

SOUTH AFRICAN LAW COMMISSION

Project 85

**SECOND INTERIM REPORT ON
ASPECTS OF THE LAW RELATING TO AIDS**

PRE-EMPLOYMENT HIV TESTING

April 1998

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To Mr A M Omar, M P, Minister of Justice

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for consideration the Commission=s second interim report on **Aspects of the law relating to AIDS.**

I MAHOMED

Chairperson

April 1998

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The project committee would like to pay particular tribute to the extraordinary dedication to this project, shown by the researcher, Mrs Anna-Marié Havenga.

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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SUMMARY OF RECOMMENDATIONS

1 The interim recommendations in this report are contained in Chapter 8.

2 The Commission 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 the Department. The Commission also accepted a proposal by the Department to work towards integrating its proposals regarding pre-employment HIV testing into the Employment Equity Bill currently being prepared by the Department.

3 In view of the fact that the final formulation of the Employment Equity Bill is subject to the parliamentary process, the Commission has at this stage accepted certain principles for legislative intervention regarding pre-employment HIV testing. The Commission however does not at this stage make a final recommendation on any specific legislative option for realising these principles. The Commission endorses the principles accepted in a proposed Bill (attached as ANNEXURE B) and also offers comment on the latest available draft of the Employment Equity Bill (the 14th Draft) presented to Cabinet.

3.1 In the light of comments received, the Commission reformulated the draft Bill published in Discussion Paper 72 to reflect two significant modifications. First, in accordance with the Department of Labour's approach in the Employment Equity Bill, and in response to pronounced resistance to "AIDS exceptionalism", the revised Bill applies not only to HIV testing but to testing for "any medical condition". It is to be noted however that the mandate of the project committee that prepared the Commission's interim report is limited to research on an investigation concerning HIV/AIDS. The extension of the terms of the Bill to medical conditions generally is therefore not sourced on any specific research undertaken by the project committee. Second, to meet a

concern raised by primarily the business community regarding a reflected desire for clarity on whether HIV testing was permissible in relation to the provision of employee benefits, the revised Bill includes this consideration as an acceptable basis for HIV testing.

3.2 The Commission's comments on the 14th Draft of the Employment Equity Bill are contained in Chapter 8 of this interim report (paragraphs 8.35-8.58). The 14th Draft includes provisions regarding a prohibition on pre-employment HIV testing, the formulation of which has been developed by the Department of Labour in conjunction with the Commission's project committee.

4 The Commission recommends that any legislative intervention regarding pre-employment HIV testing be in accordance with certain principles. Whether they will be realised in the form of a separate statute, or as part of existing or prospective labour legislation, remains open for decision.

5 Principles the Commission recommends for legislative intervention 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 to testing 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 severally 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 is 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 which would include issuing instructions regarding the provision of counselling,

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the maintenance of confidentiality, and eliciting 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.
- + So as to integrate the main opposing argument regarding AIDS exceptionalism, statutory intervention need not be HIV/AIDS specific.

6 After completion of this report and before the Commission finally adopted the report 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 in the Government Gazette corresponds with the 14th Draft of the Bill (attached as ANNEXURE C) and accommodates the recommendations in principle as set out in Chapter 8 of this report. However, the published Bill contains the following relevant editorial changes: additional clauses were inserted between clause 37 and clause 38, and clause 52 and 53 respectively, with a resultant change in numbering of certain clauses referred to in Chapter 8. In addition, the definition of medical "testing" in clause 59 of the 14th Draft has been adapted (refer to clause 61 of the re-numbered and published Bill).

7 A final report on pre-employment HIV testing will be submitted by the Commission, should it prove to be necessary.

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1 INTRODUCTION

- 1.1 The South African Law Commission has been investigating reform of the law affecting AIDS and HIV since 1993. Since then a discussion document (Working Paper 58) was published for general information and comment during 1995. A reconstituted project committee - assisting the Commission in resolving differences of opinion between interest groups reflected in the comments received on Working Paper 58 and in developing final recommendations - decided to adopt an incremental approach to this large and difficult task.
- 1.2 The Commission has already adopted the committee's first interim report (dealing with condom standards; incorporating universal infection control measures in occupational safety regulations; limiting the use of non-disposable syringes; implementing a national policy on HIV testing; and descheduling AIDS from mandatory coercive measures authorised by regulation). The report was tabled in Parliament on 28 August 1997.
- 1.3 In the current interim report, the Commission addresses the question whether statutory intervention to prohibit pre-employment testing for HIV is warranted.
- 1.4 Preliminary proposals regarding this issue were included in a discussion paper (Discussion Paper 72) published for comment during June 1997. Written comments were received from 65 respondents. (A list of commentators is attached as ANNEXURE A.) Although respondents were divided on the issue of prohibiting and regulating pre-employment HIV testing, the majority supported the principle of no pre-employment HIV testing as formulated by the project committee, as well as the statutory enactment of a prohibition as proposed in the Discussion Paper. This formulation included an escape clause to allow for HIV testing of an applicant for employment where such testing is reasonably, justifiably and rationally warranted.

- 1.5 Comments on Discussion Paper 72 are integrated extensively in the interim report. Comments on the principles proposed and on the terms of the proposed Bill to prohibit HIV testing are discussed separately in Chapter 7 and are evaluated in Chapter 8.
- 1.6 The comments received, and a suggestion by the Department of Labour (supporting the preliminary recommendations) that a statutory intervention on pre-employment HIV testing be compatible with present and prospective labour legislation and should preferably be included in the Department's proposed Employment Equity Bill, led to the further development of the preliminary proposals. The Commission has collaborated closely with the Department of Labour on the formulation of such inclusion in the 14th Draft of the Employment Equity Bill which has been submitted for Cabinet approval in November 1997. Since the final formulation of this Bill is subject to the parliamentary process, the Commission accepts certain principles for legislative intervention regarding pre-employment HIV testing in this report, embodies these principles in draft legislation (ANNEXURE B), but in addition offers comment on the 14th Draft of the Employment Equity Bill. However, a final recommendation on any specific legislative option for realising the principles accepted, is not made at this stage. If necessary, this interim report will be followed up by a final report on pre-employment HIV testing.
- 1.7 After completion of this report and before the Commission finally adopted the report 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 in the **Government Gazette** corresponds with the 14th Draft of the Bill (attached as ANNEXURE C) and accommodates the recommendations in principle as set out in Chapter 8 of this report. However, the published Bill contains the following relevant editorial changes: additional clauses were inserted between clause 37 and clause 38, and clause 52 and 53 respectively, with a resultant change in numbering of certain clauses referred to in Chapter 8. In addition, the definition of medical "testing" in clause 59 of the 14th Draft has been adapted (refer to clause 61 of the re-numbered and published Bill).

- 1.8 It is to be noted that this interim report deals only with the issue of HIV testing in the workplace. Subsequent interim reports will deal with other matters identified for reform.

2 BACKGROUND

A) **WHAT ARE HIV AND AIDS?**

2.1 AIDS is an acronym for "acquired immune deficiency syndrome".¹ It is the clinical definition given to the onset of certain life-threatening infections in persons whose immune systems have ceased to function properly.² The condition is "acquired" in the sense that it is not hereditary. AIDS, it is generally accepted, is caused by the human immunodeficiency virus (HIV) which, over a period of years (five to twelve or more) inhibits the cells that usually fight infection.³ HIV attacks and destroys the body's immune system. The body's natural defence mechanism consequently cannot offer resistance to conditions that usually do not involve danger to healthy people. AIDS is a syndrome of symptoms. It is not a specific disease. It is a collection of several conditions that occur as a result of damage the virus causes to the immune system. Persons thus do not die of AIDS. They die of one or more diseases or infections (pneumonia, tuberculosis or certain cancers) that are "opportunistic" because they attack the body when immunity is low. AIDS can therefore be defined as a syndrome of opportunistic diseases, infections and cancers that eventually cause a person's death.

2.2 The genetic material of HIV ("human immunodeficiency virus") becomes a permanent part of the DNA⁴ (the genetic material of all living cells and of certain

¹ This discussion paper presents a relatively simple and synoptic description of HIV/AIDS. South African sources consulted include: **AIDS Unit Strategy** 1991 1-13; Arendse 1991 **ILJ** 218-219; De Jager 1991 **TSAR** 212-216; FitzSimons **Facing up to AIDS** 13-33; Matjila (Unpublished) 1-7; Van Dyk 1-22; Van Wyk 1-80; Van Wyk 1988 **De Jure** 326-329; Van Wyk 1988 **THRHR** 317-320; Whiteside **Facing up to AIDS** 3-12. Foreign sources on the medical background include: **Australia Report on Privacy and HIV/AIDS** 9-12; Green **AIDS and the Law** 28-36; Gunderson et al 9-29; Jarvis et al 5-26; Miller 1-20; Volberding **AIDS: Principles, Practices and Politics** 97-112; Krim **AIDS an Epidemic of Ethical Puzzles** 15-20; Carr **AIDS in Australia** 3-23; Crofts **AIDS in Australia** 24-32; Gostin **AIDS and Patient Management** 3-8.

² For a complete discussion of medical aspects of HIV and AIDS, see **AMFAR AIDS/HIV Treatment Directory** June 1996 135-137. See also Nolan **AIDS an Epidemic of Ethical Puzzles** vii; De Witt 8; Evian 1993 3.

³ Nolan **AIDS an Epidemic of Ethical Puzzles** viii; De Witt 8-9; Evian 1993 4-9.

⁴ DNA is the abbreviation for "desoxyribonucleic acid".

viruses) of the infected individual. The result is that a person who acquires HIV remains infected for the rest of his or her life (and can therefore transmit the virus to others).

- 2.3 Infection with HIV does not necessarily entail that a person is sick. A person with HIV can remain otherwise healthy and without symptoms for a number of years.⁵ He or she can live without notice of infection. HIV infection during this period is called asymptomatic infection.⁶ During asymptomatic infection, a person is capable of performing all of his or her daily activities, and can thus lead a full and productive life.⁷ Such a person does not have AIDS. A person has AIDS only when he or she becomes ill as a result of one or more opportunistic illnesses. AIDS is the final clinical stage of HIV infection.⁸ *In this interim report, the Commission's frame of reference, unless otherwise stated, is otherwise healthy persons with HIV. The essential relevant feature in the case of such persons is that they are still capable of productive employment, and may remain so for a number of years.*⁹

B) TRANSMISSION OF HIV

- 2.4 As soon as a person is infected with HIV he or she is able to transmit the infection irrespective of whether symptoms exist. HIV has been identified in blood, semen, vaginal discharge, mother's milk, the brain, bone-marrow, cerebrospinal fluid, urine, tears, foetal material and saliva. However, it is likely that only blood, semen, vaginal discharge and mother's milk contain a sufficient concentration of HIV to make transmission possible. But HIV is not easily transmitted. Transmission can occur only through specific and limited routes: through sexual intercourse; from mother to infant through birth or breast feeding; and through exposure to infected blood products and

⁵ Gostin et al 1986 **AMJLM** 8.

⁶ Ibid; Evian 1993 23; De Witt 8.

⁷ McCormack 1995/1996 **The Journal of Air Law and Commerce** 305, 306; Evian 1991 16.

⁸ Although some scientists apparently no longer wish to differentiate between persons with HIV and persons with AIDS (cf Van Wyk 25), this differentiation is nevertheless maintained in the majority of sources consulted and is explicitly accepted in Canada and Australia where recommendations for law reform were made in 1992 (**Ontario Report** 6-7; **Australia Report on Privacy and HIV/AIDS** 9).

⁹ See par 2.11-2.12, 2.14-2.15, 3.6.3, 4.10.2-4.10.3 and fn 151 below.

bodily fluids.¹⁰

2.5 There is thus no risk of HIV transmission from casual contact in a normal work environment.¹¹ It cannot be transmitted by air or casual contact. It cannot be transmitted through food preparation, on toilet seats, or in any ordinary workplace. Measures, in the form of universal precautions and other prophylactic measures, in any event necessary to prevent the occupational transmission (that is transmission where the nature of the work is such that exposure to infected blood or organs is possible in the course of the work) of other infections such as hepatitis B (which are frequently more infectious, and as dangerous), prevent the transmission of HIV.¹²

2.6 At present no scientific evidence exists that HIV can be transmitted through any other mode than the following:

- + By hetero- or homosexual intercourse.
- + By receipt of or exposure to the blood, blood products, semen, tissues or organs of a person who is infected with HIV.¹³
- + By a mother with HIV to her foetus before or during birth, or to her baby after birth by means of breast-feeding.

2.7 To infect a person, HIV must reach the lymphatic system. The virus therefore cannot be spread by forms of personal contact other than those described above. Outside the human body and especially outside body fluids, HIV has an extremely limited life span of a few seconds only.¹⁴ The virus is also destroyed by disinfectant.¹⁵

¹⁰ Evian 1993 11. See also eg Curran 1980 **Columbia Law Review** 720 fn 2; Deloach 1990 **Creighton Law Review** 693 fn 8; Lachman 131.

¹¹ Arnott 1996 **Innes Labour Brief** 35; Greenlaw 1992 **Journal of Health and Hospital Law** 80.

¹² WHO **Report of an International Consultation on AIDS and Human Rights** 1989 50; Goss and Adam-Smith 1, 2.

¹³ This can occur, *inter alia*, by the use of dirty or used syringes and/or needles for intravenous drugs. Intravenous drug users inject drugs directly into their bloodstream. To ensure that the needle has struck a vein, they usually draw blood into the syringe before the drug is injected (without removing the needle). Thus a small amount of blood always remains in the needle and/or syringe and may consequently be injected directly into the bloodstream of the next injector (Van Dyk 18).

¹⁴ Van Dyk 19; CDC **Morbidity and Mortality Weekly Report** 12 July 1991 5, 7; Evian 1991 9.

¹⁵ Van Wyk 1988 **De Jure** 328; **Transvaler** 21 July 1992; **The Star** 22 July 1992; Van Dyk 29-30.

- 2.8 Not every person exposed to HIV becomes infected. Similarly, it is possible that not every person who is infected with HIV eventually develops AIDS. Scientists are as yet uncertain of the precise position. There is apparently reasonable consensus that 45-50% of infected persons will develop AIDS after 10 years. It has also been estimated that between 65-100% of infected persons will develop the disease within 16 years.¹⁶

C) COURSE OF HIV/AIDS

- 2.9 The course of HIV infection is generally divided into four different stages: the acute or initial phase; the asymptomatic phase; the third phase (during which less serious opportunistic diseases occur); and the final phase, during which the patient has full-blown or clinical AIDS.

* **Initial phase: preceding seroconversion**

- 2.10 The initial phase begins very shortly after a person's infection with HIV has occurred. Symptoms that present are similar to those of influenza (fever, night sweats, headaches, muscular pain, skin rashes and swollen glands). This phase continues until seroconversion occurs (when antibodies develop in the subject's blood in an ineffective attempt to protect the body against HIV). Seroconversion takes place on average six to twelve weeks after exposure (in exceptional cases even later). The period between infection and seroconversion is known as the "window period". Blood tests generally used to determine whether a person has been infected with HIV cannot trace HIV itself, but react to the presence of antibodies. The fact that antibodies are formed only after a lapse of time entails that blood tests conducted during the window period may deliver false negative (seronegative) results. Where antibodies have not yet developed, the blood test for antibodies will be negative in spite of infection. During the window period an

¹⁶ Keir **AIDS Analysis Africa** December 1990/January 1991 9; Van Wyk 1988 **De Jure** 328; Krim **AIDS an Epidemic of Ethical Puzzles** 19; Carr **AIDS in Australia** 7.

infected person can transmit HIV, but will not test positive (seropositive) for the virus.¹⁷

* **Second phase: asymptomatic seropositivity**

2.11 During this phase the person is infected with HIV; antibodies have already developed and will be indicated by antibody tests from this stage onwards; but he or she shows no symptoms of illness. However, the body's resistance and immune response are slowly being impaired. This second phase can continue for many years while the infected person remains otherwise healthy and is capable of productive employment. In this phase infected persons are often not aware that they have HIV; they can therefore transmit the virus unknowingly to others.

* **Third phase: AIDS-related symptoms**

2.12 This phase (referred to in the past as "AIDS-related complex" [ARC]) can also continue for several years. Symptoms of the opportunistic diseases that cause death in the final phase now occur.¹⁸ These include swelling of the lymph glands in the neck, groin and armpits as well as drastic loss of body weight, thrush and chronic diarrhoea.

* **Final phase: clinical AIDS**

2.13 Only during the final phase can a person be said to have AIDS. As a result of the compromised immunological response because of the HIV infection, a person during this stage is prone to infections by organisms that normally are present but do not cause disease in otherwise healthy and uninfected persons. This type of infection is referred to as opportunistic infection. In this phase such a person's body is no longer capable of

¹⁷ Ferbas et al 1996 **Journal of Virology** 7285-7289; **The University Record** 9 January 1995, points to a study of Koopman, Simon and Longini suggesting that people with HIV may be as much as 100 to 1,000 times as infectious during the period before seroconversion than afterwards. See also Evian 1993 15.

¹⁸ Regarding the kinds of opportunistic diseases, see **AMFAR AIDS/HIV Treatment Directory** June 1996 94-136; Nolan **AIDS an Epidemic of Ethical Puzzles** viii; Lachman 201-203.

withstanding opportunistic diseases, the symptoms of which were observed in the preceding phase. Unless effectively treated the person may no longer be able to work productively. He or she usually dies within two years as a result of these diseases.

