commitment on **the** human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) annexed to the present resolution.

8th plenary meeting
27 June 2001

Annex

Declaration of Commitment on HIV/AIDS

"Global Crisis – Global Action"

1. We, heads of State and Government and representatives of States and Governments, assembled at the United Nations, from 25 to 27 June 2001, for the twenty-sixth special session of the General Assembly, convened in accordance with resolution 55/13 of 3 November 2000, as a matter of urgency, to review and address the problem of HIV/AIDS in all its aspects, as well as to secure a global commitment to enhancing coordination and intensification of national, regional and international efforts to combat it in a comprehensive manner;

2. Deeply concerned that the global HIV/AIDS epidemic, through its devastating scale and impact, constitutes a global emergency and one of the most formidable challenges to human life and dignity, as well as to the effective enjoyment of human rights, which undermines social and economic development throughout the world and affects all levels of society – national, community, family and individual;

3. Noting with profound concern that by the end of 2000, 36.1 million people worldwide were living with HIV/AIDS, 90 per cent in developing countries and 75 per cent in sub-Saharan Africa;

4. Noting with grave concern that all people, rich and poor, without distinction as to age, gender or race, are affected by the HIV/AIDS epidemic, further noting that people in developing countries are the most affected and that women, young adults and children, in particular girls, are the most vulnerable;

5. Concerned also that the continuing spread of HIV/AIDS will constitute a serious obstacle to the realization of the global development goals we adopted at the Millennium Summit of the United Nations;

6. Recalling and reaffirming our previous commitments on HIV/AIDS made through:

   - The United Nations Millennium Declaration, of 8 September 2000;[1]
   - The political declaration and further actions and initiatives to implement the commitments made at the World Summit for Social Development, of 1 July 2000;[2]
   - The political declaration[3] and further action and initiatives to implement the Beijing Declaration and Platform for Action,[4] of 10 June 2000;

- Key actions for the further implementation of the Programme of Action of the International Conference on Population and Development, of 2 July 1999;[5]
- The regional call for action to fight HIV/AIDS in Asia and the Pacific, of 25 April 2001;
- The Abuja Declaration and Framework for Action for the fight against HIV/AIDS, tuberculosis and other related infectious diseases in Africa, of 27 April 2001;
- The Declaration of the Tenth Ibero-American Summit of heads of State, of 18 November 2000;
- The Pan-Caribbean Partnership against HIV/AIDS, of 14 February 2001;
- The European Union Programme for Action: Accelerated action on HIV/AIDS, malaria and tuberculosis in the context of poverty reduction, of 14 May 2001;
- The Baltic Sea Declaration on HIV/AIDS Prevention, of 4 May 2000;
- The Central Asian Declaration on HIV/AIDS, of 18 May 2001;

7. Convinced of the need to have an urgent, coordinated and sustained response to the HIV/AIDS epidemic, which will build on the experience and lessons learned over the past 20 years;

8. Noting with grave concern that Africa, in particular sub-Saharan Africa, is currently the worst-affected region, where HIV/AIDS is considered a state of emergency which threatens development, social cohesion, political stability, food security and life expectancy and imposes a devastating economic burden, and that the dramatic situation on the continent needs urgent and exceptional national, regional and international action;

9. Welcoming the commitments of African heads of State or Government at the Abuja special summit in April 2001, particularly their pledge to set a target of allocating at least 15 per cent of their annual national budgets for the improvement of the health sector to help to address the HIV/AIDS epidemic; and recognizing that action to reach this target, by those countries whose resources are limited, will need to be complemented by increased international assistance;

10. Recognizing also that other regions are seriously affected and confront similar threats, particularly the Caribbean region, with the second-highest rate of HIV infection after sub-Saharan Africa, the Asia-Pacific region where 7.5 million people are already living with HIV/AIDS, the Latin American region with 1.5 million people living with HIV/AIDS and the Central and Eastern European region with very rapidly rising infection rates, and that the potential exists for a rapid escalation of the epidemic and its impact throughout the world if no specific measures are taken;

11. Recognizing that poverty, underdevelopment and illiteracy are among the principal contributing factors to the spread of HIV/AIDS, and noting with grave concern that HIV/AIDS is compounding poverty and is now reversing or impeding development in many countries and should therefore be addressed in an integrated manner;

12. Noting that armed conflicts and natural disasters also exacerbate the spread of the epidemic;

13. Noting further that stigma, silence, discrimination and denial, as well as a lack of confidentiality, undermine prevention, care and treatment efforts and increase the impact of the epidemic on individuals, families, communities and nations and must also be addressed;

14. Stressing that gender equality and the empowerment of women are fundamental elements in the reduction of the vulnerability of women and girls to HIV/AIDS;

15. Recognizing that access to medication in the context of pandemics such as HIV/AIDS is one of the fundamental elements to achieve progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;

16. Recognizing that the full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic, including in the areas of prevention, care, support and treatment, and that it reduces vulnerability to

HIV/AIDS and prevents stigma and related discrimination against people living with or at risk of HIV/AIDS;

17. Acknowledging that prevention of HIV infection must be the mainstay of the national, regional and international response to the epidemic, and that prevention, care, support and treatment for those infected and affected by HIV/AIDS are mutually reinforcing elements of an effective response and must be integrated in a comprehensive approach to combat the epidemic;

18. Recognizing the need to achieve the prevention goals set out in the present Declaration in order to stop the spread of the epidemic, and acknowledging that all countries must continue to emphasize widespread and effective prevention, including awareness-raising campaigns through education, nutrition, information and health-care services;

19. Recognizing that care, support and treatment can contribute to effective prevention through an increased acceptance of voluntary and confidential counselling and testing, and by keeping people living with HIV/AIDS and vulnerable groups in close contact with health-care systems and facilitating their access to information, counselling and preventive supplies;

20. Emphasizing the important role of cultural, family, ethical and religious factors in the prevention of the epidemic and in treatment, care and support, taking into account the particularities of each country as well as the importance of respecting all human rights and fundamental freedoms;

21. Noting with concern that some negative economic, social, cultural, political, financial and legal factors are hampering awareness, education, prevention, care, treatment and support efforts;

22. Noting the importance of establishing and strengthening human resources and national health and social infrastructures as imperatives for the effective delivery of prevention, treatment, care and support services;

23. Recognizing that effective prevention, care and treatment strategies will require behavioural changes and increased availability of and non-discriminatory access to, inter alia, vaccines, condoms, microbicides, lubricants, sterile injecting equipment, drugs, including anti-retroviral therapy, diagnostics and related technologies, as well as increased research and development;

24. Recognizing also that the cost, availability and affordability of drugs and related technology are significant factors to be reviewed and addressed in all aspects and that there is a need to reduce the cost of these drugs and technologies in close collaboration with the private sector and pharmaceutical companies;

25. Acknowledging that the lack of affordable pharmaceuticals and **of** feasible supply structures and health systems continues to hinder an effective response to HIV/AIDS in many countries, especially for the poorest people, and recalling efforts to make drugs available at low prices for those in need;

26. Welcoming the efforts of countries to promote innovation and the development of domestic industries consistent with international law in order to increase access to medicines to protect the health of their populations, and noting that the impact of international trade agreements on access to or local manufacturing of essential drugs and on the development of new drugs needs to be evaluated further;

