

MEDIA STATEMENT BY THE SOUTH AFRICAN LAW COMMISSION ON ITS INVESTIGATION INTO ASPECTS OF THE LAW RELATING TO AIDS

(PROJECT 85) - PRE-EMPLOYMENT HIV TESTING AND HIV/AIDS AND DISCRIMINATION IN SCHOOLS

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On 6 May 1998 the South African Law Commission submitted two interim reports on aspects of the law relating to AIDS to the Minister of Justice. The Commission has been assisted in this task by a project committee representative of divergent interests under the leadership of Mr Justice Edwin Cameron.

The reports (the Commission's Second and Third Interim Reports on Aspects of the Law relating to AIDS) deal with pre-employment HIV testing, and with HIV/AIDS and discrimination in schools respectively. Both reports contain proposals for legislative intervention. The one recommends legislation to prohibit pre-employment testing for HIV, subject to exceptions, while the other recommends the adoption of a national schools policy on AIDS and HIV.

The Commission's First Interim Report on Aspects of the Law relating to AIDS (which was Tabled in Parliament by the Minister of Justice in August 1997) dealt with a limitation on the use of non-disposable syringes, needles, and other hazardous material in health care settings; the implementation, in relevant occupational legislation, of universal precautions in the work place; the statutory implementation of a national compulsory standard for condoms in accordance with international standards; the promulgation of a national policy on testing for HIV infection; and the amendment, finalisation and promulgation of the Draft Regulations Relating to Communicable Diseases and the Notification of Notifiable Medical Conditions, 1993 (which deschedule AIDS as a communicable disease in respect of which certain coercive measures apply mandatorily).

The Second Interim Report deals with the question whether statutory intervention to prohibit pre-employment testing for HIV is warranted.

* There is at present no specific statutory prohibition on pre-employment testing for HIV in our law. There is also no clarity as to the circumstances under which an employer could require an applicant for employment to take an HIV test. The present constitutional and legislative inhibitions on unfair discrimination in general may seem to be sufficient to prevent irrational pre-employment testing for HIV. However, neither the 1996 Constitution nor the Labour Relations Act, 1995 confer unqualified rights and may therefore countenance an employer testing an applicant for employment for HIV. Its review of comparable legal systems, together with a consideration of the current scientific knowledge and the ethical, social and economical issues led the Commission to conclude that legislative

intervention is necessary. This aims to attain the twin objectives of maintaining otherwise healthy persons with HIV in productive employment, and protecting the rights of persons with HIV in the workplace.

* The Commission however accepted comments by the Department of Labour that any proposed legislation regarding a prohibition on pre-employment HIV testing will have to be compatible with the broader framework of existing and prospective labour legislation administered by that Department. The Commission also accepted a proposal by the Department to work towards integrating any legislative proposals into the Department's current Employment Equity Bill.

* Since the final formulation of the Employment Equity Bill is subject to the parliamentary process, the Commission has in its interim report accepted certain principles for legislative intervention without making a conclusive recommendation on any specific legislative option for realising these principles. Whether the principles will be realised in the form of a separate statute, or as part of existing or prospective labour legislation, remains open. The Commission offers comment on the latest draft of the Employment Equity Bill available at the time the report was prepared and which accommodates the Commission's recommendations in principle. The Commission also enunciates the principles accepted for legislative intervention in a proposed alternative Bill (attached to the interim report). Should it prove to be necessary, a final report on pre-employment HIV testing will be submitted by the Commission.

* Since completion of the interim report and before the Commission approved of it on 17 April 1998, the Department of Labour published the Employment Equity Bill under General Notice 1840 of 1997 in Government Gazette No 18481 of 1 December 1997. The Bill published corresponds with the Draft on which comment is offered in the interim report.

* Principles the Commission recommends for legislative intervention on pre-employment HIV testing are as follows:

+ To create certainty and clarity on the legality or otherwise of HIV testing as a specific form of discrimination in the employment relationship.

+ To prohibit testing where it constitutes unfair discrimination and an unfair labour practice.

+ To balance the rights of persons with HIV and those of employers.

+ To intervene statutorily so as to prohibit HIV testing per se, subject to permissible exceptions.

+ To deal legislatively with both job applicants and existing employees in order to enable the fair allocation of employee benefits.

+ Although the Commission initially aimed for a prohibition on pre-employment HIV testing to cover all employees, it was accepted that, given the framework of existing and prospective labour legislation,

which excludes them, such legislative intervention could not apply easily to the South African National Defence Force, the South African Secret Service, and the National Intelligence Agency.

+ A prohibition on HIV testing in the workplace should not be absolute but should allow for exceptions where testing is allowed under legislation and in certain circumstances where it is deemed to be fair and justifiable. Justification for testing should be based on medical facts, employment conditions, social policy, the fair distribution of employee benefits and the inherent requirements of the particular job. All of these factors should be considered jointly and individually in ascertaining whether testing is fair and justifiable.

+ An intervention should provide a flexible standard to allow for the law to develop in accordance with scientific knowledge, society's understanding of the epidemic, changing socio-economic circumstances, and the possible emergence of new rationales for HIV testing in the work place.