2.13.1 Diseases that generally occur are pneumonia, tuberculosis and Kaposi's sarcoma (a rare type of skin cancer). Neurological and psychiatric disorders (known as AIDS dementia) may also occur in this final phase (and in rare cases may occur also earlier).¹⁹ Symptomatic presentation differs from continent to continent. The most important opportunistic diseases in Africa are tuberculosis and chronic diarrhoea. A form of pneumonia (caused by *Pneumocystis carinii* [PCP]) is responsible for the majority of deaths among persons with AIDS in Europe and North America.²⁰ The disease conditions from which people with AIDS suffer are generally not transmissible. Persons with AIDS usually pose no threat of infecting others with opportunistic diseases as opposed to the transmission of HIV itself. A notable exception is untreated tuberculosis. Tuberculosis is transmissible in itself.²¹ It is thus important that patients with pulmonary tuberculosis be on treatment before being allowed back into the workplace so as not to expose others to active disease.²²

2.14 The course of HIV infection varies from person to person. The period before sero-conversion can last on average from six to twelve weeks. The average duration in Africa of the asymptomatic phase is estimated to be seven years, and it is generally accepted that the average period of time from infection with HIV until full-blown AIDS develops is less than 10 years. The final phase lasts on average from one to two years. However, the life expectancy of persons with HIV differs according to their general state of health, their living conditions, available health services and treatment, and the opportunistic disease in question. Although the course of the disease follows the same

¹⁹ **AMFAR AIDS/HIV Treatment Directory** June 1996 135-138.

²⁰ Hawkes and McAdam 1993 **Medicine International** 70-71.

²¹ Lachman 202. Cf **AMFAR AIDS/HIV Treatment Directory** June 1996 97-134. Comment from the City of Cape Town Health Department on Discussion Paper 72 pointed out that 40% of HIV positive patients with TB are sputum negative and thus not infectious.

²² Comment offered by the City of Cape Town Health Department.

overall pattern in developed and developing countries, the period between becoming infected and death is much shorter in the latter. This can probably be ascribed to the prevalence of endemic diseases (for instance tuberculosis) and to a lack of adequate medical treatment.²³ In South Africa, severe poverty and malnutrition could possibly be included as reasons why patients with HIV have a shortened life expectancy.²⁴

2.15 Not all persons with HIV go through all four phases. Some do not even show symptoms before they develop clinical AIDS (the final phase). During periods of symptomatic infection, a person with HIV may be able to live and work actively, but may experience fatigue or brief periods of illness.²⁵ In the typical course of the disease, the window period, the long asymptomatic phase and the possible occurrence of AIDS dementia in particular have implications for employment law.

2.16 New treatments are currently being developed that extend the life expectancy of people with HIV and AIDS.²⁶ Many of these are expensive.²⁷ Not enough is yet known about their long term efficacy. There is some hope that HIV and AIDS may eventually, for those who can afford treatment, become manageable in ways similar to diabetes, epilepsy, and heart disease.²⁸

²³ Ibid; Carr **AIDS in Australia** 8.

²⁴ Comments on Discussion Paper 72 by the City of Cape Town Health Department. Cf also the discussion of HIV/AIDS and possible life expectancy in Africa in par 3.6.3 below.

²⁵ Evian 1991 16.

²⁶ Cf Groopman **The New Republic** 12 August 1996; Gyldmark and Tolley **The Economic and Social Impact of AIDS in Europe** 30-37.

²⁷ Cf Papaevangelou et al **The Economic and Social Impact of AIDS in Europe** 70.

²⁸ Cf Farnham 1994 **Public Health Reports** 312.

D) SIGNIFICANCE AND FUNCTIONALITY OF TESTING FOR HIV²⁹

2.17 The most general manner in which it can currently be determined whether a person is infected with HIV is by blood tests for the presence of antibodies to HIV. Although available, blood tests to detect HIV itself (in contradistinction to the test for antibodies) are not at present generally used in the public sector.³⁰

2.18 The blood tests that have been used throughout the world since 1985 to detect the presence of HIV antibodies are the enzyme-linked immunosorbent assay (ELISA) and the Western Blot (WB) tests.³¹ The ELISA test for HIV antibodies is very sensitive and reacts beyond the window period positively to nearly any infection. Because of its high sensitivity, a single test can deliver a false positive result. For this reason it is necessary to carry out a second, more specific, test to confirm HIV positivity. It is also advisable to perform the tests on a second, different, blood specimen. The WB test, which is such a more specific test, is traditionally used to confirm an initial positive test. However, the WB is expensive³² and can therefore not always be used in practice. Different types of ELISA tests with a higher degree of specificity have consequently been developed and the World Health Organisation (WHO) has compiled guidelines which indicate the circumstances under which multiple (different types of) ELISA tests will suffice in order to establish HIV infection.³³ South Africa has accepted the WHO recommendations to diagnose HIV infection with at least two positive ELISA test results.³⁴ The City of Cape Town Health Department has noted in comments on Discussion Paper 72 that employers may also utilise a variety of "over the counter" kits for testing and that legislation ought

²⁹ On HIV testing generally, see Levine and Bayer **AIDS an Epidemic of Ethical Puzzles** 21-22; **Confronting AIDS** 304-307; Moodie 1988 **SA Journal of Continuing Medical Education** 58-63.

³⁰ See par 2.21 below. The City of Cape Town Health Department pointed out that viral load testing is extensively used for private patient management and for monitoring of patients in drug treatment trials.

³¹ See CDC **Morbidity and Mortality Weekly Report** 14 August 1987 509; Chavey et al 1994 **Journal of Family Practice** 249 et seq.

³² The cost of a WB test is approximately R276 to R751; the cost of an ELISA test carried out by a private body varies from R74 to R203 (information supplied by Prof A Heyns of the SA Blood Transfusion Service on 27 October 1997).

³³ According to the WHO guidelines the prevalence of HIV in the population to which the person belongs on whom the blood test is performed, is decisive. The scientific premise is that the higher the prevalence of HIV infection, the greater the probability that a person who in the first instance tests positive, is truly infected (cf Fleming and Martin 1993 **SAMJ** 685-687).

to control the sale and use of these kits.

- 2.19 The result of a blood test to detect HIV antibodies can be available within approximately 24 to 48 hours after the blood sample is taken.³⁵
- 2.20 Currently a positive HIV antibody test means that the person concerned is infected with HIV, will remain infected for life, and can infect other persons. The ELISA and WB tests do not indicate the stage of infection which the person tested has reached. A negative HIV antibody test means that no antibodies against HIV have been traced in the blood of the person concerned. This could mean that the person is not infected. But it could mean merely that antibodies to the virus have not yet developed³⁶ and thus he or she is infected but is in the window period. To obtain a reliable result such a person will after a period of time have to be tested for HIV again.³⁷
- 2.21 It is alleged that where the standard test procedure (an ELISA test followed by one or more confirmatory tests) is followed, a correct result will be obtained in more than 99% of HIV infections.³⁸ New tests are available that test for HIV itself, rather than antibodies to the virus.³⁹ These may shorten the window period to about 16 days.⁴⁰ In addition, some of these tests (for instance viral load tests⁴¹) may more accurately predict

³⁴ Fleming and Martin 1993 **SAMJ** 685-687.

³⁵ Information supplied by Prof A Heyns of the SA Blood Transfusion Service on 27 October 1997. See also Gostin 1991 **American Journal of Law and Medicine** 110.

³⁶ Gostin et al 1986 **American Journal of Law and Medicine** 10; Banta 5.

³⁷ A very small percentage of infected people never develop antibodies against HIV and will therefore repeatedly show false negative tests (Van Dyk 13).

³⁸ **Australia Report on Privacy and HIV/AIDS** 11; cf also the remarks of Van Dyk 12 and Van Wyk 1988 **De Jure** 327 on the accuracy of the tests. Moodie (1988 **SA Journal of Continuing Medical Education** 63) alleges that the WB test theoretically provides "the ultimate confirmation" while Volberding (**AIDS: Principles, Practices and Politics** 102) is of the opinion that if a combination of antibody tests is properly carried out in population groups with a high prevalence of HIV infection, such testing is "highly accurate".

³⁹ Orthmann **Law and Policy Reporter** April 1996 55.

⁴⁰ Information supplied by Prof A Heyns of the SA Blood Transfusion Service on 27 October 1997.

⁴¹ Viral load testing is the direct measurement of the amount of HIV virus in the blood of people with HIV infection. (HIV mostly lives in the lymph system. Only 2% lives in the blood.) It is currently regarded as the best marker for the progression of HIV disease and is becoming a standard of HIV treatment monitoring. Studies has, for instance, determined that patients who have a higher virus load will progress more quickly to AIDS than persons with lower virus loads. Viral load testing is therefore used as an adjunct in treating HIV and is not used to initially diagnose HIV infection (Viral Load Testing - Reports from the Vancouver AIDS Conference [Internet accessed on 10 November 1997]; HIV- Infogram: Viral

future health status.⁴² However, because of their cost they are not yet recommended for general use.⁴³ Tests which detect HIV in the urine, and saliva may be less sensitive than tests on blood. The polimerase chain reaction technique (internationally known as the PCR), which detects the virus itself in the blood, is also available. It is however, complicated and difficult to execute and is thus only performed in specialised or reference laboratories.⁴⁴ PCR may reduce the window period to 11 days.⁴⁵

2.22 A person may voluntarily request HIV testing for a variety of reasons: to determine health status and make life decisions accordingly, and to ensure appropriate therapeutic intervention. (In countries with high HIV prevalence and limited financial resources HIV testing may not be indicated since it is not financially possible to provide appropriate treatment.) A person may also need an HIV test to obtain insurance coverage or health care or because a seronegative test is a precondition for employment. It is therefore clinically recommended to test for HIV only in limited situations, such as when the result could change diagnostic procedures and treatment itself.⁴⁶ Some commentators argued that because HIV testing is used very conservatively in South Africa we are unable to manage the epidemic or motivate the government regarding the seriousness of the situation.⁴⁷

2.23 An employer may seek to test applicants for employment for a variety of reasons. These may include the desire to limit costs of recruitment and training, to prevent occupational transmission, to protect workers with HIV from opportunistic infections or strenuous work, to limit illness-related declines in productivity, and to protect benefit

Load Testing [Internet accessed on 10 November 1997]; The Body: Viral Load Testing [Internet accessed on 10 November 1997]).

⁴² Saag et al 1996 **National Medicine** 625-629.

⁴³ Colebunders and Ndumbe 1993 **The Lancet** 601; Chavey et al 1994 **Journal of Family Practice** 249. But see also Volberding 1996 **The Lancet** 71-73.

⁴⁴ Information supplied to the Commission by Prof A Heyns of the SA Blood Transfusion Service on 27 October 1997; see also van Dyk 12; Crofts **AIDS in Australia** 26-27.

⁴⁵ Information supplied to the Commission by Prof A Heyns of the SA Blood Transfusion Service on 27 October 1997.

⁴⁶ Colebunders and Ndumbe 1993 **The Lancet** 601; cf also **MASA Guidelines** 7.

⁴⁷ Comment of the City of Cape Town Medical Officer of Health.

pools.⁴⁸

E) EXTENT OF HIV/AIDS IN SOUTH AFRICA

2.24 No reliable statistics on the incidence of AIDS itself, or of AIDS-related deaths, appear to be available. However, the prevalence of HIV can be projected from studies conducted at antenatal clinics of the public health services in South Africa. Between 1995 and 1996 the HIV prevalence rate at antenatal clinics increased by 35,7% from 10,44% to 14,17%.⁴⁹ When these figures are extrapolated, estimates are that roughly 6% of the total population or 11% of the adult (i.e. sexually active) population (compared to 4,3% of the total population or 7,8% of the adult population in 1995⁵⁰) is infected.⁵¹ The Department of Health has estimated that approximately 2,4 million adults were infected with HIV at the end of 1996.⁵² The latest survey, reflecting the same pattern as seen before, shows that in all age groups under 45, HIV prevalence has increased since 1995 with women in their twenties becoming infected at the highest rate (between 15,33% and 17,74%).⁵³ Seroprevalence rates for the sexually active population in KwaZulu-Natal and Mpumalanga were already above 15 percent at the end of 1995.⁵⁴ The greatest single increase in prevalence was North West Province where a three-fold increase (from 8,3% to 25,13%) was found.⁵⁵

2.25 Although the overall rate of increase has slowed down, the latest figures show that the HIV epidemic in South Africa is still growing.⁵⁶ According to experts this can

⁴⁸ See par 3.4, 3.5, 3.6, 3.7 and 3.8 below.

⁴⁹ Department of Health Report on Seventh National HIV Survey 1996.

⁵⁰ **Epi Comments** October 1996 11.

⁵¹ Doyle and Muhr (Unpublished) 1.

⁵² Taking into consideration that the survey was limited to women of child bearing age, estimates refer to the 15-49 year age group. The Department further estimates that 157 000 babies born since 1990 are infected with HIV (Department of Health Report on Seventh National HIV Survey 1996).

⁵³ Ibid.

⁵⁴ **Epi Comments** October 1996 6, 10 (figure 5).

⁵⁵ Department of Health Report on Seventh National HIV Survey 1996.

⁵⁶ Ibid; cf also **Epi Comments** October 1996 2.

be expected as the epidemic starts approaching its mature phase.⁵⁷ Although the epidemic continues, the rate of growth is no longer exponential.

F) HIV AND THE WORKPLACE: OVERVIEW

2.26 Although HIV cannot be transmitted casually, and transmission in the workplace is unlikely,⁵⁸ AIDS and HIV will nevertheless have a dramatic effect on the workplace and on the economy in general. Because many of those affected are economically active, AIDS and HIV will have a significant impact on investment in training, cost of labour, and productivity.⁵⁹ The Actuarial Society of South Africa in comments on Discussion Paper 72 stated that it is clear that the HIV/AIDS epidemic is having, and will continue to have, a material impact on the productive capacity of the South African economy. This was supported in comments by the South African Chamber of Business (SACOB), the Afrikaanse Handelsinstituut (AHI) and the Chamber of Mines of South Africa.

2.27 Through the premature death and illness of economically active persons, AIDS will affect the productivity of workplaces, increase production costs, and might reduce national output.⁶⁰ The brunt of the illness is likely to be borne by the economically active population.⁶¹ Labour productivity will decrease as employees become sick, and as skilled or experienced staff die.

2.28 In addition to loss of labour directly attributable to the disease, the productivity of seronegative individuals may decrease because of demand for their time in caring for and supporting sick spouses, dependants and other family members.⁶² The costs of additional

⁵⁷ Doyle and Muhr (Unpublished) 1-2.

⁵⁸ Matjila (Unpublished) 4, 5, 8; Van Wyk 1988 *De Jure* 328; Albertyn and Rosengarten 1993 *SAJHR* 77; Strauss *Huldigingsbundel vir WA Joubert* 141; *Australia Discussion Paper Employment Law* 9, 32; *Ontario Report* 64.

⁵⁹ Arnott 1996 *Innes Labour Brief* 35; Doyle *Facing up to AIDS* 110; Sifris *Trends Transforming South Africa* 146; Labour Sector *1997 Response to SALC Presentation* 1.

⁶⁰ Whiteside *Guidelines for Developing a Workplace Policy and Programme on HIV/AIDS and STDS 1997* 5; Strode and Smart (Unpublished) 1.

⁶¹ Albertyn and Rosengarten 1993 *SAJHR* 77.

⁶² Cross *Facing up to AIDS* 138, 155.

benefits, re-training, and possible depletion of workplace morale will have to be borne. Whiteside states that in Kenya the epidemic has cost private employers between 3% and 8% of company profits.⁶³ A large portion of this was due to absenteeism. In addition, there were costs of lower productivity and the loss of experienced staff. Doyle in addition projects that the epidemic may significantly raise the costs of employee benefits.⁶⁴ The greatest costs created by HIV may thus not be the costs of providing health care, preventing infection, or creating a cure. The largest component of costs appears likely to be that attributable to lost income and production.⁶⁵

2.29 The scale of the epidemic will in any event impose some unavoidable costs. The epidemic will affect all workplaces. Given the current incidence of HIV (measured in the rate of daily new infections), new infections will occur amongst those already employed as well as those applying for jobs.

2.30 Nearly all experts agree that preventing HIV transmission is the most effective way to curtail its costs to the economy.⁶⁶ Employers and employee organisations can reduce the impact of the epidemic on the workplace by educating employees about HIV, and helping employees prevent HIV transmission.⁶⁷ This was confirmed in comments by the Chamber of Mines of South Africa.

⁶³ Whiteside **Guidelines for Developing a Workplace Policy and Programme on HIV/AIDS and STDS 1997** 6. Costs may be different in South Africa, where seroprevalence rates are lower but employment costs may be higher.

⁶⁴ As quoted in Whiteside **Guidelines for Developing a Workplace Policy and Programme on HIV/AIDS and STDS 1997** 6.

⁶⁵ Massagli et al 1994 **American Journal of Public Health** (Lexis Nexis); Leigh et al 1995 **AIDS** 81-88; see also Whiteside **Guidelines for Developing a Workplace Policy and Programme on HIV/AIDS in the Workplace** 5. See also fn 59-61 above.

⁶⁶ Loewenson (Unpublished 1996)2-4; Whiteside **Guidelines for Developing a Workplace Policy and Programme on HIV/AIDS and STDS 1997** 5-7; Kimball and Myo 1996 **The Lancet** 1670. See also **BSA Draft National HIV/AIDS Employment Code of Conduct 1994**.

⁶⁷ Whiteside **Guidelines for Developing a Workplace Policy and Programme on HIV/AIDS and STDS 1997** 7; Kerkhoven (Unpublished) 1-2; Sibeenzu (Unpublished) 2-3.