27. Welcoming the progress made in some countries to contain the epidemic, particularly through: strong political commitment and leadership at the highest levels, including community leadership; effective use of available resources and traditional medicines; successful prevention, care, support and treatment strategies; education and information initiatives; working in partnership with communities, civil society, people living with HIV/AIDS and vulnerable groups; and the active promotion and protection of human rights; and recognizing the importance of sharing and building on our collective and diverse experiences, through regional and international cooperation including North-South, South-South and triangular cooperation;

28. Acknowledging that resources devoted to combating the epidemic both at the national and international levels are not commensurate with the magnitude of the problem;

29. Recognizing the fundamental importance of strengthening national, regional and subregional capacities to address and effectively combat HIV/AIDS and that this will require increased and sustained human, financial and technical resources through strengthened national action and cooperation and increased regional, subregional and international cooperation;

30. Recognizing that external debt and debt-servicing problems have substantially constrained the capacity of many developing countries, as well as countries with economies in transition, to finance the fight against HIV/AIDS;

31. Affirming the key role played by the family in prevention, care, support and treatment of persons affected and infected by HIV/AIDS, bearing in mind that in different cultural, social and political systems various forms of the family exist;

32. Affirming that beyond the key role played by communities, strong partnerships among Governments, the United Nations system, intergovernmental organizations, people living with HIV/AIDS and vulnerable groups, medical, scientific and educational institutions, non-governmental organizations, the business sector including generic and research-based pharmaceutical companies, trade unions, the media, parliamentarians, foundations, community organizations, faith-based organizations and traditional leaders are important;

33. Acknowledging the particular role and significant contribution of people living with HIV/AIDS, young people and civil society actors in addressing the problem of HIV/AIDS in all its aspects, and recognizing that their full involvement and participation in the design, planning, implementation and evaluation of programmes is crucial to the development of effective responses to the HIV/AIDS epidemic;

34. Further acknowledging the efforts of international humanitarian organizations combating the epidemic, including the volunteers of the International Federation of Red Cross and Red Crescent Societies in the most affected areas all over the world;

35. Commending the leadership role on HIV/AIDS policy and coordination in the United Nations system of the Programme Coordinating Board of the Joint United Nations Programme on HIV/AIDS (UNAIDS); and noting its endorsement in December 2000 of the Global Strategy Framework on HIV/AIDS, which could assist, as appropriate, Member States and relevant civil society actors in the development of HIV/AIDS strategies, taking into account the particular context of the epidemic in different parts of the world;

36. Solemnly declare our commitment to address the HIV/AIDS crisis by taking action as follows, taking into account the diverse situations and circumstances in different regions and countries throughout the world;

Leadership

Strong leadership at all levels of society is essential for an effective response to the epidemic

Leadership by Governments in combating HIV/AIDS is essential and their efforts should be complemented by the full and active participation of civil society, the business community and the private sector

Leadership involves personal commitment and concrete actions

At the national level

37. By 2003, ensure the development and implementation of multisectoral national strategies and financing plans for combating HIV/AIDS that address the epidemic in forthright terms; confront stigma, silence and denial; address gender and age-based dimensions of the epidemic; eliminate discrimination and marginalization; involve partnerships with civil society and the business sector and the full participation of people living with HIV/AIDS, those in vulnerable groups and people mostly at risk, particularly women and young people; are resourced to the extent possible from national budgets without excluding other sources, inter alia, international cooperation; fully promote and protect all human

rights and fundamental freedoms, including the right to the highest attainable standard of physical and mental health; integrate a gender perspective; address risk, vulnerability, prevention, care, treatment and support and reduction of the impact of the epidemic; and strengthen health, education and legal system capacity;

38. By 2003, integrate HIV/AIDS prevention, care, treatment and support and impact-mitigation priorities into the mainstream of development planning, including in poverty eradication strategies, national budget allocations and sectoral development plans;

At the regional and subregional level

39. Urge and support regional organizations and partners to be actively involved in addressing the crisis; intensify regional, subregional and interregional cooperation and coordination; and develop regional strategies and responses in support of expanded country-level efforts;

40. Support all regional and subregional initiatives on HIV/AIDS including: the International Partnership against AIDS in Africa (IPAA) and the ECA-African Development Forum African Consensus and Plan of Action: Leadership to overcome HIV/AIDS; the Abuja Declaration and Framework for Action for the fight against HIV/AIDS, tuberculosis and other related infectious diseases in Africa; the CARICOM Pan-Caribbean Partnership against HIV/AIDS; the ESCAP regional call for action to fight HIV/AIDS in Asia and the Pacific; the Baltic Sea Initiative and Action Plan; the Horizontal Technical Cooperation Group on HIV/AIDS in Latin America and the Caribbean; and the European Union Programme for Action: Accelerated action on HIV/AIDS, malaria and tuberculosis in the context of poverty reduction;

41. Encourage the development of regional approaches and plans to address HIV/AIDS;

42. Encourage and support local and national organizations to expand and strengthen regional partnerships, coalitions and networks;

43. Encourage the United Nations Economic and Social Council to request the regional commissions, within their respective mandates and resources, to support national efforts in their respective regions in combating HIV/AIDS;

At the global level

44. Support greater action and coordination by all relevant organizations of the United Nations system, including their full participation in the development and implementation of a regularly updated United Nations strategic plan for HIV/AIDS, guided by the principles contained in the present Declaration;

45. Support greater cooperation between relevant organizations of the United Nations system and international organizations combating HIV/AIDS;

46. Foster stronger collaboration and the development of innovative partnerships between the public and private sectors, and by 2003 establish and strengthen mechanisms that involve the private sector and civil society partners and people living with HIV/AIDS and vulnerable groups in the fight against HIV/AIDS;

Prevention

Prevention must be the mainstay of our response

47. By 2003, establish time-bound national targets to achieve the internationally agreed global prevention goal to reduce by 2005 HIV prevalence among young men and women aged 15 to 24 in the most affected countries by 25 per cent and by 25 per cent globally by 2010, and intensify efforts to achieve these targets as well as to challenge gender stereotypes and attitudes, and gender inequalities in relation to HIV/AIDS, encouraging the active involvement of men and boys;

48. By 2003, establish national prevention targets, recognizing and addressing factors leading to the spread of the epidemic and increasing people’s vulnerability, to reduce HIV

incidence for those identifiable groups, within particular local contexts, which currently have high or increasing rates of HIV infection, or which available public health information indicates are at the highest risk of new infection;

49. By 2005, strengthen the response to HIV/AIDS in the world of work by establishing and implementing prevention and care programmes in public, private and informal work sectors, and take measures to provide a supportive workplace environment for people living with HIV/AIDS;

50. By 2005, develop and begin to implement national, regional and international strategies that facilitate access to HIV/AIDS prevention programmes for migrants and mobile workers, including the provision of information on health and social services;

51. By 2003, implement universal precautions in health-care settings to prevent transmission of HIV infection;

52. By 2005, ensure: that a wide range of prevention programmes which take account of local circumstances, ethics and cultural values, is available in all countries, particularly the most affected countries, including information, education and communication, in languages most understood by communities and respectful of cultures, aimed at reducing risk-taking behaviour and encouraging responsible sexual behaviour, including abstinence and fidelity; expanded access to essential commodities, including male and female condoms and sterile injecting equipment; harm-reduction efforts related to drug use; expanded access to voluntary and confidential counselling and testing; safe blood supplies; and early and effective treatment of sexually transmittable infections;

53. By 2005, ensure that at least 90 per cent, and by 2010 at least 95 per cent of young men and women aged 15 to 24 have access to the information, education, including peer education and youth-specific HIV education, and services necessary to develop the life skills required to reduce their vulnerability to HIV infection, in full partnership with young persons, parents, families, educators and health-care providers;