+ In determining whether or not HIV testing should be allowed, both justifiability and fairness need to be taken into account equally.

+ The burden to show that HIV testing under specific circumstances is fair, should rest upon the employer.

+ An impartial forum (such as the Labour Courts created by existing labour legislation) should be available to adjudicate whether HIV testing (or an application to authorise such testing) was fair and justifiable.

+ The Labour Court, in authorising testing for HIV, should be given wide powers. These would include issuing instructions regarding counselling, confidentiality, and information or submissions regarding medical facts, employment conditions, social policy, the inherent requirements of the job and the fair allocation of employee benefits.

+ Judicial appeal procedures should be an integral part of a statutory prohibition.

+ Legislation prohibiting HIV testing in the workplace should be accessible and enforceable.

+ Statutory intervention need not be HIV/AIDS specific.

The Third Interim Report deals with HIV/AIDS and discrimination in schools and recommends that the Minister of Education, under the National Education Policy Act, 1996, determine national policy on HIV/AIDS in schools. A draft national policy for HIV/AIDS in public schools is included in the report.

* Development of the current recommendations follows upon preliminary recommendations by the former Commission in 1995 (Working Paper 58) and on a pronounced need reflected by the well-publicised crisis caused by the application in early 1997 by Nkosi Johnson (an eight-year-old boy with

AIDS), to be admitted to a public school in Johannesburg. The reaction of some members of the public and the apparent absence of a national education policy on this issue, underscored that the practical situation has not improved since 1995. This is despite the fact that the South African Schools Act was passed in 1996, which gave effect to both the spirit and letter of the 1996 Constitution by protecting learners from unfair discrimination and guaranteed them their rights to a basic education and to equal access to public schools.

* The current recommendations were moreover preceded by a Discussion Paper with preliminary proposals distributed for public comment during the latter half of 1997. There was overwhelming support for enacting a national policy on HIV/AIDS for schools. The proposed national policy has been developed by the Commission in close liaison with the Department of Education.

* In the report the Commission confirms its preliminary conclusions that a national policy for HIV/AIDS in schools is urgently required in order to protect learners with HIV from unfair discrimination in the school environment. However, such intervention will have to take into account the rights of all learners and should aim for a fair balance between the rights of learners with HIV and those without HIV.

* The Commission confirms its preliminary view that the policy should apply nationally, that it should prevail over any other policy instrument on HIV/AIDS in public schools, and have children of school going age (including children in the pre-primary phase) as its chief focus. In view of the fact that compliance with the proposed policy cannot otherwise be ensured in the case of independent schools, the Commission recommends that Members of Executive Councils responsible for education should in terms of the South African Schools Act, 1996 make compliance with the policy a condition on which registration of independent schools may be granted.

* The Commission recommends that the national policy should set out broad guidelines in accordance with constitutional principles. In view of the wide variety of circumstances prevailing in South African schools and since the South African Schools Act, 1996 stresses the importance of parent empowerment in the education of their children, it is recommended that a governing body of a school should, in addition, be able to adopt a more specific HIV/AIDS policy at school level to give operational effect to the national policy. The purpose of the school level policy would be to provide a mechanism to express the needs of individual schools and their communities, especially with regard to their ethos and values, within the framework of the national policy's minimum standards and norms. It is intended that the national policy should constitute a set of basic principles from which governing bodies may not deviate.

* In view of the current legal position and the comments received on its preliminary proposals, the Commission included the following basic principles in the draft national policy:

+ Compulsory testing of learners as a prerequisite for admission to any school, or any unfair discriminatory treatment (for instance the refusal of continued school attendance on the basis of the HIV status of the learner), is not justified.

- + However, it is recognised that special measures in respect of learners with HIV may be necessary. These must be fair and justifiable in the light of medical facts, school conditions and the best interests of learners with and without HIV.
- + Learners' rights to privacy are confirmed. Where HIV-related information is disclosed to a member of staff, the policy provides that, except where statutory or other legal authorisation exists, such information may be divulged only with the informed consent of the learner (above the age of 14 years) or in other cases with the consent of his or her parent or guardian.
- + The needs of learners with HIV should, as far as is reasonably practicable, be accommodated within the school environment.
- + "Universal precautions" (standard precautionary measures aimed at the prevention of HIV transmission including instructions concerning basic hygiene and the wearing of protective clothing such as rubber gloves when dealing with blood and body fluids) should be implemented by all schools to exclude effectively the risk of transmission of HIV in the school environment. The policy contains specific provisions on participation in contact sport and contact play.
- + All learners have a right to be educated on HIV/AIDS, sexuality and healthy lifestyles, in order to protect themselves against HIV infection. The policy recognises the need for the involvement - although limited - of parent communities in order to ensure that sexuality education will take into account the community ethos and values. The policy requires that information on HIV/AIDS be given in an accurate and scientific manner.
- + All learners should respect the rights of other learners.
- + A school's governing body should be able to adopt an HIV/AIDS policy at school level to give operational effect to the national policy. This would however have to take place within the framework set by the national policy.

The Second and Third Interim Reports deal only with the matters referred to. Subsequent interim reports will deal with other matters relating to HIV/AIDS identified for reform.

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