G) EXTENT OF PRE-EMPLOYMENT TESTING FOR HIV IN SOUTH AFRICA

2.31 Despite a widely accepted point of view that pre-employment testing is ineffective at eliminating HIV from the workplace, there are reports of pre-employment testing of applicants for employment in the public and private sectors.⁶⁸

2.32 While reports vary, evidence suggests that a sizable number of private employers are subjecting job applicants to HIV tests and discriminating against those who test seropositive.⁶⁹ However, formal statistics do not exist. Enquiries by the project committee regarding the prevalence of pre-employment HIV testing elicited information on only one formal survey conducted in South Africa in the recent past.⁷⁰ In this survey (conducted in 1995) of 300 employers (overseeing about 350,000 employees) 18,1% admitted to pre-employment HIV testing. Of these, 30% conceded that the tests could not be described as voluntary.⁷¹ A majority of employers surveyed said that they would discriminate against an applicant for employment (by allowing knowledge of HIV positivity to influence a decision to hire) if they knew that he or she had HIV.⁷² In a follow-up of this survey, using a smaller sample of 93 employers and reaching the same varied geographical and economic locations, 36,1% of employers indicated that they test job applicants for HIV.⁷³ In both the survey and the follow-up several employers have

⁶⁸ See eg London and Myers 1996 **SAMJ** 329-330; Cameron and Adair (Unpublished) 3-4; Labour Sector **1997 Response to SALC Presentation** 1-2.

⁶⁹ Albertyn and Rosengarten 1993 **SAJHR** 78; Baggaley et al 1995 **Environmental Medicine** 9-10; London and Myers 1996 **SAMJ** 329-330; see also Labour Sector **1997 Response to SALC Presentation** 1-2.

⁷⁰ The research was carried out by a final year LL B student at the University of the Witwatersrand with the assistance of the management labour consultancy Andrew Levy and Associates. The research results are contained in an unpublished paper **The Blood in the Pool - AIDS and Employment Benefits** (A Research Report by Bradley Silver LL B III 1995). The survey engaged the responses of businesses involved in activities that varied from manufacturing to fishing to mining. It reached the three major cities of Durban, Johannesburg and Cape Town and reflects results from a wide range of enterprises, public and private (Silver [Unpublished] 5).

⁷¹ Silver (Unpublished) 5 and Annexure A.

⁷² Silver (Unpublished) Annexure A; see also Holding 1991 **Boardroom** 12.

⁷³ Silver (Unpublished) Annexure B. Cf the results of similar research undertaken in Zambia where in a survey of 33 employers more than half required HIV tests; while nine excluded applicants on HIV status (Baggaley et al 1995 **Occupational Environmental Medicine** 9).

cited the protection of benefit schemes as a main reason for testing applicants.⁷⁴ Further enquiries by the project committee during September 1997 to country-wide offices of the AIDS Training, Information and Counselling Centres (ATICCs) confirmed the ongoing practice of some employers to subject job applicants to pre-employment HIV testing. Independently of each other, the ATICCs invariably testified to recent experience with or assistance to prospective employees in this regard. The information supplied reflects that in particular contract workers in larger industries, prospective employees of smaller businesses, and domestic workers, are subjected to pre-employment HIV testing. It was emphasised by the ATICCs that domestic workers are frequently subjected to general medical examinations at the request of prospective employers. Frequently an HIV test forms part of a general medical examination by the employer's private practitioner, being performed under coercion or without knowledge.⁷⁵

- 2.33 Apart from the private sector, three of the largest public employers - the Department of Correctional Services, the South African National Defence Force, and the South African Police Service - until recently tested applicants for employment for HIV.⁷⁶ These practices appear to have been discountenanced on 25 March 1997, when a cabinet committee announced a decision to prohibit pre-employment testing for HIV in public employment.⁷⁷ The South African Medical Service (within the South African National Defence Force) confirmed in its comment that it supports fully the principles enunciated in the cabinet memorandum. However, it has approached the Minister of Defence with suggested categories for exemption and is awaiting a final decision in this regard.

- 2.34 Despite widespread acceptance that the chance of a health care worker infecting a

⁷⁴ Silver (Unpublished) 14.

⁷⁵ The information was supplied to the project committee confidentially by ATICCs from the Gauteng, Western Cape, Eastern Cape, and KwaZulu Natal regions.

⁷⁶ 9 October 1996 **Hansard** 2381; 15 October 1996 **Hansard** 2437; see also Labour Sector **1997 Response to SALC Presentation** 1-2.

⁷⁷ **The Citizen** 26 March 1997. The Cabinet committee comprised Public Service and Administration Minister Z Skweyiya, Provincial Affairs and Constitutional Development Minister V Moosa, Health Minister N Zuma, Safety and Security Minister S Mufamadi and Correctional Services Minister S Mzimela. Defence Minister J Modise was unable to attend. Standing in for him was Deputy Defence Minister R Kasrils. Dr Mzimela is reported to have said: "The decision we took this morning is that we are doing away with tests for HIV [in the public service] altogether, with immediate effect. As of today, anyone who applies for a job will be treated as anybody else applying for a job, whether in the Education Department or

patient with HIV during routine procedures is negligible, and that universal precautions are the only way to prevent the transmission of blood-borne pathogens in the workplace,⁷⁸ many health care workers are apparently subjected to tests for HIV.⁷⁹

H) THE ROLE OF A LEGISLATIVE PROHIBITION ON PRE-EMPLOYMENT HIV TESTING IN REDUCING THE SPREAD OF HIV

2.35 A fundamental question posed by some opponents of a legislative prohibition on pre-employment HIV testing is whether pre-employment HIV testing with its possible costs is more likely than other methods of containment to prevent HIV transmission in the workplace and limit the costs of the epidemic.⁸⁰ And further, whether a legislative prohibition on pre-employment HIV testing has a role to play in reducing the spread of HIV.

2.36 The role of the law in the field of HIV/AIDS is undoubtedly complex. It has been said that in its approach to HIV/AIDS the law has to protect two conflicting interests: the law must recognise the right of the public to be protected against the disease and it must recognise the right of the individual not to be unfairly restricted because he or she is infected or perceived to be infected. Consequently the law must make some compromise which, while protecting the public health of the community, also protects the individual so that the individual will feel free to come forward for available treatment.⁸¹ How is this compromise reached?

2.37 It has been accepted that the goal should be to link health and human rights to contribute to advancing human well-being beyond what could be achieved through an

Water Affairs or any other Department".

⁷⁸ **Jansen van Vuuren v Kruger** 1993 4 SA 842 (A).

⁷⁹ See Muller (Unpublished) 1-2; Fleming (Unpublished) 3-8.

⁸⁰ Cf the comments on Discussion Paper 72 of RS Green, the Afrikaanse Handelsinstituut (AHI), the City Council of Pretoria Medical Officer of Health, and the Chamber of Mines of South Africa. The Actuarial Society of South Africa, without expressing a view either in favour of or against the project committee's preliminary proposals, suggested that the macro-economic impact the proposed statutory intervention may have in the long term, be examined.

⁸¹ Fluss **International Law and AIDS** 24.

isolated health- or human rights-based approach.⁸²

2.38 However, health and human rights have traditionally rarely been linked in an explicit manner. In seeking to fulfill its core functions and responsibilities (collection of data on important health problems in a population, developing policies to prevent and control priority health problems, and assuring services capable of realising policy goals) public health may unavoidably impact upon human rights. In the past, restrictions on human rights were often simply justified on the basis that they were necessary to protect public health. Indeed, public health has a long tradition, anchored in the history of infectious disease control, of limiting the "rights of the few" for the "good of the many".⁸³ Thus, public health approaches in combatting disease have been based upon erecting barriers between the healthy and the infected. This has resulted in coercive measures being used against individuals in an effort to limit the impact of an epidemic.⁸⁴

2.38.1 In an HIV context barriers have been created in the form of both direct and indirect measures. Indirect measures have involved efforts to stop the spread of HIV through criminalising or discouraging conduct which can lead to further transmissions (by, for instance, criminalising homosexuality or sex work), whilst direct measures have included targeting the movement or conduct of persons known or presumed to have HIV (by, for instance, placing people in

⁸² "The most widely used modern definition of health was developed by the WHO: 'Health is a state of complete physical, mental and social *well-being* and not merely the absence of disease or infirmity.' Through this definition, WHO has helped to move health thinking beyond a limited, biomedical and pathology-based perspective to the more positive domain of 'well-being'. Also, by explicitly including the mental and social dimensions of well-being, WHO radically expanded the scope of health, and by extension, the roles and responsibilities of health professionals and their relationship to the larger society. The WHO definition also highlights the importance of health promotion, defined as 'the process of enabling people to increase control over, and to improve their health.' To do so, 'an individual or group must be able to identify and realize aspirations, to satisfy needs, and to change or cope with the environment.' The societal dimensions of this effort were emphasized in the Declaration of Alma-Ata (1978), which described health as a '... social goal whose realization requires the action of many other social and economic sectors in addition to the health sector. Thus, the modern concept of health includes yet goes beyond health care to embrace the broader societal dimensions and context of individual and population well-being. Perhaps the most far-reaching statement about the expanded scope of health is contained in the preamble to the WHO Constitution, which declared that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being'" (Mann et al 1994 **Health and Human Rights** 9-12; see also Fluss **International Law and AIDS** 24-25).

⁸³ Mann et al 1994 **Health and Human Rights** 15-17.

⁸⁴ Ibid.

quarantine or requiring certain sectors of the population to undergo mandatory testing).⁸⁵ In the early stages of the epidemic many governments used various forms of these coercive public health measures in an attempt to contain the spread of the disease.

2.39 Unfortunately decisions to restrict human rights, supposedly based on public health considerations, have frequently been made in an uncritical, unsystematic and unscientific manner.⁸⁶ There is convincing evidence that the use of traditional public health measures involving coercion has failed to halt the rate of new HIV infections.⁸⁷

2.39.1 A mandatory testing program of all federal prisoners in the United States introduced in May 1987 was scrapped six months later because the costs outweighed the benefits of testing: during the first three months of universal testing, 16,372 prisoners were tested; only 3% were found to be positive. The universal testing program was replaced with a restricted programme that involved, *inter alia*, testing inmates who asked to be tested and those with clinical indications of HIV infection.⁸⁸

2.39.2 A now-classic University of South Carolina (United States) study, presented at the Fourth International Conference on AIDS in Stockholm in 1988, charted changes in HIV testing patterns after South Carolina repealed anonymous HIV testing in 1986 and established mandatory name reporting. The number of gay men tested dropped by 51%. While the total number of people tested increased slightly, the overall rate of seropositivity among those being tested decreased by 43%. The study demonstrates that ending anonymous testing and requiring the reporting of names, serve to scare away from diagnostic information and health care those people at greatest risk.⁸⁹

2.39.3 In January 1988 Illinois and Louisiana adopted mandatory premarital

⁸⁵ Cameron and Swanson 1992 **SAJHR** 201-202.

⁸⁶ Mann et al **Health and Human Rights** 15.

⁸⁷ Kirby 1993 **SAJHR** 10, 12-13; Fluss 1988 **World Health Forum** 368. Cf also Van Wyk 109-110.

⁸⁸ Gunderson et al 205; Jarvis et al 267-268.

⁸⁹ Katz **AIDS Readings on a Global Crisis** 276.

screening for HIV. During the first months of statutorily mandated premarital testing in Illinois only eight of 70 846 applicants for marriage licences were found to be seropositive. In the same period the number of marriage licences issued in Illinois decreased by 22,5%. But during this time the number of licences issued to Illinois residents in surrounding states increased significantly. Evaluation suggests that applicants for marriage licences with a history of previous or present risk behaviour may have left the state to avoid the test.⁹⁰ A documented study on compulsory pre-marital testing claimed that national mandatory premarital testing would not be a cost-effective way to slow HIV transmission and should not be implemented.⁹¹ In this regard the claim that cost-effectiveness alone should warrant the rejection of mandatory testing was questioned, and the role of intrusion into privacy emphasised.⁹² Both Illinois and Louisiana subsequently repealed their mandatory premarital testing laws.⁹³

2.40 Therefore, the assumption that public health, as articulated through specific policies and programs, is an unalloyed public good that does not require consideration of human rights norms has come under considerable challenge.⁹⁴

2.40.1 Contemporary thinking about optimal strategies for disease control has evolved significantly. Efforts to confront the most serious global health threats, including cancer, cardiovascular disease and other chronic diseases, injuries, reproductive health and infectious disease increasingly emphasise the role of personal behaviour within a broad social context.⁹⁵ Thus the traditional public health paradigm and concomitant strategies developed for diseases such as small pox, often involving coercive approaches and activities which may have burdened human rights, are accepted to be inapplicable in the context of HIV.

⁹⁰ Lachman 128; see also Gunderson et al 213 and Jarvis et al 266-267.

⁹¹ Paul Cleary et al "Compulsory Premarital Screening for the Human Immunodeficiency Virus: Technical and Public Health Considerations" **Journal of the American Medical Association** 258 (1987) 1757-62 as referred to in Gunderson et al 214.

⁹² Gunderson et al 214.

⁹³ Jarvis et al 266.

⁹⁴ Mann et al 15-17.

⁹⁵ Ibid 16-17.

2.40.1.1 Studies undertaken indicate that HIV prevention and care programmes that were based on coercive measures resulted in reduced public participation and an increased alienation of those at risk of infection.⁹⁶ Since most HIV infection is spread through voluntary activities, both infected and uninfected individuals are themselves in the best position to slow the spread of the disease: "The spread of AIDS can be halted only by appealing to the rationality of human beings bent on personal survival ... The HIV virus is not easily transmitted - people can protect themselves from it. But they can protect themselves only by behaving in accordance with information targeted at safe behaviour and behaviour change".⁹⁷ If confidentiality, informed consent and non-discrimination are not guaranteed, individuals will not come forward for early counselling, testing and treatment. Instead they will remain outside of the public health services thus posing a greater risk to the community at large.⁹⁸ Finally, it has been said that the best approach to convince people to change their behaviour requires cooperation - not coercion.⁹⁹

⁹⁶ J Dwyer "Legislating AIDS Away: The Limited Role of Legal Persuasion in Minimizing the Spread of HIV" 1993 **Journal of Contemporary Health Law and Policy** Vol 9 167 as quoted in the **UN Guidelines on HIV/AIDS and Human Rights** 1996. See also Cameron and Swanson 1992 **SAJHR** 222-225.

⁹⁷ Katz **AIDS Readings on a Global Crisis** 278. See also Gunderson et al 49, 98; Berge 1992 **Florida Law Review** 782-786.

⁹⁸ Gunderson et al 49, 98; Katz **AIDS Readings on a Global Crisis** 276; Berge 782-786. See also **Ontario Report** 27-29 where the same principle with regard to sexually transmitted diseases (STDs) in general was explained thus: Identification is a central element in what has been called the classical biomedical model of infectious disease control. Mandatory testing theoretically permits the identification, treatment, and, if necessary, isolation of all infected persons, and the prevention of further infection outside this group. Notwithstanding the historical and legislative predominance of the biomedical model, most public health officials agree that the model has serious drawbacks that limit its effectiveness as a public health measure in all cases of infectious diseases. These draw backs are particularly evident in the failure of past attempts to apply the model to control the spread of STDs. In the past the stigma associated with STDs seriously restricted the ability of the biomedical model either to identify infectious persons or to sever routes of transmission. Measures to identify infected persons were hampered by fears of stigmatization and prejudice. *Those who knew that they might be at risk for infection learned ways to avoid identification by public health authorities . Follow-up measures to control the spread of the infection may only have increased the fear of identification particularly if those measures were highly invasive, coercive, or threatening or if they resulted in the disclosure of highly sensitive identifying information.*

⁹⁹ Berge 1992 **Florida Law Review** 805.

2.40.1.2 As Harms AJA stated in relation to the preservation of confidentiality in **Jansen van Vuuren v Kruger**¹⁰⁰ at 850B-D:

The reason for the rule is twofold: On the one hand it protects the privacy of the patient. On the other it performs a public interest function. This was recognised in *X v Y and Others* [1988] 2 All ER 648 (QB) at 653a-b where Rose J said: '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 individual 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 ...'

2.40.2 This finding reflects more generally the enhanced current understanding of the role of respect for human rights in the preservation of public health.

2.40.3 It has thus been recognised that health and human rights are complementary approaches to the central problem of defining and advancing human well-being. Modern concepts of health recognise that underlying "conditions" establish the foundation for realising physical, mental and social well-being. In the HIV/AIDS context the underlying reasons why some communities are more susceptible to the epidemic include developmental factors such as poverty, malnutrition, lack of legal protection, gender inequality and an absence of basic health care services. Therefore any successful public health approach to the epidemic has to recognise these vulnerability factors and deal with them.¹⁰¹ This is particularly pertinent in assessing whether it is legitimate to deny an otherwise healthy person with HIV employment purely on the basis of the infection.

2.41 The idea that human rights and public health must inevitably conflict has thus

¹⁰⁰ 1993 4 SA 842 (A).

¹⁰¹ UN Guidelines on HIV/AIDS and Human Rights 1996 3-4.

been adjusted to recognise that they are complementary.¹⁰² Specifically in the context of HIV/AIDS, new approaches have therefore been developed, seeking to maximise realisation of public health goals through simultaneously respecting and promoting human rights. HIV/AIDS is not unique in this regard. Efforts to harmonise health and human rights goals are clearly possible in other areas. At present an effort to identify human rights burdens created by public health policies, programs and practices, followed by negotiations towards an optimal balance whenever public health and human rights goals appear to conflict, is a necessary minimum.¹⁰³ An approach to realising health objectives that simultaneously promotes - or at least respects - rights and dignity is clearly desirable.