54. By 2005, reduce the proportion of infants infected with HIV by 20 per cent, and by 50 per cent by 2010, by ensuring that 80 per cent of pregnant women accessing antenatal care have information, counselling and other HIV-prevention services available to them, increasing the availability of and providing access for HIV-infected women and babies to effective treatment to reduce mother-to-child transmission of HIV, as well as through effective interventions for HIV-infected women, including voluntary and confidential counselling and testing, access to treatment, especially anti-retroviral therapy and, where appropriate, breast-milk substitutes and the provision of a continuum of care;

Care, support and treatment

Care, support and treatment are fundamental elements of an effective response

55. By 2003, ensure that national strategies, supported by regional and international strategies, are developed in close collaboration with the international community, including Governments and relevant intergovernmental organizations, as well as with civil society and the business sector, to strengthen health-care systems and address factors affecting the provision of HIV-related drugs, including anti-retroviral drugs, inter alia, affordability and pricing, including differential pricing, and technical and health-care system capacity. Also, in an urgent manner make every effort to provide progressively and in a sustainable manner, the highest attainable standard of treatment for HIV/AIDS, including the prevention and treatment of opportunistic infections, and effective use of quality-controlled anti-retroviral therapy in a careful and monitored manner to improve adherence and effectiveness and reduce the risk of developing resistance; and **to** cooperate constructively in strengthening pharmaceutical policies and practices, including those applicable to generic drugs and intellectual property regimes, in order further to promote innovation and the development of domestic industries consistent with international law;

56. By 2005, develop and make significant progress in implementing comprehensive care strategies to: strengthen family and community-based care, including that provided by the informal sector, and health-care systems to provide and monitor treatment to people

living with HIV/AIDS, including infected children, and to support individuals, households, families and communities affected by HIV/AIDS; and improve the capacity and working conditions of health-care personnel, and the effectiveness of supply systems, financing plans and referral mechanisms required to provide access to affordable medicines, including anti-retroviral drugs, diagnostics and related technologies, as well as quality medical, palliative and psychosocial care;

57. By 2003, ensure that national strategies are developed in order to provide psychosocial care for individuals, families and communities affected by HIV/AIDS;

HIV/AIDS and human rights

Realization of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS

Respect for the rights of people living with HIV/AIDS drives an effective response

58. 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;

59. By 2005, bearing in mind the context and character of the epidemic and that, globally, women and girls are disproportionately affected by HIV/AIDS, develop and accelerate the implementation of national strategies that promote the advancement of women and women's full enjoyment of all human rights; promote shared responsibility of men and women to ensure safe sex; and empower women to have control over and decide freely and responsibly on matters related to their sexuality to increase their ability to protect themselves from HIV infection;

60. By 2005, implement measures to increase capacities of women and adolescent girls to protect themselves from the risk of HIV infection, principally through the provision of health care and health services, including for sexual and reproductive health, and through prevention education that promotes gender equality within a culturally and gender-sensitive framework;

61. By 2005, ensure development and accelerated implementation of national strategies for women's empowerment, the promotion and protection of women's full enjoyment of all human rights and reduction of their vulnerability to HIV/AIDS through the elimination of all forms of discrimination, as well as all forms of violence against women and girls, including harmful traditional and customary practices, abuse, rape and other forms of sexual violence, battering and trafficking in women and girls;

Reducing vulnerability

The vulnerable must be given priority in the response

Empowering women is essential for reducing vulnerability

62. By 2003, in order to complement prevention programmes that address activities which place individuals at risk of HIV infection, such as risky and unsafe sexual behaviour and injecting drug use, have in place in all countries strategies, policies and programmes that identify and begin to address those factors that make individuals particularly vulnerable to HIV infection, including underdevelopment, economic insecurity, poverty, lack of empowerment of women, lack of education, social exclusion, illiteracy, discrimination, lack of information and/or commodities for self-protection, and all types of sexual exploitation of women, girls and boys, including for commercial reasons. Such strategies,

policies and programmes should address the gender dimension of the epidemic, specify the action that will be taken to address vulnerability and set targets for achievement;

63. By 2003, develop and/or strengthen strategies, policies and programmes which recognize the importance of the family in reducing vulnerability, inter alia, in educating and guiding children and take account of cultural, religious and ethical factors, to reduce the vulnerability of children and young people by ensuring access of both girls and boys to primary and secondary education, **including HIV/AIDS** in curricula for adolescents; ensuring safe and secure environments, especially for young girls; expanding good-quality, youth-friendly information and sexual health education and counselling services; strengthening reproductive and sexual health programmes; and involving families and young people in planning, implementing and evaluating HIV/AIDS prevention and care programmes, to the extent possible;

64. By 2003, develop and/or strengthen national strategies, policies and programmes, supported by regional and international initiatives, as appropriate, through a participatory approach, to promote and protect the health of those identifiable groups which currently have high or increasing rates of HIV infection or which public health information indicates are at greatest risk of and most vulnerable to new infection as indicated by such factors as the local history of the epidemic, poverty, sexual practices, drug-using behaviour, livelihood, institutional location, disrupted social structures and population movements, forced or otherwise;

Children orphaned and made vulnerable by HIV/AIDS

Children orphaned and affected by HIV/AIDS need special assistance

65. By 2003, develop and by 2005 implement national policies and strategies to build and strengthen governmental, family and community capacities to provide a supportive environment for orphans and girls and boys infected and affected by HIV/AIDS, including by providing appropriate counselling and psychosocial support, ensuring their enrolment in school and access to shelter, good nutrition and health and social services on an equal basis with other children; and protect orphans and vulnerable children from all forms of abuse, violence, exploitation, discrimination, trafficking and loss of inheritance;

66. Ensure non-discrimination and full and equal enjoyment of all human rights through the promotion of an active and visible policy of de-stigmatization of children orphaned and made vulnerable by HIV/AIDS;

67. Urge the international community, particularly donor countries, civil society, as well as the private sector, to complement effectively national programmes to support programmes for children orphaned or made vulnerable by HIV/AIDS in affected regions and in countries at high risk and to direct special assistance to sub-Saharan Africa;

Alleviating social and economic impact

To address HIV/AIDS is to invest in sustainable development

68. By 2003, evaluate the economic and social impact of the HIV/AIDS epidemic and develop multisectoral strategies to address the impact at the individual, family, community and national levels; develop and accelerate the implementation of national poverty eradication strategies to address the impact of HIV/AIDS on household income, livelihoods and access to basic social services, with special focus on individuals, families and communities severely affected by the epidemic; review the social and economic impact of HIV/AIDS at all levels of society, especially on women and the elderly, particularly in their role as caregivers, and in families affected by HIV/AIDS, and address their special needs; and adjust and adapt economic and social development policies, including social protection policies, to address the impact of HIV/AIDS on economic growth, provision of essential economic services, labour productivity, government revenues, and deficit-creating pressures on public resources;

69. By 2003, develop a national legal and policy framework that protects in the workplace the rights and dignity of persons living with and affected by HIV/AIDS and those at the greatest risk of HIV/AIDS, in consultation with representatives of employers and workers, taking account of established international guidelines on HIV/AIDS in the workplace;