2.42 In practice it has been shown that non-discrimination is not only a human rights imperative but also a technically sound strategy for ensuring that persons with HIV are not driven underground, where they are inaccessible to education programmes and unavailable as credible bearers of AIDS prevention messages for their peers.¹⁰⁴ The effect of discrimination is also to alienate. People living with HIV are often members of already stigmatised groups who experience discrimination and who may suffer lower self-esteem and reduced motivation to make sustained and responsible behaviour change. Fear of discrimination is a significant impediment to persons coming forward

¹⁰² Mann et al 1994 **Health and Human Rights** 16-17.

¹⁰³ Jonathan Mann, a former director of the WHO's Global Programme on AIDS has described the new approach as follows: "It is not a question of the 'rights of the many' against 'the rights of the few'; the protection of the uninfected majority depends upon and is inextricably bound with the protection of the rights and dignity of infected persons (as quoted by Cameron and Swanson 1992 **SAJHR** 232). Justice Michael Kirby (former Chairman of the Australian Law Reform Commission and Member of the WHO Global Commission on AIDS) goes further by referring to the new approach as the 'AIDS paradox' and explaining it thus: "The AIDS paradox arises from a reflection on the nature of this epidemic and the features of the virus. By a paradox, one of the most effective laws we can offer to combat the spread of HIV which causes AIDS is the protection of persons living with AIDS, and those about them, from discrimination. This is a paradox because the community expects laws to protect the uninfected from the infected. Yet, at least at this stage of the epidemic, we must protect the infected too. We must do so because of reasons of basic human rights. But if they do not convince, we must do so for the sake of the whole community which has a common cause in the containment of the spread of HIV" (Kirby 1993 **SAJHR** 3-4.) See also Mann et al 1994 **Health and Human Rights** 16-17.

¹⁰⁴ Item 54 of the **Global Strategy for the Prevention and Control of AIDS: 1992 Update** Forty Fifth World Health Assembly Provisional Agenda Item 33 (Appendix I to **International Law and AIDS** -International Response, Current Issues, and Future Directions - edited by Gostin and Porter USA: American Bar Association 1992 278); **Jansen van Vuuren v Kruger** 1993 4 SA 842 (A) at 850B-D.

for counselling, testing, support and treatment.¹⁰⁵ Therefore upholding human rights principles assists public health efforts to protect the health of the whole community in promoting the individual behaviour change necessary for a reduction in infection rates.

2.42.1 As Harms AJA held in **Jansen van Vuuren v Kruger** regarding special circumstances justifying the protection of confidentiality in the case of HIV and AIDS:¹⁰⁶

By the very nature of the disease, it is essential that persons who are at risk should seek medical advice or treatment.

2.43 In the **United Nations Guidelines on HIV/AIDS and Human Rights**¹⁰⁷ (adopted March 1997) the shared goals of public health and human rights in the HIV/AIDS context are seen as -

- + reducing the vulnerability of people to HIV infection;
- + lessening the adverse impact of HIV/AIDS on communities; and
- + empowering individuals and communities to respond to the epidemic.¹⁰⁸

2.44 In comments on Discussion Paper 72 this approach has been confirmed and the Commission has been reminded why, as part of public health, prevention, and care efforts, human rights must be protected: First, because it is right to do so; second, because preventing discrimination helps ensure a more effective HIV prevention programme; third, since marginalisation intensifies the risk of HIV infection; and fourth, because a community can respond effectively to HIV/AIDS only by expressing the basic right of people to participate in decisions which affect them.¹⁰⁹

¹⁰⁵ **Australia Final Report on AIDS** 31.

¹⁰⁶ 1993(4) SA 842 (A) at 854B-D.

¹⁰⁷ Prepared at the Second International Consultation on HIV/AIDS and Human Rights 22-25 September 1996, Geneva by the Joint United Nations Programme on HIV/AIDS and the United Nations Centre for Human Rights.

¹⁰⁸ **UN Guidelines on HIV/AIDS and Human Rights** 1996.

¹⁰⁹ Comments of HIV Management Services (Pty) Ltd.

2.45 The new approach has also been confirmed through recent studies in countries such as Thailand, Uganda and Tanzania. These show a decreasing HIV prevalence rate following the introduction of prevention strategies based upon non-coercive, voluntary principles in which persons with HIV participate fully.¹¹⁰

2.46 In our country a legislative prohibition on pre-employment HIV testing will also promote the goals and objectives of the NACOSA National AIDS Plan¹¹¹ in that it will send a clear message to the community at large that discrimination and stigma against persons with HIV is unacceptable. Furthermore, it will reinforce the Plan's prevention programme which aims at, amongst others, giving a human face to the epidemic, involving people living with HIV/AIDS in all prevention programmes and empowering communities to respond to the epidemic in a caring and non-discriminatory fashion. The aim of the Plan has been re-confirmed in the Department of Health's National HIV/AIDS and STD Directorate's latest public education programme of 1997 - the "*beyond awareness campaign*" - which focuses on individual behaviour change and risk assessment rather than relying on the knowledge of a sex partner's HIV status for protection.

2.46.1 More significantly, this approach has been expressly endorsed by the Minister of Health, Dr N D Zuma, with regard to pre-employment HIV testing when she stated in Parliament in 1994 that "pre-employment HIV testing is unacceptable and discriminatory because it stigmatises prospective employees and infringes their human rights by excluding them from prospective employment".¹¹²

¹¹⁰ W Poolcharoen and S Phongpitt "HIV Prevention Works: The Experience of Thailand" and Dr E Madraa "HIV Prevention Works: The Uganda Case Study" (Unpublished papers presented at the XI International Conference on AIDS Vancouver, July 1996) as quoted in the **UN Guidelines on HIV/AIDS and Human Rights** 1996; Grimm 1997 **Human Rights Brief** (Internet accessed on 10 November 1997).

¹¹¹ This Plan was developed by the National AIDS Convention of South Africa (NACOSA) through a consultative process in 1992. It was formally adopted by the Department of Health on 21 July 1994. The Plan still forms the core of the Department of Health's operational plans in respect of HIV/AIDS.

¹¹² As quoted in the Department of Health's comments on Discussion Paper 72.

2.47 Recently some Governments have initiated legislative changes to promote the more traditional public health approach to curbing the epidemic. These include proposed legislation in Zimbabwe criminalising the intentional spread of HIV, and the proposed HIV Prevention Act of 1997 introduced into the House of Representatives (United States) in March of this year. The proposed Act (which is currently still at committee discussion stage) covers a range of more traditional public health interventions such as improved HIV epidemic measurement; partner notification; HIV testing of sexual offenders; protection for patients and health care providers; HIV notification for insurance applicants and adoptive parents; criminalisation of intentional HIV transmission; and strict confidentiality for implementation of the provisions of the Act.

2.47.1 Some of the comments on Discussion Paper 72 supported this re-introduction of the traditional public health approach to prevent the further spread of HIV. The Chamber of Mines of South Africa, for instance, referred the Commission to the proposed HIV Prevention Act and submitted that a prohibition on pre-employment HIV testing would seriously hamper public health responses to the HIV epidemic through preventing the identification of individuals with HIV. The Chamber believes that new infections can be prevented only through knowledge of those members of the community with HIV.

2.48 But attempts to return to the traditional public health approach with regard to HIV/AIDS, have met with fierce opposition in the United States.¹¹³ Although containment and prevention efforts could play an important role as part of an overall strategy for combatting HIV/AIDS, they have been shown not to be overly effective by themselves.¹¹⁴ A major problem with this may be a lack of understanding and education on the public's part. This may permit HIV-related prejudices to flourish which may drive persons with HIV underground in an effort to avoid the discrimination associated with the disease. As a result, as observed earlier, persons with HIV often do not receive adequate treatment and care and may thus be more likely to infect others. Discrimination also perpetuates misinformation and stereotypes about how the disease is spread and the

¹¹³ Burr *The Atlantic Monthly* June 1997 65-67. For more detail see par 8.19.9-8.19.10 below.

types of people who are affected. The resulting negative attitudes cause HIV/AIDS to remain a forbidden subject, and in consequence people are likely to remain uninformed about risky behaviour they should avoid in order to remain uninfected.¹¹⁵

2.49 If pre-employment HIV testing is allowed to continue, it may create the impression that persons with HIV are a risk to our workplaces and thus in turn that their children may be a risk to our schools and their family members a risk to our communities. This would clearly undermine the Government's national prevention programme. In other words, by expressly prohibiting pre-employment HIV testing the messages contained within the Government's "*beyond awareness campaign*" of protection through behaviour change, acceptance of individual responsibility for sexual health, non-discrimination, and support and care for persons with HIV/AIDS, are endorsed.

2.50 The Commission is therefore of the view that a legislative ban on pre-employment HIV testing would promote the aims and objectives of the Government's National AIDS Plan and the public health goal of reducing the spread of HIV.

114 Grimm 1997 **Human Rights Brief** (Internet accessed on 10 November 1997).

115 Ibid.

3 RATIONALES FOR PRE-EMPLOYMENT HIV TESTING

3.1 A number of distinct rationales are generally advanced to justify pre-employment testing and to legitimate workplace discrimination on the basis of HIV. Broadly, these rationales stem from concern over employers' rights; workplace transmission; impaired occupational capacity arising from HIV-related causes; the costs of including people with HIV in the workforce; problems of providing benefits for employees with HIV; and beneficent concern for applicants with HIV.¹¹⁶ There are in addition broader concerns about the creation of disincentives for investment by over-regulating business, and the impact of AIDS-specific measures on public thinking about the epidemic.

3.2 As indicated in the introduction, individual comments on the rationales as set out in Discussion Paper 72 are included in this Chapter and Chapter 4. Understandably the emphasis placed in comments on the rationales differ according to the interests represented by the persons and bodies commenting. In general, comments on the rationales confirmed the opposing interests at stake in this debate, as well as the complexity and challenge facing the Commission in finding an equitable and workable solution. The rationales for pre-employment testing elicited the strongest response from commentators in that proponents supplied additional motivation while opponents submitted strong counter arguments.

A) **FIRST RATIONALE: EMPLOYERS' AND EMPLOYEES' RIGHTS**

3.3 Philosophically, many of the rationales for pre-employment testing derive from an emphasis on employer freedom of choice in deciding whom to hire. The legal basis of this right is located in the right to freedom of association and the freedom to contract. In a society which recognises these rights and freedoms, any inhibition - including inhibitions on whom an employer may hire - must be well justified.

¹¹⁶ BSA 1997 Response to SALC Presentation 2, 4.

3.3.1 The AHI submitted in its comments that an employer was entitled to hire the best candidate according to the job requirements. According to them, this could include taking economic factors into account when selecting employees. The AHI however emphasised that if pre-employment testing was required it should, as all other aspects of pre-employment assessment, be objectively justifiable in terms of the job requirements.

3.3.2 It may also be argued that a job applicant has the right to consent to furnishing information about his or her HIV status or to being tested. An individual's right to act as an autonomous being and thus decide which is the best course of action for him or herself in any given situation, is entrenched not only in the right to privacy but also in the rights to human dignity¹¹⁷ and freedom and security of the person.¹¹⁸ Moreover section 16 of the Constitution of the Republic of South Africa (Act 108 of 1996) (the 1996 Constitution) clearly gives everyone the right to freedom of expression which includes the freedom to impart information. From this perspective an individual is therefore entitled to make voluntary disclosures of private or personal information to a prospective employer or during the employment process.¹¹⁹

3.3.3 If the right to privacy extends to protect an individual from unwarranted interference in decision making regarding personal matters, as indicated below,¹²⁰ it could be argued that a prohibition on pre-employment HIV testing which does not also allow for voluntary submission to testing (or voluntary disclosure of HIV status) may amount to an infringement of such

¹¹⁷ The Constitution of the Republic of South Africa (Act 108 of 1996) sec 10.

¹¹⁸ Ibid sec 12(2).

¹¹⁹ Under circumstances of labour surplus (the supply of work seekers exceeding demand, resulting in unemployment) almost every job advertisement attracts numerous applicants. These applicants are aware that they are competing for the particular job. They also know that their relative healthiness could be as important as their relative qualifications in getting them the job. Good health, therefore, is a competitive advantage and may be used by the applicant.

¹²⁰ See par 4.3. See also the decision in **Bernstein v Bester** 1996 4 BCLR 449 referred to in par 5.11.4 below.

right.¹²¹

B) SECOND RATIONALE: OCCUPATIONAL TRANSMISSION

3.4 Although occupational transmission of the virus is unlikely, it is not impossible.¹²² As has been rightly pointed out by the AHI, risks vary from occupation to occupation with certain occupations bearing far greater risks than others. The AHI however does not agree with calculating the risk of occupational transmission theoretically.¹²³ The AHI submits that the risk is job-related and that for people who are in fact susceptible to such transmission, the risk is 100%. An employer may therefore wish to test applicants for employment for HIV because it considers it has a responsibility to prevent occupational transmission of HIV and that there is a possibility (however remote) of HIV transmission in that particular workplace.¹²⁴

3.4.1 The occupational safety justification for testing has led to health care workers with HIV being prevented from performing specified duties.¹²⁵ Doctors or surgical technicians known to have HIV have been prohibited from performing

¹²¹ Cf however, Neethling et al at 38 who is of the opinion that a infringement of the free exercise of will or autonomy does not involve an infringement of privacy since there is no acquaintance with private facts contrary to the will of and determination of the person in question. Moreover, it would appear that in such cases there is no question whatsoever of personality infringement. The free exercise of a person's will or his autonomy is related to the freedom of human self-determination within the limits imposed by the law. As such it falls under the concept of legal subjectivity (that is, someone's status in the law as a person and his capacity to possess rights and duties). If the right to privacy includes making an autonomous decision and not being interfered with, the right to autonomous decision making exists both as a personality right in terms of the common law and as a right enshrined in the Bill of Rights. It would thus receive stronger protection in that the legislature may not pass any law or take any action which infringes or unreasonably limits such right. Thus in addition to the normal delictual remedies available in the case of the infringement of a personality right, such rights receive constitutional guarantees and protection (op cit 82-83).

¹²² See fn 58 above for authority that HIV transmission in the ordinary workplace is a theoretical possibility but highly unlikely. See also Mason 1986 **Public Health Reports** 6; CDC **Morbidity and Mortality Weekly Report** 20 May 1994 347; **AIDS Weekly** 9 November 1992 24. Outside the health care profession, there have been no reported cases of occupational transmission of HIV.

¹²³ Cf par 4.7.1 below.

¹²⁴ 15 October 1996 **Hansard** 2437. In response to a question from Mrs NA Sisulu, The Minister of Safety and Security discusses his responsibility to protect the public from the possibility of transmission of HIV by a policeman in the work environment.

¹²⁵ In the United States, the **Americans with Disabilities Act** (42 USC ' ' 12101-12117 [Supp V 1993]) generally discourages pre-employment testing, but will permit testing in certain instances where a direct threat of injury or occupational transmission is created by the applicant's present health status. See, for example, the Equal Employment Opportunity Commission's regulations requiring an employer to focus on

exposure prone operations.¹²⁶ In **Doe v University of Maryland Medical System Corporation**, an Appellate Federal Court in the United States considered whether even in the surgical setting, where there was at most a one in 42 000 chance of HIV transmission during the performance of an exposure prone procedure, preventing a doctor with HIV from performing those procedures was justified. The court found that such a possibility of transmission constituted a "significant" risk given the consequences of HIV transmission, and that the hospital was justified in attempting to contain that risk through the adoption of specific procedures which included barring the doctor with HIV from performing certain operations. Because the possibility of transmission constituted a significant risk, the court found that the doctor was not "otherwise qualified" to perform his surgical duties, and that - for the purposes of the **Americans with Disabilities Act**¹²⁷ - discrimination against the doctor was fair and justifiable.

3.4.2 The occupational transmission rationale has also been advanced as a justification for testing applicants for employment in the military and in emergency service organisations.¹²⁸ Military officials contend that in certain battlefield instances the exchange of blood (either in combat or as part of human blood banks) is likely, and thus ensuring that military servicemen do not have HIV has operational benefits for national security.¹²⁹

3.4.2.1 The military, in Australia, is at present permitted to exclude servicemen with HIV from positions that - as an inherent job qualification - require field transfers of blood from one serviceman to another.¹³⁰

126 the applicant's present ability to safely perform essential job functions (29 CFR ' 1630 [1994]).
Doe v University of Maryland Medical System Corporation 50 F 3d 1261 (1995); **Leckelt v Board of Commissioners** 909 F 2d 820 (1990); **Bradley v University of Texas MD Anderson Cancer Center** 3 F 3d 922 (1993), *cert denied*, 114 S Ct 1071 (1994).

127 See fn 235 and par 5.17-5.17.3 below.

128 9 October 1996 **Hansard** 2381.

129 Ibid.

130 **Commonwealth of Australia v The Human Rights and Equal Opportunity Commission and 'X'** No

3.4.2.2 In the United States, the military is allowed to test servicemen for HIV.¹³¹ Until 1996 service members who tested HIV positive were not automatically discharged.¹³² In February 1996, the United States Congress passed legislation authorising the discharge of all service members who test positive for HIV.¹³³ President Clinton however ordered the United States Department of Justice to refrain from defending the provision from legal challenge.¹³⁴ In April 1996, the controversial legislation was repealed.¹³⁵

3.4.3 In certain instances, emergency service organisations - such as police and fire departments - have attempted to test applicants for HIV.¹³⁶ In one case, **Anonymous Firemen v City of Willoughby**, a Federal District Court judge in the United States found that the possibility of HIV transmission during the provision of emergency care, could justify the exclusion of applicants for employment with HIV. Despite evidence that transmission could not occur through casual contact,¹³⁷ and that mandatory HIV testing "implicated job applicants' right to privacy", the court accepted that the City could take

Qg 115 of 1995, 1996 Aust Fed (ct Lexis 859). However, see also par 5.23 below.