Research and development

With no cure for HIV/AIDS yet found, further research and development is crucial

70. Increase investment in and accelerate research on the development of HIV vaccines, while building national research capacity, especially in developing countries, and especially for viral strains prevalent in highly affected regions; in addition, support and encourage increased national and international investment in HIV/AIDS-related research and development, including biomedical, operations, social, cultural and behavioural research and in traditional medicine to improve prevention and therapeutic approaches; accelerate access to prevention, care and treatment and care technologies for HIV/AIDS (and its associated opportunistic infections and malignancies and sexually transmitted diseases), including female-controlled methods and microbicides, and in particular, appropriate, safe and affordable HIV vaccines and their delivery, and to diagnostics, tests and methods to prevent mother-to-child transmission; improve our understanding of factors which influence the epidemic and actions which address it, inter alia, through increased funding and public/private partnerships; and create a conducive environment for research and ensure that it is based on the highest ethical standards;

71. Support and encourage the development of national and international research infrastructures, laboratory capacity, improved surveillance systems, data collection, processing and dissemination, and the training of basic and clinical researchers, social scientists, health-care providers and technicians, with a focus on the countries most affected by HIV/AIDS, particularly developing countries and those countries experiencing or at risk of a rapid expansion of the epidemic;

72. Develop and evaluate suitable approaches for monitoring treatment efficacy, toxicity, side effects, drug interactions and drug resistance, and develop methodologies to monitor the impact of treatment on HIV transmission and risk behaviours;

73. Strengthen international and regional cooperation, in particular North-South, South-South and triangular cooperation, related to the transfer of relevant technologies suitable to the environment in the prevention and care of HIV/AIDS, the exchange of experiences and best practices, researchers and research findings and strengthen the role of UNAIDS in this process. In this context, encourage ownership of the end results of these cooperative research findings and technologies by all parties to the research, reflecting their relevant contribution and dependent upon their providing legal protection to such findings; and affirm that all such research should be free from bias;

74. By 2003, ensure that all research protocols for the investigation of HIV-related treatment, including anti-retroviral therapies and vaccines, based on international guidelines and best practices, are evaluated by independent committees of ethics, in which persons living with HIV/AIDS and caregivers for anti-retroviral therapy participate;

HIV/AIDS in conflict and disaster-affected regions

Conflicts and disasters contribute to the spread of HIV/AIDS

75. By 2003, develop and begin to implement national strategies that incorporate HIV/AIDS awareness, prevention, care and treatment elements into programmes or actions that respond to emergency situations, recognizing that populations destabilized by armed conflict, humanitarian emergencies and natural disasters, including refugees, internally displaced persons, and in particular women and children, are at increased risk of exposure to HIV infection; and, where appropriate, factor HIV/AIDS components into international assistance programmes;

76. Call on all United Nations agencies, regional and international organizations, as well as non-governmental organizations involved with the provision and delivery of international

assistance to countries and regions affected by conflicts, humanitarian crises or natural disasters, to incorporate as a matter of urgency HIV/AIDS prevention, care and awareness elements into their plans and programmes and provide HIV/AIDS awareness and training to their personnel;

77. By 2003, have in place national strategies to address the spread of HIV among national uniformed services, where this is required, including armed forces and civil defence forces, and consider ways of using personnel from these services who are educated and trained in HIV/AIDS awareness and prevention to assist with HIV/ AIDS awareness and prevention activities, including participation in emergency, humanitarian, disaster relief and rehabilitation assistance;

78. By 2003, ensure the inclusion of HIV/AIDS awareness and training, including a gender component, into guidelines designed for use by defence personnel and other personnel involved in international peacekeeping operations, while also continuing with ongoing education and prevention efforts, including pre-deployment orientation, for these personnel;

Resources

The HIV/AIDS challenge cannot be met without new, additional and sustained resources

79. Ensure that the resources provided for the global response to address HIV/AIDS are substantial, sustained and geared towards achieving results;

80. By 2005, through a series of incremental steps, reach an overall target of annual expenditure on the epidemic of between 7 and 10 billion United States dollars in low and middle-income countries and those countries experiencing or at risk of experiencing rapid expansion for prevention, care, treatment, support and mitigation of the impact of HIV/AIDS, and take measures to ensure that the resources needed are made available, particularly from donor countries and also from national budgets, bearing in mind that resources of the most affected countries are seriously limited;

81. Call on the international community, where possible, to provide assistance for HIV/AIDS prevention, care and treatment in developing countries on a grant basis;

82. Increase and prioritize national budgetary allocations for HIV/AIDS programmes as required, and ensure that adequate allocations are made by all ministries and other relevant stakeholders;

83. Urge the developed countries that have not done so to strive to meet the targets of 0.7 per cent of their gross national product for overall official development assistance and the targets of earmarking 0.15 per cent to 0.20 per cent of gross national product as official development assistance for least developed countries as agreed, as soon as possible, taking into account the urgency and gravity of the HIV/AIDS epidemic;

84. Urge the international community to complement and supplement efforts of developing countries that commit increased national funds to fight the HIV/AIDS epidemic through increased international development assistance, particularly those countries most affected by HIV/AIDS, particularly in Africa, especially in sub-Saharan Africa, the Caribbean, countries at high risk of expansion of the HIV/AIDS epidemic and other affected regions whose resources to deal with the epidemic are seriously limited;

85. Integrate HIV/AIDS actions in development assistance programmes and poverty eradication strategies as appropriate, and encourage the most effective and transparent use of all resources allocated;

86. Call on the international community, and invite civil society and the private sector to take appropriate measures to **help to** alleviate the social and economic impact of HIV/AIDS in the most affected developing countries;

87. Without further delay, implement the enhanced Heavily Indebted Poor Country (HIPC) Initiative and agree to cancel all bilateral official debts of HIPC countries as soon as possible, especially those most affected by HIV/AIDS, in return for demonstrable commitments by them to poverty eradication, and urge the use of debt service savings to

finance poverty eradication programmes, particularly for prevention, treatment, care and support for HIV/AIDS and other infections;

88. Call for speedy and concerted action to address effectively the debt problems of least developed countries, low-income developing countries, and middle-income developing countries, particularly those affected by HIV/AIDS, in a comprehensive, equitable, development-oriented and durable way through various national and international measures designed to make their debt sustainable in the long term and thereby to improve their capacity to deal with the HIV/AIDS epidemic, including, as appropriate, existing orderly mechanisms for debt reduction, such as debt swaps for projects aimed at the prevention, care and treatment of HIV/AIDS;

89. Encourage increased investment in HIV/AIDS-related research nationally, regionally and internationally, in particular for the development of sustainable and affordable prevention technologies, such as vaccines and microbicides, and encourage the proactive preparation of financial and logistic plans to facilitate rapid access to vaccines when they become available;

90. Support the establishment, on an urgent basis, of a global HIV/AIDS and health fund to finance an urgent and expanded response to the epidemic based on an integrated approach to prevention, care, support and treatment and to assist Governments, inter alia, in their efforts to combat HIV/AIDS with due priority to the most affected countries, notably in sub-Saharan Africa and the Caribbean and to those countries at high risk, and mobilize contributions to the fund from public and private sources with a special appeal to donor countries, foundations, the business community, including pharmaceutical companies, the private sector, philanthropists and wealthy individuals;

91. By 2002, launch a worldwide fund-raising campaign aimed at the general public as well as the private sector, conducted by UNAIDS with the support and collaboration of interested partners at all levels, to contribute to the global HIV/AIDS and health fund;

92. Direct increased funding to national, regional and subregional commissions and organizations to enable them to assist Governments at the national, regional and subregional level in their efforts to respond to the crisis;