131 Gunderson et al 193 fn 3.

132 They were, however, often prevented from holding certain positions, including overseas assignments and service on board ships. **Plowman v United States Department of The Army** 698 F Supp 627 (1988); Gunderson et al 198. On government testing of applicants for employment in general, see 22 CFR 11.1(e)-(5).

133 Cf Orthmann **Law and Policy Reporter** April 1996 55. See 10 USCS 1177 (1996); Public Law 104-106, Div A, Title V, Subtitle F, @ 567(a)(1).

134 See Orthmann **Law and Policy Reporter** April 1996 55.

135 10 USCS @ 1177 (1966) was repealed by Public Law 104-134, Title 22, Chapter 7, @ 2707 (a)(1), 110 Stat 1321-330 April 26 1996.

136 **Doe v City of Chicago** 883 F Supp 1126 (1994); **Anonymous Firemen v City of Willoughby** 779 F Supp 402 (1991); **Doe v District of Columbia** 796 F Supp 559 (1992).

137 Cf the recent case of transmission of HIV in the absence of known risk exposure for HIV as reported in the Centers for Disease Control **Morbidity and Mortality Weekly Report** of 11 July 1997 at 620-623: In February 1996 transmission of HIV by an unknown route involving an HIV-infected man and his previously uninfected female sex partner was reported to the CDC. The epidemiological investigation of this transmission suggested that the woman was infected through mucous membrane exposure to the man's saliva that was contaminated by blood from his bleeding gums or exudate from undetected oral lesions. (Such exposure may have occurred during deep kissing and the woman's inflamed gingival mucosa, as indicated by her dental records, might have been a contributing factor.) The report noted that exposure to saliva uncontaminated with blood is considered to be a rare mode of HIV transmission.

reasonable precautions (i e testing) to prevent such a transmission.¹³⁸

C) **THIRD RATIONALE: IMPAIRMENT OF EMPLOYMENT-RELATED CAPACITY**

3.5 It is suggested that people with HIV, while not yet symptomatic, may experience neuropsychological symptoms. Employers fear that such symptoms may, even in the asymptomatic phase, impair performance and thus place co-workers or customers at risk of injury. Some employers suggest that the only way to prevent sudden onset of AIDS dementia is to test all applicants for employment for HIV. This argument for testing draws upon evidence that HIV may reside in the central nervous system of even asymptomatic persons. The aircraft pilot¹³⁹ and the mines lift operator are two occupations where it has been argued that a sudden onset of AIDS dementia could be dangerous to a large number of people. Given the drastic harm that could result from an accident in these occupations, it is argued that curtailment of the rights of all applicants is warranted. In the United States, concern over AIDS dementia and HIV-related neurological deficiencies has led to the disqualification (i e grounding) of pilots who are on anti-viral medication or who already have clinically defined AIDS (as opposed to HIV infection).¹⁴⁰ It has also been argued that doctors whose judgment is impaired by AIDS dementia may put patients at risk.¹⁴¹

3.5.1 The contention that possible pre-symptomatic presentation of HIV-related neurological impairment may warrant HIV testing is most frequently raised in the case of airline pilots. One source has stated that "AIDS can impair eye muscle coordination and other vital flight skills even before infected airline crew members show overt symptoms of the incurable, fatal disease" and that 25% of people with HIV were affected by neuropsychological symptoms before any

138 **Anonymous Firemen v City of Willoughby** 779 F Supp 402 (1991).

139 Harding et al 4.

140 McCormack 1995/1996 **The Journal of Air Law and Commerce** 292.

141 Fleming (Unpublished) 4-5.

other symptom.¹⁴²

3.5.2 It has been established not only that HIV does reside in the central nervous system, but that AIDS dementia may sometimes be the first manifestation of clinically defined AIDS.¹⁴³ There is no consensus on whether the possibility that AIDS dementia might occur in asymptomatic individuals can be ruled out, and how dangerous such an onset of dementia might be.

3.5.3 The AHI considers that in view of conflicting studies on AIDS dementia, there is as yet not sufficient evidence to show that sudden bouts of AIDS dementia will not occur in asymptomatic persons with HIV.

D) FOURTH RATIONALE: COSTS ASSOCIATED WITH RECRUITING, TRAINING AND SUPPORTING EMPLOYEES WITH HIV

3.6 It is widely accepted that, once an employee becomes ill with AIDS, application of the usual rules with regard to incapacity will generally permit appropriate job re-assignment and eventually termination. If an employee is so sick that he or she cannot return to work, the employment contract may be terminated because of the employee's incapacity. Employers however may wish to confine their direct costs by limiting the number of people they employ who can be ascertained to have HIV and who may pose an increased risk of work disability.¹⁴⁴

3.6.1 It is argued that pre-employment testing can reduce employment costs by identifying people with HIV, and removing them from the recruitment pool, since they are likely at some point to get sick. Costs incurred in training and recruiting employees, or incurred as a result of lost efficiency, are the focus of this consideration.¹⁴⁵ In a labour-intensive business the infection rate (and death

¹⁴² Wyld and Cappel 1991 **Labor Law Journal** 206; see also Harding et al 143-144.

¹⁴³ McCormack 1995/1996 **The Journal of Air Law and Commerce** 305: "Not until AIDS presents itself in one of several AIDS-characteristic diseases (including impaired cognitive skills) is the pilot's ability to perform her duties likely to be jeopardized".

¹⁴⁴ BSA 1997 **Response to SALC Presentation 1**.

¹⁴⁵ Solomon 1996 **AIDSScan** 5.

rate) can be as high as 25% of the work force. During the last year of illness an employee can be absent for up to 50% of the time. On this basis the AHI in its comments pointed out that as South Africa has been accepted as a fully fledged member of the international community, it is now required to compete on the international market. Lowered productivity will negatively impact on our ability to compete with others. The AHI also submitted that certain forms of training were exceptionally expensive (for example the training of airline pilots) and that in such circumstances employees were expected to remain with their employers for extensive periods of time.¹⁴⁶

3.6.2 The economic argument for testing has been extended by reference to new and more sensitive tests, for instance viral load testing, that may be able to forecast more accurately the future health status of prospective employees.¹⁴⁷ The argument is that it is justifiable to use knowledge about eventual unwellness in order to assist in making hiring decisions.

3.6.2.1 Dr Clive Evian and SACOB argue in their comments on Discussion Paper 72 that the issue for employers is not so much whether an individual is HIV positive or not but rather how advanced his or her HIV condition is. They state that this can now objectively be determined through clinical examination, CD4 cell count and HIV viral load testing. According to Dr Evian, an employer "should have the right to reject employees who have objective evidence of very advanced disease". Despite this, SACOB is not in favour of general pre-employment HIV testing. The Chamber contends that HIV testing should be done only when at any pre-employment medical examination an applicant presents with clinical indications of AIDS. In this instance it is unlikely that the employee would be able to fulfill his or her employment contract and therefore the employer should be

¹⁴⁶

See par 4.10.5 and 4.10.8 for counter arguments.

¹⁴⁷

BSA **1997 Response to SALC Presentation 1**. For a more complete discussion of the arguments for pre-employment testing, see Finnemore 1990 **IPM Journal** 35-40; Mello 83-85, 90-91. For more detail on

able to refuse such an applicant employment.¹⁴⁸ Dr Jim Murphy, Group Medical Officer of Barlow Limited, submitted that the Commission should take into account that an employer may expect an employee to be healthy and productive for a minimum period of time (for instance three to five years). As the CD4 cell count (in contradistinction to an HIV antibody test) may give some indication in this regard, it should be clarified whether the CD4 cell count would be permitted as part of a pre-employment medical examination.¹⁴⁹

3.6.2.2 The Provincial Administration, Western Cape Department of Health commented that it should be deemed fair and justifiable for an employer to refuse an individual employment on the ground of that person's deteriorated HIV status.

3.6.3 Contrary to the argument that persons with HIV may continue to be productive members of society for many years after acquiring HIV, Professor Alan Whiteside and the Chamber of Mines of South Africa submitted in their comments that in Africa there is evidence to suggest that the median time between infection and death is five to six years. This considerably increases the cost burden for employers.¹⁵⁰ The Actuarial Society of South Africa is strongly of the opinion that it is not correct to claim that the life expectancy of South Africans infected with HIV will be similar to that of infected persons in Western Europe or the United States. The Society estimates that the average life expectancy will be of the order of 10 years as opposed to 15 years typically experienced in Europe and the United States. (The Society anticipates however that life expectancy in South Africa will tend to be greater than is the case for the rest of Sub-Saharan Africa which is normally quoted as about eight years.¹⁵¹)

viral load testing see fn 41 above.

148

See also par 7.28 below.

149

Cf the arguments in par 4.10.2-4.10.5 below.

150

Cf par 4.10 et seq below for contrary points of view.

151

It is however, significant to note that in contrast to the detailed data available on disease progression from industrialized countries, the figures normally quoted for Africa are based on scanty data and are limited to sub-Saharan Africa. Data are available from six studies only - four of which suggest that in Africa,

3.6.4 The Chamber of Mines of South Africa in its comments draws attention to the particular link between HIV and tuberculosis which is of very real consequence to the mining industry (the single largest industry employer of labour in the country). Exposure to silica dust is one of the factors that increases the risk of contracting tuberculosis. The mining industry therefore constitutes an environment where a high risk of tuberculosis infection is present. The Chamber submits that a prohibition on pre-employment HIV testing overlooks the fact that employers may run the risk of incurring increased liability for their failure to protect employees and prospective employees with HIV from exposure to tuberculosis in the mining sector. Moreover, the principle of no pre-employment HIV testing ignores the provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996) which place a duty on employers to maintain a healthy and safe work environment. It is thus submitted by the Chamber that the testing of employees to determine their suitability for employment in occupations with a high risk of contracting tuberculosis should not be deemed to be unfair discrimination.¹⁵²

E) FIFTH RATIONALE: COST OF AND RISK TO EMPLOYEE BENEFITS

3.7 Pre-employment testing may also derive from concern to protect employee benefit programmes from financial risk or insolvency.¹⁵³ These include health and medical schemes, pension and provident funds, retirement and annuity funds, and group life coverage. HIV and AIDS will have different impacts on all of these funds. It is

progression rates to AIDS are similar to rates in industrialized countries. Only two of the studies suggest a more rapid progression. In one of these researchers found that the rapid progression of disease may be related to unknown lifestyle factors and frequent re-exposure to HIV of the study group (women sex workers). It was further found that lack of medical care may affect both the duration of the incubation period as well as the symptomatic survival period: If most deaths occur after clinical AIDS has developed, rapid disease progression must be occurring - but it seemed more likely that what was happening in Africa was premature death from extraneous high-grade infections at a pre-AIDS stage. It was concluded that additional studies are needed in order to accurately document rates of disease progression in developing countries (Mulder **AIDS in the World II** 15-16).

¹⁵² Cf par 4.10.10 below for counter arguments.

¹⁵³ For a discussion, see Cameron and Adair (Unpublished) 5.

argued that benefit schemes cannot continue to function properly if people with HIV are given coverage whether limited or unlimited. In conjunction with this argument, proponents of testing suggest that employees without HIV have a right to exclude those with HIV from their benefit coverage, or limit their coverage of HIV-related costs.¹⁵⁴ Several respondents from the business sector submitted in their comments on Discussion Paper 72 that if HIV is to be treated as any other life threatening disease then mechanisms should be available to enable benefit funds to assess the potential risk of new members.¹⁵⁵

F) SIXTH RATIONALE: BENEFICENT PROTECTION OF EMPLOYEES IN THE WORKPLACE

3.8 Pre-employment testing may be considered to have value because it may be in the best interests of applicants for employment to establish their HIV status, in order to ensure that workplace accommodations can be made.¹⁵⁶ This argument is based on the interest that individuals may have in finding out their HIV status to enable them to avoid or take precautions against opportunistic infections. Instances include health care workers and others whose work has a tendency to include exposure to untreated tuberculosis.

3.8.1 Another suggested instance is airline flight crew, who in the course of performing their job functions are required to travel to locations for which prophylactic inoculation with live vaccines - which might not be clinically recommended for people with suppressed immune systems - is necessary.¹⁵⁷

¹⁵⁴ BSA **1997 Response to SALC Presentation 7**, noting the wide variety of parties that have an interest in employee benefits.

¹⁵⁵ Comments of eg the AHI, the City of Durban Pension Fund, and the Town Secretary, Transitional Local Council of Krugersdorp. Cf also the comments of the City Council of Pretoria Personnel Services Department who implied that a distinction should be drawn between testing for access to employment and access to employee benefits.

¹⁵⁶ BSA **1997 Response to SALC Presentation 2**, noting the susceptibility of individuals with HIV to TB bacillus.

3.8.2 In the United States, members of the foreign service (and other government employees¹⁵⁸) who are subject to long term deployment in countries without appropriate medical care are tested for HIV. In a court action by the union of federal employees contesting the United States State Department's policy not to post employees with HIV to countries without appropriate medical care, the policy was upheld because the court found that the testing could be in the best interest of the union members.¹⁵⁹

G) SEVENTH RATIONALE: SOCIAL BENEFITS DERIVED FROM ASCERTAINING THE HIV STATUS OF APPLICANTS FOR EMPLOYMENT

3.9 It is further suggested that testing applicants for employment may have a social benefit in that persons who learn that they have HIV will be able to make appropriate life decisions, such as changing their diet, or taking precautions to protect sexual partners. It is argued that testing will counteract the cloak of silence that surrounds HIV and AIDS.

3.9.1 Dr JH Olivier, the City Council of Pretoria Medical Officer of Health submitted in comments that by ascertaining the health status of a worker, everyone - including the employee - benefits. If employers are willing to budget for the cost of testing, it takes a burden off the Government and other benefit providers. He concluded that testing can prove to be most valuable as the results can be utilised to determine the real onslaught of HIV and anticipate the effects on the economy and society.

¹⁵⁷ Cf also par 3.6.4 above.

¹⁵⁸ See 22 CFR 11.1(e) for examples of employees subject to HIV testing. These include people who are employed in the Peace Corp, and deployed to countries without appropriate medical care.

¹⁵⁹ **Local 1812 v United States Dept of State** 662 F Supp 50 (1987).

H) EIGHTH RATIONALE: FEARS OF CO-WORKERS AND CLIENTELE

3.10 While some employers may recognise that there is generally no risk of HIV transmission in the workplace, they may still want to exclude employees with HIV so as to forestall possible workplace disruptions resulting from co-worker reaction to HIV and to ensure that clientele do not abandon business because of irrational fears of getting HIV. This argument has often been raised in service industries such as restaurants and hotels, where employers may recognise that there is no risk of HIV transmission but may still want to remove the fears of clientele.

3.10.1 The AHI in addition pointed out in their comments that once people develop AIDS this could have a negative impact on the atmosphere in the workplace in the sense that co-workers may feel resentful about having to take on an additional workload because of their colleagues' incapacity. According to them, co-workers and clients will further have to deal with the social implications of witnessing deteriorating health and eventual death.

I) NINTH RATIONALE: COSTS OF REGULATION

3.11 It is argued that legislation may be part of a trend of over-regulation that will inhibit economic growth. Over-regulation may detract from national economic development by discouraging investment in people and job creation. If employers are forced to hire certain groups of people, the cost of labour may be driven up. If the cost of labour is too high, capital will leave South Africa for other unregulated, or less regulated, markets. Even marginal increases in labour or investment costs, or even the perception that such costs may arise, may make investment here less attractive and thus operate as a disincentive to it. Over-regulation may also lead to greater mechanisation, the employment of fewer people, or even the employment of people on a part time basis, offering fewer or no employment related benefits.

3.11.1 This rationale was supported by the comments of the AHI.

J) TENTH RATIONALE: "AIDS EXCEPTIONALISM"

3.12 Finally, it is argued that AIDS-specific legislation may have no public health benefit because its exceptional treatment of the condition could further stigmatise HIV.¹⁶⁰ The public health response to HIV should be similar to the response to other comparable diseases. The impression that HIV is receiving special treatment may create a backlash against those affected. These arguments were strongly supported by several commentators.¹⁶¹

4 RATIONALES AGAINST PRE-EMPLOYMENT HIV TESTING

4.1 It is argued that testing applicants for employment facilitates unfair discrimination and infringes upon their right to privacy. Broadly, it is further argued that if HIV testing infringes upon the rights of applicants for employment, there must be a reasonable justification for the infringement. The further point is made that HIV testing frequently occurs in employment areas where there is virtually no possibility of transmission, and where HIV poses no danger to co-workers or the general public. Pre-employment testing in these instances may be futile, unfair, unproductive and misleading.¹⁶² It is also argued that non-voluntary HIV testing may furthermore inhibit prevention efforts by continuing to stigmatise HIV and AIDS and by facilitating discrimination against people with HIV.¹⁶³ Furthermore, there is no responsibility to employ those who from unwellness are incapacitated from doing their jobs: the

¹⁶⁰ BSA 1997 Response to SALC Presentation 6.

¹⁶¹ Comments of SACOB, Dr Clive Evian, the AHI, the Judges of the Northern Cape Division of the High Court of South Africa, the Actuarial Society of South Africa, the Life Offices' Association (LOA), Prof Alan Whiteside, Dr T Patyicki, Dr Aart Hendriks of the University of Amsterdam and Dr JH Olivier, City Council of Pretoria Medical Officer of Health. The City of Durban Medical Officer of Health also indirectly supported these arguments. Comments regarding AIDS exceptionalism are extensively dealt with in par 7.19 -7.27 below.