93. Provide the UNAIDS co-sponsoring agencies and the UNAIDS secretariat with the resources needed to work with countries in support of the goals of the present Declaration;

Follow-up

Maintaining the momentum and monitoring progress are essential

At the national level

94. Conduct national periodic reviews with the participation of civil society, particularly people living with HIV/AIDS, vulnerable groups and caregivers, of progress achieved in realizing these commitments, identify problems and obstacles to achieving progress, and ensure wide dissemination of the results of these reviews;

95. Develop appropriate monitoring and evaluation mechanisms to assist with follow-up in measuring and assessing progress, and develop appropriate monitoring and evaluation instruments, with adequate epidemiological data;

96. By 2003, establish or strengthen effective monitoring systems, where appropriate, for the promotion and protection of human rights of people living with HIV/AIDS;

At the regional level

97. Include HIV/AIDS and related public health concerns, as appropriate, on the agenda of regional meetings at the ministerial and head of State and Government level;

98. Support data collection and processing to facilitate periodic reviews by regional commissions and/or regional organizations of progress in implementing regional

strategies and addressing regional priorities, and ensure wide dissemination of the results of these reviews;

99. Encourage the exchange between countries of information and experiences in implementing the measures and commitments contained in the present Declaration, and in particular facilitate intensified South-South and triangular cooperation;

At the global level

100. Devote sufficient time and at least one full day of the annual session of the General Assembly to review and debate a report of the Secretary-General on progress achieved in realizing the commitments set out in the present Declaration, with a view to identifying problems and constraints and making recommendations on action needed to make further progress;

101. Ensure that HIV/AIDS issues are included on the agenda of all appropriate United Nations conferences and meetings;

102. Support initiatives to convene conferences, seminars, workshops, training programmes and courses to follow up issues raised in the present Declaration, and in this regard encourage participation in and wide dissemination of the outcomes of the forthcoming Dakar Conference on access to care for HIV infection; the Sixth International Congress on AIDS in Asia and the Pacific; the Twelfth International Conference on AIDS and Sexually Transmitted Infections in Africa; the Fourteenth International Conference on AIDS, Barcelona, Spain; the Tenth International Conference on People Living with HIV/AIDS, Port-of-Spain; the Second Forum and Third Conference of the Horizontal Technical Cooperation Group on HIV/AIDS and Sexually Transmitted Infections in Latin America and the Caribbean, Havana; the Fifth International Conference on Home and Community Care for Persons Living with HIV/AIDS, Chiang Mai, Thailand;

103. Explore, with a view to improving equity in access to essential drugs, the feasibility of developing and implementing, in collaboration with non-governmental organizations and other concerned partners, systems for the voluntary monitoring and reporting of global drug prices;

We recognize and express our appreciation to those who have led the effort to raise awareness of the HIV/AIDS epidemic and to deal with its complex challenges;

We look forward to strong leadership by Governments and concerted efforts with the full and active participation of the United Nations, the entire multilateral system, civil society, the business community and private sector;

And finally, we call on all countries to take the necessary steps to implement the present Declaration, in strengthened partnership and cooperation with other multilateral and bilateral partners and with civil society.

1 See resolution 55/2.

2 Resolution S-24/2, annex, sects. I and III.

3 Resolution S-23/2, annex.

4 Resolution S-23/3, annex.

5 Resolution S-21/2, annex.

Abbreviations

and

acronyms

Important words and phrases

List of abbreviations and acronyms

ACT	AIDS Care Trust
ADR	Alternative Dispute Resolution
AIDS	Acquired Immune Deficiency Syndrome
ALN	AIDS Legal Network
ALP	AIDS Law Project
ALU	AIDS Law Unit, Legal Assistance Centre
AZT	Azidothymidine (an antiretroviral drug)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
HAART	Highly Active Antiretroviral Therapy
HIV	Human Immuno-deficiency Virus
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
ID	Identity Document
LAAN	Life Assurers' Association of Namibia
LAC	Legal Assistance Centre
MCC	Medicines Control Council
MOHSS	Ministry of Health and Social Services
MTCT	Mother-to-child transmission
NACOP	National AIDS Control Programme
Nampol	Namibian Police
NDF	Namibian Defence Force
NGO	Non-Governmental Organisation
No	Number
PCR	Polymerase Chain Reaction (test)
PEP	Post-Exposure Prophylaxis
SADC	Southern African Development Community
SALC	South African Law Commission
STI	Sexually Transmitted Infection
TAC	Treatment Action Campaign
TB	Tuberculosis
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	United Nations Joint Programme on AIDS
USA	United States of America
WHO	World Health Organisation
WTO	World Trade Organisation

List of important words and phrases

Act	A law made by Parliament, for example the Combating of Rape Act.
"affected" by HIV or AIDS	A person who is infected with HIV or AIDS, or the family and friends of such a person.
Affidavit	A written statement, made under oath, and signed in front of a commissioner of oaths.
Age of consent	The age at which a person can legally consent to sexual intercourse.
Aggravating factor	A fact that a court takes into consideration that will make sentence heavier.
AIDS	Acquired Immune Deficiency Syndrome, the advanced stage of HIV disease.
AIDS-defining conditions or illnesses	A group of particular medical conditions or illnesses that health care workers use to indicate that a person has developed AIDS. These include certain cancers, brain infections, etc.
AIDS-related illnesses	These are illnesses brought on by a weakened immune system that a person with HIV gets as a result of HIV infection.
Alternative dispute resolution	ADR is used as an alternative to going to court. Options include negotiation or mediation.
Anonymous, unlinked testing	HIV testing without knowing the identity of the person. This is used for research purposes.
Antibodies	The body produces antibodies to fight off infections, such as flu. With HIV, doctors test for HIV antibodies to see if a person has HIV.
Antiretroviral drugs	Drugs used to fight HIV.
Antiretroviral therapy treatment	The treatment used to reduce the quantity of HIV in the blood.
Appeal	A person appeals against a finding made by a court if he or she is unhappy with the result.
Arbitrate	An independent person listens to the parties in a dispute and then decides how to settle the dispute. Courts are not involved in the arbitration process.
Assets	The property and belongings of a person, for example a house or car.
Asymptomatic	The asymptomatic stage of HIV is the stage between initial infection and the signs of illness appearing. This stage can last for up to 8 or 10 years.
Autonomy	A person's right to take decisions about one's own life and body, for example, when to go for an HIV test.

Available resources	The resources that government has to implement programmes and policies, such as social welfare and health services.
Beneficiary	The person who is an heir in a will; a person who inherits something from the person who died.
Best interests of the child	This is the standard used internationally to decide what is most beneficial to a child. For example, courts often have to decide which parent should be given the custody of the child after a divorce, based on the best interests of the child.
Bill	A bill is a draft law that goes to parliament where it is discussed until it is accepted and passed into law. The Domestic Violence Bill is an example.
Bill of Rights	The list of human rights in Chapter 3 of the Constitution.
Bisexual	A bisexual person is physically and emotionally attracted to members of his or her own sex and to members of the opposite sex.
Breach	To break a contract by not fulfilling all the obligations under the contract, or the failure to respect a person's right to confidentiality.
Capacity	The ability to do something. For example, the ability to work or to make decisions about one's life.
CD4 cell count	The number of CD4 cells in a person's blood indicate the extent to which HIV has damaged the person's immune system. If a person's CD4 count is less than 200, he or she clinically has AIDS.
Civil claim/case	This the type of case a person makes when she or he claims damages from another person or institution for financial loss (for example, breach of contract), or for other damages (for example when a doctor tests a person without their consent).
Civil law	Civil law regulates the relationship between people and organisations. For example, the rights and obligations flowing from a contract are part of civil law.
Clinical trial	During a clinical trial, researchers study the effects and side-effects of new medication on people. There are clinical trials to determine whether HIV/AIDS vaccines or microbicides are effective.
Coercive circumstance	Coercive circumstances often influence a person to do something they would not have done voluntarily and of their own free will. For example, force, threats or physical assault are coercive circumstances.
Collective agreements	Employers and trade unions in an industry can make a collective agreement that will regulate employer-employee relationships in the particular industry.
Commissioner of oaths	A person authorised by law to witness another person making a statement under oath. Legal practitioners, bank managers, police officials and clerks of the court are examples of commissioners of oaths.