¹⁶² Albertyn and Rosengarten 1993 **SAJHR** 85-86; Arendse 1991 **ILJ** 218-227; Cameron 1993 **Employment Law** 8-10; Evian 1991 27-29; Fluss 1988 **World Health Forum** 365-369; **Business Day** 20 February 1997; Lacob 1996 **De Rebus** 396-400; London and Myers 1996 **SAMJ** 329-330; **SALUS** December 1994 10-11; **Australia Discussion Paper Employment Law** 25-27.

¹⁶³ Kirby 1993 **SAJHR** 3- 4; Cameron 1993 **SAJHR** 27; Trebilcock 1989 **International Labour Review** 30.

employment contract may be terminated, after compliance with legislative prescriptions, in the case of those too ill to fulfill their job requirements.

4.2 As indicated in Chapter 3, comments received on the rationales are also included in this Chapter. With regard to the rationales against pre-employment HIV testing commentators did not respond as extensively as in the case of the rationales in favour of testing. In this instance comments mainly consisted of confirmation and endorsement of the arguments presented.

A) **FIRST RATIONALE: EMPLOYERS' AND EMPLOYEES' RIGHTS**

4.3 Requiring an applicant for employment to undergo an HIV test, as a general condition of employment, may infringe his or her right to physical integrity (i.e. through the drawing of blood) and his or her right to privacy (i.e. through testing the blood sample for HIV).¹⁶⁴ The right to bodily integrity may protect a person's right of ultimate decision whether or not to subject him- or herself to an unwarranted medical intervention.¹⁶⁵ The right to privacy can protect a person from unwarranted intrusions into his or her home and body. The right to privacy does not merely protect against these physical intrusions. It also can extend to protect an individual from unwarranted disclosures of personal information,¹⁶⁶ and may even extend to unwarranted interference in decision making regarding personal matters.¹⁶⁷

4.3.1 The Appellate Division of the Supreme Court (renamed the Supreme Court of Appeal under the 1996 Constitution) found that the unwarranted disclosure of a person's HIV status is an infringement upon that individual's privacy rights.¹⁶⁸

¹⁶⁴ Van Wyk 128-155; Van Wyk 1991 **Medicine and Law** 144-147; Van Oosten **Essays in Honour of SA Strauss** 282-283, 286, 289.

¹⁶⁵ Van Oosten **Essays in Honour of SA Strauss** 282.

¹⁶⁶ **Financial Mail (Pty) Ltd v Sage Holdings Ltd** 1993 2 SA 451 (A) 462E-F; **Jansen van Vuuren v Kruger** 1993 4 SA 842 (A) 849E-F. See par 5.11.1-5.11.4.

¹⁶⁷ **Bernstein v Bester** 1996 4 BCLR 449 (CC) 483E-G. See par 5.16-5.16.2 for an American view of the right to privacy. See par 5.26 for the European Court of Justice's similar view of the right to privacy.

¹⁶⁸ **Jansen van Vuuren v Kruger** 1993 4 SA 842 (A) 849E-F. See par 5.11.1-5.11.4.

- 4.3.2 While in some instances the application for employment may legitimate enquiries into otherwise personal information, the extent of the justification of the enquiry must depend upon *job related* considerations. It can not be argued that an application for employment in itself constitutes an unreserved waiver of the rights of the applicant for employment.
- 4.4 Testing may facilitate unfair discrimination against applicants with HIV. A decision to test is often based upon stereotype and irrational fear.¹⁶⁹ An employer will generally test an applicant for HIV only in order to differentiate between those applicants with HIV and those who are seronegative. The mere HIV status of an employee will generally not have any effect on his or her ability to perform essential job functions. Taking into account the HIV status of an applicant for employment may constitute unfair discrimination against that applicant.
- 4.5 The question - in regard to both infringement upon an applicant's right to privacy and bodily integrity and an applicant's right to equality - is whether there is adequate justification for the infringement.
- 4.6 To require a test as a precondition for employment may amount to the imposition of a mandatory requirement which bears upon the voluntary nature of the consent to the invasion of bodily integrity and of privacy. An applicant for employment who needs the job to provide him- or herself and dependants with food and shelter, and who is required as a precondition of employment to undergo HIV testing may not consent voluntarily to the test in any real sense of the word.¹⁷⁰ This consideration counters the argument that applicants for employment are merely exercising a personality or constitutional right encompassing the right to impart information when an employer requires that they

¹⁶⁹ Cf Cover 1982 **Yale Law Journal** 1287(Lexis Nexis); Halley 1994 **Stanford Law Review** 503 (Lexis Nexis). Both Halley and Cover argue that the fairness of discrimination, in the context of race and sexual orientation, should be scrutinized - not in mere terms of biological characteristics - but with a historical sense of socially generated stereotypes. Cf also Labour Sector **1997 Response to SALC Presentation 2**.

¹⁷⁰ Neethling 106, 274; Neethling **Huldigingsbundel vir WA Joubert** 118; cf also Van Wyk 129, 278-279.

volunteer their HIV status.

4.6.1 The AIDS Legal Network (ALN) expressed the opinion that pre-employment HIV testing does not infringe on employers' right to hire, their freedom of association or their freedom to contract since traditionally these rights have always been limited by a person's qualifications, performance and suitability for a job. The ALN submitted that health has been a consideration, but only in so far as it impacts upon immediate ability to perform the essential job functions. This view was supported by the Democratic Nursing Association of South Africa in their comment.

B) SECOND RATIONALE: OCCUPATIONAL TRANSMISSION

4.7 In most job occupations there is no danger of occupational transmission of HIV or of opportunistic infections associated with AIDS.¹⁷¹ Even in health care, where blood-prone procedures may be involved, retrospective studies involving health care workers with HIV have shown a minimal risk of HIV transmission to patients.¹⁷²

4.7.1 In a surgical procedure where a doctor with HIV manipulates a needle or knife within a body cavity, there is at most a one in 42 000 chance of HIV transmission.¹⁷³ The risk in occupations that involve less blood and bodily fluids, such as the police or fire force, is even more negligible.¹⁷⁴ In **Doe v District of**

171 See fn 206 below for a definition of "mandatory testing".
See Arendse 1991 **ILJ** 220: "According to the best scientific evidence, the HIV or AIDS infected employee does not, in the performance of his or her normal workplace activities, constitute a risk to other employees".
See also Cameron 1993 **Employment Law** 8-10; London and Myers 1996 **SAMJ** 329-330; Matjila (Unpublished) 6-8; Labour Sector **1997 Response to SALC Presentation** 6-7.

172 Matjila (Unpublished) 7; Bell and Chamberland 1992 **Annals of Internal Medicine** 871; McIntyre (Unpublished) 1, 6; Wicher 1993 (MEDLINE Abstract); An United States Appellate Court has noted that there was between a one in 42 000 and a one in 417 000 chance of transmission from doctor to patient during exposure prone procedures (**Doe v University of Maryland Medical System Corporation** 50 F 3d 1261 (1995)). (The court distinguished between an "exposure prone procedure" - involving the digital palpation of a needle tip or knife in a poorly visualized or highly confined space - and most types of surgery that create an even tinier chance of HIV transmission.)

173 CDC **Morbidity and Mortality Weekly Report** 12 July 1991 1.

174 Matjila (Unpublished) 7, 8.

Columbia the United States Federal District Court recognised that the decision to exclude firemen with HIV - on the basis of a hypothetical risk that HIV transmission could occur - was irrational and unfair.¹⁷⁵

4.7.2 The Australian Federal Court recognised that even in the military context, requiring an employee to "bleed safely" in the case of an occupational accident was a ludicrous job qualification.¹⁷⁶ While a theoretical risk of HIV transmission exists in all situations where two people might, as the court states, "trip on a stair, fall and suffer injury which bleeds" in such manner that transmits HIV to a fellow worker, a theoretical possibility of that kind was held not to justify discriminating against people with HIV.¹⁷⁷ This approach was supported by the Democratic Nursing Association of South Africa who felt that the military should be encouraged to practice universal precautions even in times of military conflict.

4.7.3 Even where (or if) HIV could create a danger in the workplace, testing applicants for employment for HIV cannot guarantee an HIV-free workforce. An employer cannot "screen" out HIV from the workplace any better than it can require existing employees to abstain from sexual intercourse or other activities that may transmit HIV. Testing is therefore an expensive and inefficient method of attempting to reduce the number of people in the workforce with HIV.

4.7.4 It is acknowledged internationally that the most effective means for employers to protect against transmission of HIV in the workplace is to implement universal infection control measures.¹⁷⁸ The AHI supported this argument. Implementing these measures is most obviously necessary in the health care field where universal precautions are in any event needed to prevent

¹⁷⁵ **Doe v District of Columbia** 769 F Supp 559 (1992).

¹⁷⁶ **Commonwealth of Australia v The Human Rights and Equal Opportunity Commission and 'X'** No Qg 115 of 1995, 1996 Aust Fed Ct (Lexis 859).

¹⁷⁷ Ibid 38. Cf also par 5.17.6 for a full discussion of this case and its premises.

¹⁷⁸ South African Law Commission **First Interim Report on Aspects of the Law Relating to AIDS (Project 85)** February 1997, par 3.1-3.25. See also the comment by the AHI which supported this argument.

transmission of infections between patients and/or health care workers.¹⁷⁹

C) **THIRD RATIONALE: IMPAIRMENT OF EMPLOYMENT-RELATED CAPACITY**

4.8 According to present knowledge, there appears to be little basis for fearing that asymptomatic persons with HIV may be subject to sudden bouts of AIDS dementia that could put co-workers or customers at risk. As early as 1988, the WHO's Statement on Neuropsychological Aspects of HIV Infection found:

Governments, employers, and the public can be assured that based on the weight of available scientific evidence, otherwise healthy HIV-infected individuals are no more likely to be functionally impaired than uninfected persons. Thus, HIV testing would not be a useful strategy to identify functional impairment in otherwise healthy persons.¹⁸⁰

4.9 Since this statement, a number of studies on AIDS dementia in asymptomatic seropositive individuals has been performed. On balance, the evidence suggests that AIDS dementia is unlikely to occur in asymptomatic people with HIV.

4.9.1 The WHO's **Neuropsychiatric AIDS Study, Cross Sectional Phase II** (1994) concluded that risk of subtle cognitive deficits may exist in asymptomatic stages, but that these changes do not seem to affect daily living activities.¹⁸¹

4.9.2 Recent studies suggest that, in spite of the presence of HIV in the central nervous system, people with HIV will remain neurologically intact during

¹⁷⁹ Fleming (Unpublished) 5 states: "The possibility of HIV-transmission from health care worker (HCW) to patient is immeasurably small. The rights of a HCW with HIV are the same as any other person with HIV".

See also the **SA Nursing Association in Conversation with SA Strauss 1994** which states (at 8): "The fact that a health care worker has AIDS does not provide sufficient justification for denying him his livelihood. The possibility of the AIDS virus being communicated to a patient by an HIV-infected health care worker in the course of delivering health care is very slight and can be avoided by taking effective preventive measures".

¹⁸⁰ As quoted in WHO **Report of an International Consultation on AIDS and Human Rights** 1989 50.

¹⁸¹ Maj et al 1994 **Archives of General Psychiatry** 51 et seq.

the incubation period.¹⁸² Longitudinal studies reported to date "have failed to find any difference in neuropsychological performance between people with asymptomatic HIV infection and seronegative controls", and have established that while neuropsychological performance differentials existed between those with asymptomatic and symptomatic HIV, no such differentials existed between HIV seronegative and asymptomatic HIV seropositive individuals.¹⁸³

4.9.3 One study testing the value of using neuropsychological impairment as an indicator of early illness (morbidity) acknowledged that asymptomatic HIV-positive subjects had a "poorer immune profile and poorer neurologic symptom rating" than HIV-negative subjects, but found nevertheless that the groups "did not differ significantly on any other parameter, including ... motor or cognitive function or mean score on the global measure of neuropsychological performance".¹⁸⁴

4.9.4 A Canadian report found no evidence supporting the allegation that asymptomatic individuals with HIV could suffer from cognitive deficiencies and concluded that there is no justification for HIV testing to detect function impairment in asymptomatic persons in the interest of public safety.¹⁸⁵

4.9.5 A study of 748 people with HIV found only one case of transient neurological deficit where the patient did not simultaneously demonstrate a severely compromised immune system.¹⁸⁶

4.9.6 In a recent and comprehensive treatment directory on HIV/AIDS, the position is summarised thus:

Opportunistic infections occur in one third of the central nervous systems (CNS) of people with AIDS. While it is clear that the CNS

¹⁸² Iragui et al **Electroencephalography and Clinical Neurophysiology** 1.

¹⁸³ Burgess et al 1994 **Psychological Medicine** 886, 888, 890.

¹⁸⁴ Albert 1995 **Archives of Neurology** 527.

¹⁸⁵ **Ontario Report** 63, fn 204, 205.

¹⁸⁶ Baily and Mandal 1995 **AIDS** 711-712; cf however **AIDSScan** December 1995 9.

may be exposed to HIV early in the course of infection, *this does not characteristically result in clinically evident neurological dysfunction until much later*. Thus, studies of asymptomatic seropositives have shown that the cerebrospinal fluids may have abnormally high levels of white blood cells, protein, locally produced antibody, and detectable virus, yet the study subjects *remained clinically normal even when evaluated using careful quantitative neuropsychological testing*. Additionally, prospective studies ... have shown that systemically asymptomatic subjects remain neurologically intact.¹⁸⁷ (Emphasis added.)

4.9.7 If it is effectively demonstrated that people with HIV experience, while still asymptomatic, HIV-related neurological impairment, it may be fair and justifiable for certain employers to limit the access of people with HIV to specific professions.

4.9.8 However, currently, the best way to prevent workplace accidents arising from neurological impairment is to test for the dysfunction itself. HIV itself is not a reliable indicator of neurological impairment. Proponents of workplace safety have argued for psychometric or other practical (rather than biological) tests to determine neurological functioning. A Canadian report has concluded that -

(T)here exist practical rather than biological tests for neurological and spacial functioning which are non-discriminatory because they do not locate the cause of the impairment but concentrate on its effect in relation to job performance.¹⁸⁸

D) FOURTH RATIONALE: COSTS ASSOCIATED WITH RECRUITING, TRAINING AND SUPPORTING EMPLOYEES WITH HIV

¹⁸⁷

AMFAR AIDS/HIV Treatment Directory June 1996 135-138.

4.10 As stated earlier, the epidemic will have an overall effect on the economy, and employers will unavoidably be faced with higher labour costs.¹⁸⁹ The brunt of the illness will be borne by the economically active population.¹⁹⁰ However, workers with HIV may continue to be productive members of society for many years after acquiring HIV (thus paying for their own medical aid, contributing to the tax base, and taking care of their families and dependants).¹⁹¹ Employing otherwise healthy persons with HIV for as long as possible thus makes sound economic sense. The City of Cape Town Health Department and the Breede River District Council AIDS Action Committee pointed out that since the advent of new combination therapies a large percentage of patients on these therapies would be able to continue to work for longer periods of time and possibly indefinitely. Legally an employer is not required to retain employees who, from illness, are no longer able to perform their essential job functions.¹⁹² Neither the state, nor individuals, nor employers are expected to bear the costs of HIV on their own. If an employer seeks to limit the transmission of HIV, and the costs that HIV will impose on society, the most rational and efficient expenditure of time and money is on education and other prevention strategies, rather than mandatory testing.¹⁹³

4.10.1 Expenditures for testing applicants may waste resources because tests can determine only whether a person is seropositive for HIV antibodies at the time the test is taken. Testing applicants for employment may waste resources on people who may not (for reasons unrelated to HIV) come into the workforce. It is argued that the most effective way to reduce HIV related recruitment and training costs is to educate existing employees about HIV and AIDS, and to encourage existing employees to engage in prevention campaigns. In occupations where there are high costs to specialised training, employers may find it more cost-effective to provide medical support to such employees as may

188 **Ontario Report 27**; cf also Labour Sector **1997 Response to SALC Presentation 5**.

189 Cameron 1991 **ILJ** 201-203.

190 Albertyn and Rosengarten 1993 **SAJHR** 77.

191 Cf par 3.6.3 above for counter arguments.

192 Sec 2(2) of Schedule 8 of the Labour Relations Act (Act 66 of 1995) (LRA) provides that "(T)his Act recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the *employee*, the capacity of the *employee*, and the *operational requirements* of the employer's business". See also Labour Sector **1997 Response to SALC Presentation 5-6**.

have HIV. Medication, and other interventions including lifestyle adaptation, may extend the length of time employees with HIV can work.

4.10.2 The HIV status of an applicant for employment does not generally indicate how long that individual will be capable of working. As Arendse states: Applicants who are deemed medically fit at the time of the interview should not be deprived of work because of the possibility of AIDS: medical fitness should be determined through the normal process of consideration and the normal rules concerning sickness should operate.¹⁹⁴

4.10.3 Even as testing becomes more sophisticated - and viral load tests may begin to estimate how long an employee will be able to perform job functions¹⁹⁵ - the entire cost of the illness will not have to be borne by the employer. No employer is obliged to employ a sick workforce. When incapacity supervenes (that is, when an employee is no longer capable of performing a job function), the employment contract may, after observance of legal prescriptions, be terminated.¹⁹⁶ Conversely, otherwise healthy employees should be permitted to work.¹⁹⁷

4.10.4 As scientific and genetic tests become more sensitive, doctors will be able to calculate risks for cancer, diabetes and heart disease. Ultimately, it might

¹⁹³ Colebunders and Ndumbe 1993 **The Lancet** 601; Kimball and Myo 1996 **The Lancet** 1670.