Common law	This is law not made by Parliament. These laws come from Roman-Dutch or English law. Parliament can, however, change the common law.
Communicable disease	A disease which is spread by human contact, for example, tuberculosis.
District labour court	It is a court that can hear labour cases between an employer and an employee. Magistrates' courts are also district labour courts.
Community of property	When people are married in community of property, they share the property that is brought into the marriage and the property that they acquire during the marriage.
Compulsory licensing	Government can issue a licence that allows a manufacturer other than the patent-holder to make a product (such as medication) that is still under patent.
Conciliation	Parties in a dispute try to resolve a dispute through ?????????
Confidentiality	Keeping information private, like a person's medical information.
Consent	To agree, or to give permission for something to be done, for example when a person allows a doctor to tell other doctors that he or she is HIV-positive.
Constitution	The highest law in the country. All of our laws must be in line with the Constitution.
Constitutional	An act or action is constitutional if it follows the Constitution. A Constitutional law is a law relating to the Constitution. It also refers to court cases dealing with the Constitution.
Contraception	People use contraception to prevent pregnancy. Also called birth control. Examples of contraceptive devices are the pill and condoms.
Contract	A written or oral agreement between people which results in rights and duties for the parties to the contract.
Correctional supervision	Instead of going to jail or paying a fine, a person may be sentenced by a court to do something under strict supervision, such as community service. Failure to comply will result in the person being sent to jail.
Criminal charge	This is a complaint to the police about a crime that has been committed. For example, if one person assaults another person, the person who was assaulted can lay a criminal charge with the police.
Criminalise	To make something illegal. For example, prohibiting the sale of certain medication without a prescription from a medical doctor.
Criminal law	The common law and statute laws that deal with crimes. For example, theft and rape are dealt with under the Combating of Rape Act.
Culpable homicide	The unlawful and negligent killing of another person. For example, driving too fast and causing an accident in which somebody dies.

Curator	A curator is appointed by the court to look after a person (or that person's affairs) if she or he cannot do so due to mental illness.
Customary law	The laws governing the relations between members of a traditional community. They are determined by the customs or traditions of the people. Customary law can be verbal or written.
Damages	The compensation a person can claim when something has harmed them. The harm may be financial (in the case of a contract), take the form of pain and suffering, or loss of support when the breadwinner in a family is killed.
Deceased	The person who has died.
Decriminalise	To cancel the laws that make something illegal. For example, to change the legislation so that sex work is no longer a crime.
Dependant/s	People who rely on someone else for financial support. For example, the children and the spouse of a person are her or his dependants.
Diagnose	To find out what is wrong with a sick person, ie to find out that a person has high blood pressure.
Disability	A certain condition that prevents a person from doing a particular thing. Being blind is a disability.
Disclose	To share a patient's private information with other people.
Discrimination	Treating a person differently (usually unfairly) for some reason such as race or religion.
Dispute	A disagreement between people. For example, a dispute over the interpretation of a contract.
Enforce	To take steps to protect rights. Police enforce the law by making sure that we comply with the law.
Epidemic	A large outbreak of a disease is called an epidemic, such as the HIV/AIDS epidemic.
Equality	People being treated equally by the law.
Estate	Everything that a person owns. For example, a house, a car, money and insurance policies.
Ethical guidelines	Rules or principles decided upon by a professional body that guide the professional conduct of its members. Examples are the ethical rules of legal practitioners, nurses and doctors.
Exclusion clause	A clause in an insurance contract by which the insurance company tries to exclude its liability when a certain thing happens, such as when a person becomes HIV-positive or dies as a result of suicide.

Executor	The Master of the High Court appoints an executor to make sure that a deceased's estate is divided and distributed according to the deceased person's will, or according to the laws of intestate succession.
Expose/exposure	Being in contact with HIV where there is a possibility of infection, for example during unprotected sexual intercourse with a person who has HIV or AIDS.
Euthanasia	Assisting a very sick person with no hope of recovery to die by switching off life-support systems or by not giving treatment that would prolong life.
Foreign law	The laws and judgments of other countries which are used to help our courts interpret Namibian laws.
Foster care/ fostering	This happens when a person other than the parents or guardian of a child looks after the child for a short period of time, following a decision by the children's court that the child is in need of care.
Fraudulent	A person acts fraudulently when he or she lies or intentionally misstates a fact in order to get certain benefits or advantages. For example, if a person were to lie about their medical history when applying for insurance.
Fundamental rights	The human rights contained in the Bill of Rights.
Gay	A gay man is physically and emotionally attracted to other men. Gay can also refer to women who are attracted to other women. Gays and lesbians are also referred to as homosexuals.
General power of attorney	A document authorising a person to act on your behalf in respect of various things like paying bills, signing lease agreements and writing cheques.
Generic drugs/ medication	Generic drugs are copies of patented drugs. They are cheaper than the patented medication.
Generic substitution	When patented medication is replaced with generic medication.
Guardian(ship)	A guardian looks after a child when the parents can no longer do so, either because they have died, or because of the parents' mental or physical condition. A court appoints a guardian. Guardianship ends when a person reaches 21 years of age.
Heterosexual	When women are physically and emotionally attracted to men, or when men are physically and emotionally attracted to women.
High Court	The High Court of Namibia
Highly active Antiretroviral Therapy (HAART)	Another name for antiretroviral therapy – one treatment to fight HIV by taking combinations of antiretroviral drugs.
Human Immunodeficiency	A virus that attacks the body's immune system and which can eventually lead to AIDS.

Virus (HIV)	
HIV disease	When people with HIV have illnesses which are not regarded as AIDS-defining conditions, or when they no longer have AIDS after taking antiretroviral therapies.
HIV-negative	A person who has tested negative for HIV.
HIV-positive	A person who has tested positive for HIV.
HIV-related illnesses	These illnesses are brought on by HIV weakening the body's immune system.
HIV status	HIV status refers to whether a person is HIV-positive or -negative.
HIV transmission	The passing of HIV from one person to another.
Homophobia	Fear of or negative feelings towards gay men and lesbians because of their sexual orientation.
Homosexual	People who are physically and emotionally attracted to members of their own sex.
Illegal	Against the law.
Immune system	The body uses its immune system to fight off illnesses and infections.
Incapacity/ incapacitated	Being unable to work or do something due to a serious physical or mental illness.
Indemnity insurance	Also called short-term insurance. A person takes out indemnity insurance to protect themselves from something happening. For example, one takes out car insurance to protect oneself from the cost of replacing a stolen car or repairing a damaged car.
Inequality	When people are not treated equally by the law.
Informed choice	Making a decision after having considered all the options and the consequences of that decision, for example whether to have children or not when HIV-positive.
Informed consent	Agreeing to something after having considered all the information needed to make the decision.
Inherent requirements	The specific abilities and training a person must have to do a particular job. For example, a driver's licence is an inherent requirement to be employed as a driver.
Insurance	A contract between a person and an insurance company in which the insurance company agrees to pay out some money if a particular event happens, in exchange for the payment of premiums by the person who takes out the insurance.
Insured	The person who takes out insurance.

Insurer	The company who gives the insurance.
Intellectual property	Intellectual property covers new inventions such as medicines and equipment, new music, books and films.
Intent/intentional	Doing something deliberately, knowing what the consequences of the action will be.
Interdict	A court order, usually to stop someone from doing something. For example, to stop one person from harassing another person.
International law	The law that regulates the conduct of States. These are often expressed in international customary law and in treaties between States, like the *Convention on the Rights of the Child*.
Intestate	A person dies intestate if the person dies without leaving a valid will.
Invalid	Something that is not allowed by the law.
Judgment	The decision of a court.
Justification	The legal reason for a particular act.
LAAN	Life Assurers' Association of Namibia. All the insurance companies that provide life insurance in Namibia belong to this association.
Labour court	The court that hears labour cases.
Lawful	Allowed by the law, or legal.
Law Society of Namibia	The professional body that regulates the work of legal practitioners in Namibia.
Lay counsellors	People who are not professionally qualified, but who use their knowledge and experience to advise and counsel others.
Legal capacity	The ability to make legal decisions or to take legal action that will be recognised by the law.
Legal guardian	A person who is appointed to look after a child in the place of a parent.
Legal remedies	Methods allowed by the law to address violations of rights. For example, sueing a hospital for medical negligence.
Lesbian	A woman who is physically and emotionally attracted to other women.
Liable/liability	Legally responsible for something.
Life assurance/ insurance	Insurance taken out to provide a sum of money to the beneficiaries of an insurance policy in the event of the insured's death.
Life Offices' Association (LOA)	The umbrella body of life insurance companies in South Africa
Life Register	A register kept by the Life Offices' Association of people who have been refused insurance for various reasons, such as HIV infection or having some

	other life-threatening condition. Some Namibian life insurance companies make use of the Life Register.
Limiting/ limitation of rights	Rights are not unlimited. They are limited by the law or by the rights of others. The right to privacy does not allow a person to abuse women and children in their own home.
Listed grounds	The prohibited grounds of discrimination mentioned in the Constitution and the Labour Act. These include sex, race and religion.
Living will	A document written when a person is healthy in which he or she indicates what should be done when they are too sick to take decisions. For example, a person can state that she does not want to be kept alive by a life support system.
Living with HIV/AIDS	A person is living with HIV or AIDS if they test HIV-positive, or have developed AIDS. A sensitive way of describing people who have HIV or AIDS.
Marginalised	People who are marginalised do not take part in the mainstream activities of society. Gays and lesbians are members of marginalised groups.
Master	An official who ensures that the estates of people are finalised after their death in accordance with the wishes of the testator in the will or in the absence of a valid will, according to the rules of intestate succession.
Means test	A formula used to work out whether a person qualifies for social welfare grants or legal aid. It is normally based on a person's income and assets.
Mediation	When a third person is requested by parties in a dispute to see whether the dispute can be resolved with the assistance of that third person.
Medical treatment	Treatment for an illness or injury, administered by a doctor or a nurse.
Medicines Control Council (MCC)	The MCC has to approve and register medicines before they can be lawfully sold in Namibia.
Mentally incompetent	A person who is mentally unable to manage his or her personal and financial affairs.
Microbicide	A substance that can be put into the vagina or anus to kill HIV or the bacteria that cause other sexually transmitted infections. Researchers are working on microbicides that will prevent HIV infection.
Mitigating factor	A reason for a magistrate or a judge to give a lighter sentence. For example, the difficult personal circumstances of the convicted person.
Mother-to-child transmission (MTCT)	Passing HIV from an infected mother to her baby during pregnancy or through breastmilk.
Negligence	When you do something wrong by mistake (or due to carelessness). For example, not practising safer sex to protect yourself against HIV transmission.

Negotiation	Trying to resolve a dispute by discussing it amongst all the parties to the dispute.
Next-of-kin	Closest family: a spouse, a partner or one's parents.
Non-consensual	Without consent or agreement.
Non-disclosure	Not revealing or telling something.
Non-discrimination	Treating all people the same way.
Non-indemnity insurance	Also called life insurance. The insurance company agrees to pay a certain amount in the event of the death of the insured person.
Notifiable disease	Some diseases, like smallpox, must be reported to the authorities. This helps to prevent the spread of the disease.
Off-patent	When the patent on a particular product (such as medication) expires after 20 years, other companies may manufacture and sell the product. The copies of the medication are called generic medication, or generic medicines.
Ombudsman	An appointment created by the Constitution to ensure respect for human rights in Namibia.
Opportunistic infection	Because of the damage caused to the immune system by HIV, some infections and illnesses take hold very easily. These are called opportunistic infections.
Oppression	When laws and social rules discriminate against some people, we say that such people are oppressed.
Out-of-court settlement	Coming to an agreement to resolve a dispute without going to court.
Paralegals	People who are not qualified as legal practitioners but who have some legal training which they use to educate and assist their communities.
Parallel importing	When a government buys a patented medicine (for example an HIV/AIDS drug) from a distributor in another country at a cheaper price than the price offered by the local patent-holder to the government.
Parental power	The power a parent has to represent his or her child and to make decisions on behalf of the child.
Patent	The legal protection given exclusively to the holder of a patent to make and distribute patented products. It is unlawful to manufacture or sell such products without the permission of the patent-holder.
PCR test	This test directly detects HIV in the body without having to wait for antibodies to develop. This test is much quicker than HIV antibody tests.
Personality rights	The rights covering a person's personality and body. For example, the right to privacy or the right not to be damaged in reputation.

Polygyny	A system which allows men to marry more than one wife.
Post-exposure prophylaxis (PEP)	An antiretroviral therapy taken within 72 hours of being exposed to HIV to prevent HIV infection. For example, PEP has to be taken for 28 days after a needle-stick injury or being raped.
Post-test counselling	Counselling which takes place after an HIV test. During post-test counselling, the results are given to the person who was tested, and the implications of the results are discussed with the person.
Power of Attorney	A legal document authorising somebody specific to represent a person in financial and other dealings.
Pre-employment testing for HIV	Some employers want to test applicants for HIV before offering them a job. This is unlawful unless allowed by a specific law or unless HIV-negative status is an inherent requirement of the job.
Prejudice	A negative opinion formed about other people often before actually having met them, often based on skin colour, sexual orientation or religious beliefs.
Premium	The money paid to an insurance company every month to provide insurance cover to the insured person.
Presumption	A legal rule that accepts something as the truth, even without proving it. For example, there is a presumption that a child under 7 years of age is not criminally responsible for a crime that he or she may commit.
Pre-test counselling	Counselling done before an HIV test, during which the test, the need for the test and the possible consequences of the results of the test are discussed.
Privacy	The right to keep personal information private and to have personal space in which a person can feel safe, such as in one's own home.
Progressive realisation	Giving effect to rights over a period of time. For example, giving effect to the provisions of the *International Covenant on Economic, Social and Cultural Rights*. This means that the government has to start impementing it in some way, perhaps by drafting policies or enacting legislation.
Protection order	A special interdict or court order to stop domestic violence; to become effective once the Domestic Violence Bill becomes law.
Public sector/service	Government services and administration.
Qualified rights	The availability of resources has an impact on whether qualified rights are fully realised. For example, the right to housing and adequate health care depend on whether the government has enough money to provide housing and health care services.
Rape	Intentionally having sexual intercourse with another person or causing someone else to have sex under coercive circumstances. Both women and men can be the victims or the perpetrators of rape.