¹⁹⁴ Arendse 1991 **ILJ** 226-227.

¹⁹⁵ Orthmann **Law and Policy Reporter** July 1996 107. Orthmann reports that the viral load test kits were approved for use by the FDA in June 1996. These tests are suggested, by Orthmann and others, to be a better predictor of disease progression (and of seropositivity) than the current method of counting CD4+ T-cells. These tests may be beneficial in diagnosing occupational transmission of HIV from patient to health care workers, and may assist in providing treatment. See also fn 41 above.

¹⁹⁶ For a definition of incapacity see: **Burdekin v Dolan Corrugate Containers Ltd** 1972 IRLR 9; **Hebden v Forsey and Son** 1973 ICR 607; **Marshall v Harland and Wolff Ltd** 1972 ICR 101; **Seeboard Plc v Fletcher** 1990 EAT 471; **Tan v Berry Bros and Rudd Ltd** 1974 ICR 586. See also Schedule 8 of the LRA which deals with when, and under what conditions, an employee may be dismissed because of incapacity (sec 10).

¹⁹⁷ Trebilcock 1989 **International Labour Review** 34 states: "(I)n the vast majority of cases there is no relationship between a person's seropositive status and the job he or she will have to perform and hence there is no justification for testing". Van Wyk 1991 **Codicillus** 7 states: "It would hardly seem ethical to exclude all seropositive people from the workplace ... No reason exists in the normal workplace to treat HIV-positive workers differently - they are usually able to do their work and will possibly remain that way

be possible on the basis of these predictive tests to seek to justify the exclusion of broad segments of the labour market from employment. There are however legal, ethical and social problems in denying employment based upon one of the myriad factors which may result in shortened life expectancy.¹⁹⁸

4.10.5 It is true that employing applicants who can be ascertained to have HIV entails the prospect that supervening illness will eventually impose on the employer a loss of productivity, and, if training has been furnished, a loss of investment. But an employee is in any event not bonded to his or her employer for life. An investment in training can for this reason never be considered wholly secure. A trained employee may leave for many reasons, or suffer illness or disease from causes other than HIV.¹⁹⁹ The South African Nursing Association supported this argument by emphasising that anyone can get sick at any time and have differing levels of ability. In addition any woman can become pregnant and thus be absent from the workplace for a period of time.²⁰⁰

4.10.6 What is more, an employee may test negative for HIV, but become infected at any stage after employment or training. This fact is a particularly acute consideration as the epidemic sweeps through the country's workforce. It renders some HIV-related costs inevitable. Insistence on HIV testing at recruitment or before training is therefore more difficult to justify than if pre-employment testing could guarantee an HIV-free workforce.

4.10.7 Because pre-employment testing can never, on its own, guarantee an HIV-free workplace, pre-employment testing can strictly be logical only if the existing workforce is regularly retested, and the employment of those ascertained to have HIV (including those still capable of performing their job requirements) terminated. The latter expedient is plainly impermissible under existing labour

for a long time".

198 See Gostin 1991 *American Journal of Law and Medicine* 110 et seq for a discussion of the possibility of genetic testing and the invidious discrimination that may as a result occur.

199 Ibid 109.

200 Cf the arguments in par 3.6.1 above.

regulation.

4.10.8 Even if pre-employment testing cannot eliminate people with HIV from the workplace, it could be argued that it could at least reduce some of the costs of recruitment and training which the individual employer may have to bear. In addition, it may be argued that pre-employment testing might reduce the number of people in the workplace with HIV. However, the costs of including people with HIV in employment are not unfamiliar: they are comparable to the costs of engaging in fair labour practices. These are costs associated, not only with HIV or AIDS, but with the prohibition on unfair discrimination and a commitment to equality and dignity for all South Africans. It must be borne in mind, furthermore, that excluding persons from employment on the ground of HIV imposes costs upon the state (and through the state, upon taxpayers), not only through the loss of their productive contributions, but through the burden of having to take care of individuals who have less access to employment in general, and who have been prematurely excluded from specific employment positions. The City Council of Pretoria Medical Officer of Health endorsed these considerations. Employers will eventually, in all likelihood, be affected by these costs.

4.10.9 There may be costs of preventing workplace transmission of HIV. These include the costs of applying universal precautions. However these costs cannot be eliminated by testing applicants for employment for HIV. If an employer was determined to maintain an HIV-free work environment, he or she would be required to test and re-test repeatedly. Even this would not eliminate the need for using generalised universal precautions so as to prevent the occupational transmission of other infections and of as yet undetected HIV.

4.10.10 As regards the particular link between HIV and tuberculosis, the ALN countered the argument of the Chamber of Mines of South Africa that a prohibition on pre-employment HIV testing overlooks the fact that employers may run the risk of incurring increased liability for their failure to protect

employees and prospective employees with HIV from exposure to tuberculosis in the mining sector.²⁰¹ The ALN submits that under the Occupational Health and Safety Act (Act 85 of 1993) and the Mine Health and Safety Act, 1996 employers are legally required to create a safe working environment. The possible risk of an industrial accident, or high prevalence of tuberculosis (for example in the mining sector) could not therefore be considered "employment conditions" that may justify testing. Every employer must ensure workplace safety as far as practicable and not seek "to weed out" potentially ill people or make bleeding safely in the event of an accident a condition of employment.

E) FIFTH RATIONALE: COST OF AND RISK TO EMPLOYEE BENEFITS

4.11 An employer or other benefit-provider can, without unfair discrimination, restructure benefit plans to prevent jeopardy to them or their collapse, without excluding all people with HIV and without overburdening employees without HIV. HIV can and should be treated like other comparable life-threatening conditions.²⁰² Several commentators, including those from the business sector (the AHI, Life Offices' Association (LOA) and the Chamber of Mines of South Africa) and Prof Alan Whiteside supported this contention.

4.11.1 Once a person is taken into employment, it is possible to structure all benefit plans to contain costs without offering unlimited coverage to anyone. The LOA supported providing persons with HIV with some alternative form of benefits where their access to the normal employee benefits would be problematic.

4.11.2 Benefit plans can furthermore distinguish between occupational and non-occupational injuries - providing coverage for illnesses that result from workplace accidents, but limiting coverage for unrelated sickness. This can

²⁰¹ See par 3.6.4 above.

ensure that otherwise healthy employees with HIV are able to retain coverage for occupational accidents, but that all employees share equally the burden of injury and illnesses that are not work-related.

4.11.3 The City Council of Pretoria Medical Officer of Health observed that it is not possible to offer differential benefits without testing for HIV or the disclosure of HIV status.

4.11.4 The Gauteng Department of Welfare and Population Development added that excluding persons with HIV from employee benefit schemes will place an additional burden on the Government's social security plans.

4.12 Non-arbitrary approaches to all illnesses are indeed likely to entail less coverage for other diseases than before HIV. But this may be the inevitable consequence of a national commitment against unfair discrimination on any irrational ground. As stated earlier, non-discrimination will necessarily entail some costs.

4.13 The Ontario Court of Appeals in **Ontario Human Rights Commission v North American Life Assurance**, accepted that a company could make distinctions based upon health status to protect benefit coverage, but stated that an offer of employment could not be conditioned upon enrolment in an employee benefit plan.²⁰³

F) **SIXTH RATIONALE: BENEFICENT PROTECTION OF EMPLOYEES IN THE WORKPLACE**

4.14 While it is accepted that certain jobs may pose heightened risks to employees with HIV, such as additional stress (which has been shown to hasten the onset of AIDS²⁰⁴) or exposure to opportunistic infection, it is argued that the employee is best

²⁰² Cf Labour Sector **1997 Response to SALC Presentation** 8-9.

²⁰³ **Ontario Human Rights Commission v North American Life Assurance Co** 123 DLR 4th 709 (1995).

²⁰⁴ **Jansen van Vuuren v Kruger** 1993 4 SA (A) 854I-J.

situated to determine his or her own interests. Non-voluntary testing is unlikely to enhance an individual's ability to determine those interests.²⁰⁵ In an occupation where exposure to active and untreated tuberculosis is likely, all employees should be encouraged to take steps to protect against tuberculosis infection. Testing of applicants for employment may more generally give employees the false sense of security that general infection control measures are not necessary.

4.14.1 The Democratic Nursing Association of South Africa argued that good standards of occupational health should be established for all employees, while the AHI questioned whether persons with HIV, in circumstances where their health was threatened, would decline a job, resign, or lose income or a promotion to reduce HIV-related stress.

G) SEVENTH RATIONALE: SOCIAL BENEFITS DERIVED FROM ASCERTAINING THE HIV STATUS OF APPLICANTS FOR EMPLOYMENT

4.15 It is argued that widespread pre-employment testing may, paradoxically, facilitate the transmission of HIV by creating a false sense of security about the need for precautionary measures amongst employees who have tested negative for the virus. In addition it is argued that the only ways to reduce the high rates of sexual transmission of HIV is to encourage condom use, fidelity with sexual partners, or abstinence. An individual's decision to engage in unprotected sexual intercourse involves calculations of a highly personal order, which could include a decision to test for HIV or to engage in conversations with his or her sexual partner(s) about fidelity.

4.15.1 It is unlikely that personal risk assessment decisions will be encouraged by non-voluntary workplace testing. The AHI supported this contention.

4.16 Widespread mandatory testing - as a means of reducing the rates of HIV

²⁰⁵

Labour Sector 1997 Response to SALC Presentation 7.

transmission - has been disavowed by almost all public health officials.²⁰⁶ Unfair discrimination against people with HIV is invidious and impedes national prevention efforts by creating disincentives to counselling and testing of the infected.²⁰⁷

H) EIGHTH RATIONALE: FEARS OF CO-WORKERS AND CLIENTELE

4.17 Although there may be a high climate of fear and antagonism surrounding HIV and AIDS, it is argued that this alone cannot justify discrimination based upon unfounded fears. Allowing discrimination on the basis of unfounded fear would also justify other irrational attitudes. A service provider could attempt to justify discriminatory practices on the basis of clientele preferences. While the law might not be able to eradicate pervasive fears surrounding HIV and AIDS, it should not give cognizance to irrational and unfair discrimination by holding efforts to promote equality in abeyance until social biases dissolve.²⁰⁸

4.17.1 The Democratic Nursing Association of South Africa stated that the fears of co-workers need to be addressed by educational programmes.

4.17.2 The City Council of Pretoria Medical Officer of Health submitted that measures to ensure confidentiality could reduce co-worker fears based on unauthorised disclosure of HIV status of employees.

I) NINTH RATIONALE: COSTS OF REGULATION

²⁰⁶ The **Draft UNAIDS Policy on HIV Counseling and Testing 1996**, developed after discussion at the Workshop of HIV Counseling and Testing Experts in the Asian Region, December 1996, defines "mandatory testing for HIV" as inclusive of those situations in which "refusal of testing [by the subject] is not realistic or would cause the individual undue hardship, as when the HIV testing is required prior to employment or marriage" (Draft Policy 2). The Policy states: "*Mandatory testing is likely to have harmful effects on public health effort to reduce transmission*" (Draft Policy 5 - emphasis added).

²⁰⁷ Ibid 5. Cf **Jansen van Vuuren v Kruger** 1993 4 SA 842 (A) 850B-E.

²⁰⁸ For the enunciation of this view, in the American context, see **Palmore v Sidoti** 466 US 429 (1984) where the Court emphatically states that "(I)t would ignore reality to suggest that ... prejudices do not exist or that all manifestations of those prejudices have been eliminated ... The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations ... We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it

4.18 A legislative prohibition on pre-employment testing is not in all respects strictly comparable to legislation that creates regulatory burdens on employers. The legislation will merely require employers to refrain from one kind of overt exclusion of otherwise qualified job applicants. As discussed above, the benefits derived from testing all applicants for employment for HIV appear to be minimal, and the costs associated with a legislative prohibition on testing will generally not be high. It is therefore unlikely that such costs as may be added by prohibition of pre-employment testing will serve as a significant inhibition to investment. In fact, a prohibition on pre-employment testing may simply result in employers offsetting anticipated cost increases by limiting their wage and other expenditures.

4.18.1 The costs created for employers by a prohibition on pre-employment tests are primarily the costs of the epidemic. The costs are those society will be faced with in one way or another. An employer will, strictly speaking, not be able to exclude these costs by excluding applicants with HIV. The crucial investment considerations are likely to be the overall costs of the epidemic in a specific country, rather than the mere appearance of regulatory intervention. No country will be able to exclude the costs of HIV. Even in Cuba, where the involvement of people with HIV in the economy is severely limited, the costs of the epidemic are still borne through the loss of labourers, the need for repetitive testing of the population, and the cost of providing care for those too sick to provide for themselves.²⁰⁹ It can be argued that the best way to encourage investment in job creation is to manage the costs of the epidemic by helping promote prevention campaigns and by counselling, care and treatment.

4.18.2 The ALN submitted that the legislation envisaged would not force employers to hire certain groups of people or create capital flight - instead it will ensure that there is an equal starting line for job applicants.

tolerate them".

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Cf Lachman 489-490, Van Wyk 167, Kirby **SAJHR** 10, 12-13, and Fluss 1988 **World Health Forum** 368 for more information on HIV prevention in Cuba.

J) TENTH RATIONALE: "AIDS EXCEPTIONALISM"

4.19 In principle, HIV and AIDS should be treated no differently from other life threatening diseases. This principle informs the entire national response to the epidemic.²¹⁰ To realise that principle in practice, however, special measures may be warranted.

4.19.1 The scale of the epidemic is singular, and no other disease will exact a comparable toll in illness and death. Given this scale, it is argued that the epidemic requires special measures. The question remains whether such special measures could ever take the form of widespread pre-employment testing - a mechanism that invades some of the most valuable rights of personality - or whether it is not clear that coercive measures are ineffective at curtailing the epidemic. In fact, given the singular features of the infection and its progression, it may be argued that allowing coercive measures (under the guise of employers' rights) actually facilitates the epidemic by undermining confidence in health care professionals, driving people away from educational programs, discouraging full disclosure, creating a false sense of security among those who test negative, and wasting limited resources that might be spent upon other more effective prevention efforts.²¹¹

4.19.2 In addition, no other disease appears to face the extent of stigma and discrimination that confront people with HIV and AIDS. Irrational treatment confounds rational responses to the epidemic. It is argued that HIV and AIDS are being singled out by employers and that people with HIV specifically are being excluded from employment. If people with other conditions were unfairly being denied access to employment, specific legislative measures

²¹⁰ NACOSA National AIDS Plan as adopted by the Government.

²¹¹ Cameron and Swanson 1992 SAJHR 202-203; Draft UNAIDS Policy Statement on Counseling and Testing 1996 5.

might be argued to be necessary in these cases as well.²¹²

²¹²

Comments regarding AIDS exceptionalism are extensively dealt with in par 7.19-7.27 below.

5 LEGAL AND COMPARATIVE PERSPECTIVE

A) CURRENT LEGAL POSITION

5.1 The concept of freedom of contract (the autonomy of the will and the right to choose whether, on what terms and with whom one wants to enter into agreements) is the foundation stone of the socio-economic, legal and political systems of all civilised countries.

5.1.1 When the concept of freedom of contract reached its pinnacle in the nineteenth century, it was as a reaction against paternalism and state interference in the private sphere.²¹³ Since that time and until the late 1970s there has been a movement away from absolute freedom of contract: "Government regulation replaced free contract, bureaucracies replaced private parties operating in the open market, markets themselves began to be increasingly dominated by monopolies, and paternalism once again was the order of the day".²¹⁴

5.1.2 Since then, the pendulum has moved back in the direction of freedom of contract as a fundamental value and freedom: "Once again, we find a strong ideological current, basing itself on the need for political and economic freedom. We find the same faith in Adam Smith and the operation of market forces, the same distrust of government bureaucracies, the same belief in the rights of individual choice".²¹⁵

5.1.3 Nevertheless, it is widely recognised that freedom of contract cannot be given free rein. Freedom of contract cannot totally exclude public interest.

²¹³ Atiyah 355.

²¹⁴ Ibid 356.

²¹⁵ Ibid.

How to protect the interests of the poor, the disabled, those unable to care adequately for themselves and those unfairly discriminated against? Up to the 1970s the tendency was for the state to interfere, by legislation, with freedom of contract especially in the field of labour relations, residential tenancies, credit sales, etc. But since then this solution has come increasingly under challenge: "During the past decade or so the view has been gaining ground, certainly in England, that these contracts should still be left to the market, while we should try to control or handle the externalities by other governmental action. If a tenant is too poor to pay an open market rent, then the tenant should receive some state financial benefit, but the market should be left to operate freely. If employees are not paid a sufficient wage to maintain a family, then the state should contribute some family income support, rather than try to interfere in the employment contract by imposing requirements for minimum wages. Only in this way, it is now being urged, can we avoid the distorting effects on supply and demand of violent interferences with freedom of contract, such as result from controlled rents or minimum wages".²¹⁶

5.1.4 While it is not clear at what stage of development South Africa finds itself, it is clear that freedom of contract is, in our country, a fundamental, pre-constitutional value. Legislative interference with contractual freedom and the contract mechanism should be limited to the minimum, and should be approached with caution. Above all, a careful balance between freedom of contract and other rights or interests should be maintained so as to avoid the serious consequence which interference with the law of supply and demand can have.