Ratify	Ratification usually takes place after a country has signed the agreement thus formally agreeing to be bound by the obligations of the agreement.
Reasonable accommodation	Attempts by an employer to provide alternative employment for an employee when that employee becomes too sick to do his or her usual work.
Reinstatement	When a court orders an employer to re-employ a dismissed employee in the same position and at the same salary.
Reproductive health	Health care focusing on the reproductive system of the body, which includes the sexual organs and the parts of the body used for giving birth.
Review	The court process of examining the procedures followed by another court or another body, such as the Medical Board, to determine if the hearing was fair and whether the correct procedures were followed.
Safer sex	Using a condom when having sex, or not having penetrative sex (not inserting the penis into the vagina or anus of another person). These practices have little or no risk of HIV transmission. Safer sex practices reduce the risk of infection by other sexually transmissible infections and help to prevent pregnancy.
Same-sex relationship	Referring to the relationship or sexual activity between people of the same sex. For example, a relationship between two men.
Segregation	Forced separation of people. For example, separating people with HIV or AIDS from other patients in a clinic.
Sero-conversion	Changing from being HIV-negative to being HIV-positive.
Sexuality education	Teaching children (or adults) about issues like human sexuality, gender and sexual orientation. Includes education about safer sex to prevent the spread of HIV and sexually transmitted infections.
Sexual orientation	The way in which people express their sexuality: whether heterosexual, homosexual or bisexual.
Social assistance	Government support for people who cannot look after themselves because of age, illness or injury.
Social security	Includes social assistance (like disability grants and foster parent grants) and social insurance (like contributions to the Maternity and Sick Leave Fund under the Social Security Act).
Socio-economic rights	Social and economic rights, such as the right to the highest possible standard of living and the right to housing.
Sodomy	When two men have anal sex with each other. This is a crime under the common law.
Special Power of Attorney	A document giving another person the authority to do a specific task, such as to sell a person's house on their behalf.

Specific performance	Giving effect to the undertakings in a contract. For example, to build a road from A to Z in accordance with the contract.
Spouse	Husband or wife.
Status	The position of a person in society or in a community. For example, knowledge of a child's status (as a minor or an adult) is important to determine what that person's rights and obligations are under the law.
Statute (law)	Laws made by Parliament, for example the Combating of Rape Act.
Statutory bodies	Institutions or organisations that are created by statute, such as the Medical Board or the Nursing Board. These bodies have legal powers to do certain things, for example, to discipline their members.
Stigma	Negative views of particular persons or groups of people. People living with HIV or AIDS are often stigmatised.
Succession	The laws that regulate what happens with a person's assets (property and money) after her or his death.
Sue	Make a civil case against someone.
Symptoms	Signs of illness.
Terminally ill	When someone is in an advanced stage of illness and there is little likelihood of them recovering from the illness.
Testator	The person who writes a will.
Transgendered	People who have a male and female gender identity.
Transmit/ transmission	To pass something on to another person. For example, to infect another person with HIV.
TRIPS Agreement	An international agreement to protect intellectual property. Under the TRIPS Agreement, patents are protected for a period of 20 years, making it unlawful to sell copies of the patented items or medication.
Unconstitutional	Something that is not in line with the Constitution.
Unfair discrimination	Treating someone differently without a fair and valid reason. For example, not giving certain benefits to a person with HIV.
Unfair dismissal	Dismissing a person without a valid reason and without following the proper procedures.
Universal precautions	Steps that can be taken to protect health care workers and other people against being infected with viruses such as HIV. These include receiving proper information and training and the provision of latex gloves, masks, disinfectant and other materials to protect a person from direct contact with bodily fluids.
Unlawful	Something is unlawful if the law does not allow it. For example, it is unlawful to break into someone's house.

Unqualified rights	Rights that do not depend on available resources, such as the right to free primary education.
Vaccine	A medicine that helps the immune system to recognise and protect itself against a virus or disease. For example, smallpox or polio vaccines.
Valid	Recognised by law.
Victimise	To pick on a person or to single them out for cruel or unfair treatment.
Violate	To abuse or have no respect for a person's rights or the law. For example, to violate the right to life.
Viral load	A measure of the amount of HIV in a person's blood.
Voluntary testing	When a person goes for an HIV test of their own free will.
Vulnerable	When someone is open to or at risk of abuse, discrimination or exploitation.
Will	A legal document in which the testator indicates what should happen to her or his assets when they die.

Window period The period of time between being infected with HIV and testing HIV-positive. This can take anything from two weeks to six months.

Statutes

Policy documents

Cases

Reports, manuals and other useful materials

Websites

Contact organisations

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Human Rights Internet: www.hri.ca

International Labour Organisation: www.ilo.org

Lesbian and Gay Equality Project (previously the National Coalition for Gay and Lesbian Equality): www.q.co.za/equality/archive.htm

Life Offices' Association: www.loa.co.za

Medecins Sans Frontieres: www.msf.org

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

Ministry of Labour, go to www.grnnet.gov.na/Contact_Us/Ministries

Ministry of Trade and Industry: www.mti.gov.na

Namibian Police: www.nampol.gov.na

Sex Workers Education and Advocacy Task Force (SWEAT): www.sweat.co.za

South African Law Commission: www.law.wits.ac.za/salc/salc.html

Treatment Action Campaign: www.tac.org.za

UNAIDS: www.unaids.org

United Nations: www.un.org

World Health Organisation: www.who.org

World Trade Organisation: www.wto.org

List of contact organisations

List of Namibian Non-Governmental Organisations

Useful South African contacts

AIDS Consortium

Tel: ++27 11 403 0265
Fax: ++27 11 403 2106
PO Box 31104
BRAAMFONTEIN 2017
SOUTH AFRICA
E-mail: aidscons@global.co.za

AIDS Law Project (ALP)

Tel: ++27 11 717 8600
Fax: ++27 11 403 2341
Centre for Applied Legal Studies
University of Witwatersrand
Private Bag 3
JOHANNESBURG 2050
SOUTH AFRICA
E-mail: alpadm@law.wits.ac.za

AIDS Legal Network (ALN)

Tel: ++27 21 423 9254
Fax: ++27 21 423 0891
PO Box 6358
ROGGEBAAI 8012
SOUTH AFRICA
E-mail: aln@kingsley.co.za

Lesbian and Gay Equality Project

(previously National Coalition for Gay & Lesbian Equality)
Tel: ++27 11 487 3810 or Tel: ++27 11 487 0772 (Gay and Lesbian Legal Advice Centre)
Fax: ++27 11 487 1670
PO Box 27811

YEOVILLE 2143
SOUTH AFRICA
E-mail: admin@ncgle.org.za

National Association of People Living with HIV/AIDS (NAPWA)
NAPWA – National Office
Tel: ++27 11 872 0975
Fax: ++27 11 872 1343
SOUTH AFRICA

Treatment Action Campaign (TAC)
Tel: ++27 21 364 5489
Fax: ++27 21 361 7051
Town One Properties
Sulami Drive Site B
KHAYELITSHA 7784
SOUTH AFRICA