5.2 At present there is no specific statutory prohibition on pre-employment testing for HIV. At common law employers were permitted to subject prospective employees to HIV testing. They were in any event at liberty to exclude job applicants on any ground

²¹⁶

Ibid 360-361.

including, *inter alia*, race, sex, sexual orientation, disability, and HIV status.²¹⁷ However, the 1996 Constitution and the Labour Relations Act (Act 66 of 1995) (LRA) both proscribe in certain respects unfair discrimination. It may also be argued that pre-employment testing for HIV trenches upon principles underlying the 1996 Constitution. Neither the 1996 Constitution nor the LRA however confer unqualified rights and they may therefore countenance an employer testing an applicant for employment for HIV under certain specific circumstances.

5.3 On 25 March 1997, a cabinet committee asserted that testing for HIV as a prerequisite for employment in the public sector had been abolished. The decision appears to apply to all defence personnel, the police, correctional services, nurses, teachers and other public sector posts. It is supposed to take immediate effect.²¹⁸ The finality and enforceability of this decision are not yet certain.

²¹⁷ Cameron 1991 **ILJ** 201-202. See also Albertyn and Rosengarten 1993 **SAJHR** 85; Van Wyk 1991 **Codicillus** 7.

²¹⁸ **The Citizen** 26 March 1997. Cf also the comments of the South African Medical Service (South African National Defence Force) on Discussion Paper 72 confirming that this Service support fully the principles enunciated in the Cabinet memorandum. However, it has approached the Minister of Defence with suggested categories for exemption and are awaiting a final decision in this regard.

* **The 1996 Constitution**

5.4 The 1996 Constitution entrenches, *inter alia*, the rights to dignity,²¹⁹ privacy²²⁰ and equality,²²¹ the right to be free from unfair discrimination²²² and from (state or private) unfair discrimination based upon disability,²²³ the right to bodily and psychological integrity,²²⁴ the right to freedom of expression and to depart information freely²²⁵ and the right to fair labour practices.²²⁶ It also grants each citizen the right to choose a trade, occupation, and profession freely.²²⁷ The 1996 Constitution provides for the limitation of these rights in certain instances where the limitation is reasonable and justifiable.²²⁸ The conferment of these rights may weigh against the validity of conditioning an offer of employment on an applicant's willingness to undergo an HIV test unrelated to job requirements.

5.5 The Bill of Rights, Chapter 2 of the 1996 Constitution, binds all organs of state.²²⁹ Regarding unfair discrimination specifically, the Bill of Rights provides: "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds" including race, gender, sex, pregnancy, sexual orientation or disability.²³⁰ Furthermore, the Bill of Rights in general binds "a natural or juristic person if, and to the extent that, (the right in question) is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".²³¹ It is therefore still unclear to what extent the constitutional right to privacy is enforceable against private entities,²³² or to what extent the common law right to privacy may be expanded or developed to give

219 The 1996 Constitution sec 10.

220 Ibid sec 14.

221 Ibid Sec 9(1).

222 Ibid sec 9(2).

223 Ibid sec 9(3), (4).

224 Ibid sec 12(2).

225 Ibid sec 16(1).

226 Ibid sec 23(1).

227 Ibid sec 22.

228 Ibid sec 36.

229 Ibid sec 8(1).

230 Ibid sec 9(4) and (3).

231 Ibid sec 8(2) and (4).

232 Ibid sec 8(2).

effect to the Constitution.

5.5.1 While the South African courts have yet to pronounce on the extent of the right to privacy in the context of testing for HIV, other jurisdictions - which our courts may consider in their interpretation of the Constitution²³³ - have accepted that an individual's right to privacy can prevent a state employer from conditioning an offer of employment on the applicant's willingness to take an HIV test.²³⁴ This is because deciding to take an HIV test - regardless even of anticipated discrimination - is the kind of personal decision that an individual may be entitled to make autonomously and in private.

5.5.2 Even, therefore, if applicants for employment are not discriminated against on the basis of HIV, conditioning employment upon their willingness to take an HIV test may be held to intrude upon their privacy. The question of horizontal application and thus whether the 1996 Constitution reaches the private conduct of individuals in regard to the constitutional right to privacy is still undecided by the Courts.

5.5.3 In the United States, New Zealand, Hong Kong, Australia and Canada, HIV is considered a disability. Making any distinctions based upon the HIV status of an applicant for employment is generally considered unfair discrimination on the basis of disability.²³⁵

²³³ Ibid sec 39(1)(c).

²³⁴ See eg the United States Appellate Court's decision in **Glover v Eastern Nebraska Community Office of Retardation** 867 F 2d 461 8th, *cert denied*, 110 S Ct 321 (1989). In **Glover** the Court held that requiring employees in a mental institution to undergo HIV testing violated their constitutional right to privacy. **Doe v City of Chicago** 883 F Supp 1126 (1994). See the 1997 judgement of the High Court of Judicature of Bombay referred to in par 5.28 below regarding pre-employment testing of government workers. See also Mello 67-68.

²³⁵ The **Americans with Disabilities Act** 42 USC ' 12112 (ADA) defines disability, *inter alia*, as a physical impairment that affects major life activities. The Equal Employment Opportunity Commission (EEOC) Interpretive Guidelines (published in the Code of Federal Regulations (CFR)) includes asymptomatic HIV within the definition of physical impairment (28 CFR ' 36.104(1)(iii)). The Guidelines provide examples of major life activity that include sexual reproduction (29 CFR ' 1630.2 (I)). Discrimination on the basis of disability (or in this case HIV status) is fair if the applicant for employment is not "otherwise qualified to perform essential job functions". One aspect of the term "otherwise qualified to perform essential job functions" is the requirement that the applicant not - in the course of ordinary work activities - pose a "significant risk" to others. For an explanation of the terms "significant risk" and "otherwise qualified" see

5.5.4 While exacting a pre-employment HIV test on its own may not violate the right to equality, or constitute unfair discrimination (as opposed to infringement of the right to privacy), knowledge of HIV status is likely to discourage an employer from making an offer of employment to an otherwise qualified applicant.²³⁶ Unfair discrimination on this basis may violate the right to equality of the applicant for employment. If an employer based decisions solely upon an individual's HIV status, unrelated to projected job performance or job requirements, this would generally be unfair discrimination.²³⁷

5.5.5 The 1996 Constitution guarantees the right to choose an occupation freely.²³⁸ This does not appear to create any form of right to a specific job.²³⁹ However, the right to choose an occupation freely may weigh against the constitutionality of wholesale exclusion of a category of persons (namely those with HIV) from a specific job position or a whole category of employment positions.

the Supreme Court decision of **School Board of Nassau County, Florida v Arline** 480 US 273 94 L Ed 307 (1987). (Cf also par 5.17 below.)

See **Canada v Thwaites** 49 ACWS 3d 1102 (1994) and **Ontario Human Rights Commission v North American Life Assurance Co** 123 DLR 4th 709 (1995) for an interpretation of Section 15(1) of the Charter of Rights and Freedoms which accepts that HIV can be a disability, and that some instances of discrimination against people with HIV are unfair. (See also par 5.18-5.21 below.)

Australia's Disability Discrimination Act 1992, includes within the definition of disability: "... (d) the presence in the body of organisms capable of causing disease or illness" (**Commonwealth of Australia v the Human Rights and Equal Opportunity Commission and 'X'** No Qg 115 of 1995, 1996 Aust Fed Ct (Lexis 859). (See also par 5.22-5.25 below.)

Mai 1996 **HIV/AIDS Legal Link** 23.

²³⁶ Cf Silver (Unpublished) 3-4.

²³⁷ Cf **BSA Draft National HIV/AIDS Employment Code of Conduct**; London and Myers 1996 **SAMJ** 329-330; Mello 39-40.

²³⁸ The 1996 Constitution sec 22.

²³⁹ Cf the recent unreported decision of the Constitutional Court on 6 October 1997 in **S v Lawrence; S v Negal; S v Solberg** (Cases CCT 38/96, 39/96 and 40/96) 26-33. In interpreting sec 26 of the interim Constitution (providing that "every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory") Chaskalson P observed that "(I)n a modern democratic society a right 'freely' to engage in economic activity and to earn a livelihood does not imply a right to do so without any constraints whatsoever".

5.5.6 These rights are not absolute. Section 36 of the 1996 Constitution permits limitations which are contained in a law of general application and which are reasonable and justifiable given, *inter alia*, the nature of the right, the importance of the limitation, its nature and extent, and the availability of less restrictive means to achieve the objective of the restriction. The rights to privacy or equality are thus not absolute. Both could be limited in certain instances. There may be instances where an employer's interest in the HIV status of an applicant is justified. Cases may arise where discriminating between applicants on the basis of their HIV status is fair. Generally, however, such distinctions seem unfair and the intrusions not justifiable.

* **LRA**

5.6 Pursuant to the right to fair labour practices conferred by section 23 of the 1993 interim Constitution,²⁴⁰ Parliament in 1995 adopted the LRA, and amended it in 1996, when the statute came into force. The LRA protects most employees, applicants for employment, and applicants for promotion, training and advancement from unfair labour practices.²⁴¹

5.7 Unfair discrimination on the basis of disability, or on any arbitrary ground, constitutes an unfair labour practice.²⁴² Disability discrimination is unfair in terms of the LRA unless it is "based on an inherent requirement of the particular job".²⁴³

5.8 Discrimination based upon HIV status could thus constitute discrimination either on the basis of "disability", or on the basis of an "arbitrary ground". In the great majority of cases where an employer uses pre-employment testing for HIV to justify differential treatment, that action seems likely to be adjudged unfair discrimination.

5.9 Where however the employer bases HIV-related discrimination upon an

²⁴⁰ The Constitution of the Republic of South Africa (Act 200 of 1993).

²⁴¹ LRA sec 2(1)(a) subject to sec 2(2) of Part B of Schedule 7.

²⁴² Ibid sec 185 and 187, in conjunction with Schedule 7.

"inherent requirement of that particular job", that discrimination will not be unfair.²⁴⁴

5.10 While the 1996 Constitution might operate to prevent the National Defence Force, the National Intelligence Agency, and the South African Secret Service from testing applicants for employment for HIV,²⁴⁵ the LRA does not apply to these bodies.²⁴⁶

Furthermore, like the 1996 Constitution, the LRA does not define "disability". It is thus uncertain whether asymptomatic individuals with HIV will be protected from disability discrimination under either the 1996 Constitution or the LRA. The LRA moreover does not prohibit an employer from testing applicants for employment for HIV. It only appears to prevent the arbitrary and unfair use of the results of such a test.

* **Case Law**

5.11 There is currently no case law in South Africa regarding the legality of pre-employment testing for HIV. However, certain decisions have upheld the right to privacy and bodily integrity in the context of HIV, as well as more generally.

5.11.1 In **Jansen van Vuuren v Kruger**,²⁴⁷ the then Appellate Division upheld and enforced the common law right to privacy in the case of a doctor's unjustifiable disclosure of a patient's HIV status. The Court found that HIV could not be transmitted casually, and that significant public health benefits could be derived from protecting an individual's right to privacy.

5.11.2 In **C v Minister of Correctional Services**,²⁴⁸ Kirk-Cohen J laid out parameters under which an HIV test could be performed. He held that, generally, informed consent was a prerequisite for testing a person for HIV. An

²⁴³ Ibid sec 2(1)(a) read with sec 2(2)(c) of Part B of Schedule 7.

²⁴⁴ Ibid sec 188(1)(a).

²⁴⁵ See par 5.5 and fn 229 above.

²⁴⁶ LRA sec 2.

²⁴⁷ 1993 4 SA 842 (A).

²⁴⁸ 1996 4 SA 292 (T).

individual, he found, could consent to an HIV test only if he or she understood the object and purpose of the test, understood what a positive result could entail, had time and place to reflect on the information received concerning the test, and had the free occasion to refuse to submit to the test.²⁴⁹

5.11.3 The right to privacy, which in South African law derives from the right to dignity,²⁵⁰ is closely intertwined with the right to bodily and psychological integrity. In **S v A**, Botha AJ stated that an infringement upon an individual's right to privacy constituted an impairment of his or her *dignitas*, regardless of the information gleaned from such an infringement.²⁵¹ The then Appellate Division has characterised the right to privacy not only as protecting the interest in avoiding disclosure of personal matters, but more generally in protecting against "intrusions upon the personal privacy of another".²⁵²

5.11.4 The conception of privacy as protecting a sphere of private decision-making has received extensive consideration abroad. There it has been held to protect the autonomous interest in controlling certain kinds of important decisions.²⁵³ In South Africa, the Constitutional Court in **Bernstein v Bester**,²⁵⁴ appeared to echo these developments by emphasising the connection between the common law and constitutional right to privacy, and underscoring the importance of the rights to autonomy and dignity:

The scope of privacy has been closely related to the concept of identity and it has been stated that rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity.

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Ibid at 301.

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Jansen van Vuuren v Kruger 1993 4 SA 842 (A) at 849E-F.

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S v A 1971 2 SA 294 (T).

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Financial Mail (Pty) Ltd v Sage Holdings Ltd 1993 2 SA 451 (A) 462E-F; **Jansen van Vuuren v Kruger** 1993 4 SA 842 (A) at 849. See, in general, Joubert 130-136.

253

Curran 1980 **Columbia Law Review** 732 fn 69. See also Edgar and Standomire 1990 **American Journal of Law and Medicine** 160; and **Whalen v Roe** 429 US 589 (1977).

254

1996 4 BCLR 449 (CC) per Justice Ackermann. Justices Chaskalson P, Mahomed DP, Madala, Langa, Mokgoro, Sachs, and Ngoepe AJ concurred.

... In South African common law the right to privacy is recognised as an independent personality right which the courts have included within the concept of *dignitas*.

... [a] breach of privacy can occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a person.²⁵⁵

5.11.4.1 By emphasising the relationship between privacy, dignity and autonomy, this judgment suggests that the zone of privacy protected in South Africa could include protection from intrusions into personal decision making. The decision to take an HIV test has been recognised, in the United States and Europe,²⁵⁶ as a highly private act. Because of the stigma and discrimination that often result from a disclosure that a person has HIV, HIV status is the kind of information that he or she might want to keep private and/or not to know at all.²⁵⁷ Furthermore, forced discovery of one's own HIV status may further have an extremely grave impact on one's life.²⁵⁸ Requiring applicants for employment to undergo an HIV test may thus affect their right to privacy, by imposing upon them, prematurely and inopportunistly, invasive decisions or knowledge regarding their bodily and psychological integrity.²⁵⁹

5.11.5 In several other Constitutional Court decisions, Justices have explained the particular relevance and import of the right to privacy in South Africa.

²⁵⁵ 1996 4 BCLR 449 (CC) 65F, 68E, 68F, citing **Financial Mail (Pty) Ltd v Sage Holdings Ltd** 1993 2 SA 451 (A) at 462F.

²⁵⁶ See **Doe v The City of New York Commission on Human Rights** 15 F 3d 264 (1994); **Woods v White** 689 F Supp 874 (1988); **X v Commission of the European Communities** European Court of Justice 1995 IRLR 320.

²⁵⁷ 1996 **Draft UNAIDS Policy Statement on Counselling and Testing** 1996 3.

²⁵⁸ It can, for instance, affect insurability, cause job loss, disrupt families and lead to stress and depression (see, for instance, Leigh et al 1995 **AIDS** 81-88).

²⁵⁹ The 1996 Constitution, sec 12(2) guarantees the right to bodily and psychological integrity. This certainly includes protection of an individual's mind and body from unwarranted intrusion. It is unclear whether this right will also be interpreted to protect the full autonomous interests that Ackermann J refers to at 65-79 in **Bernstein v Bester** 1996 4 SA BCLR 449 (CC).

5.11.5.1 In concurring opinions in **Case v Minister of Safety and Security**,²⁶⁰ Justices Langa and Didcott noted the backdrop of South African history and the need to be aware of violations of the right to privacy:²⁶¹

It [the right to privacy] is a right which, in common with others, was violated often with impunity by the legislature and the executive. Such emphasis is therefore necessary particularly in this period when South African society is still grappling with the process of purging itself of those laws and practices from our past which do not fit in with the values which underpin the Constitution if only to remind both authority and citizen that the rules of the game have changed.²⁶²

5.11.5.2 The Justices added that where infringements on the right to privacy facilitate infringements of other rights, like the right to equality, they are additionally pernicious.²⁶³

5.11.5.3 In **Ferreira v Levin and Vryenhoek v Powell**²⁶⁴ Justice Ackermann explained that:

An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible.

5.11.6 The 1996 Constitution requires that the courts "to give effect to a right in the Bill must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right."²⁶⁵ Against the constitutional background sketched above, including this injunction, it may be argued that a

²⁶⁰ 1996 5 BCLR 609 (CC).

²⁶¹ Ibid 647, 649.

²⁶² Ibid 649 (Justice Langa).

²⁶³ 1996 5 BCLR 609 (CC) at 650. See in particular fn 255, which points to South Africa's anti-miscegenation statute as an example of a violation of the right to privacy and the right to equality.

²⁶⁴ 1996 1 BCLR 1 (CC) at 28.

²⁶⁵ The 1996 Constitution sec (8)(3)(a).

requirement to undergo (and disclose the results of) an HIV test in order to procure employment could constitute a violation of the constitutional right to privacy.

- 5.12 The 1996 Constitution expressly requires the enactment of national legislation to prevent or prohibit unfair discrimination.²⁶⁶ To the extent that pre-employment testing for HIV constitutes unfair discrimination, a statute regulating or prohibiting it can be seen as a fulfilment of this injunction. As the Constitutional Court has pointed out, in relation to the equality provision (section 8) under the 1993 interim Constitution:

In drafting s 8, the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and many continue to cause, considerable harm. For this reason, s 8(2) lists a wide, and not exhaustive, list of prohibited grounds of discrimination.

Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of s 8 and, in particular, ss (2), (3) and (4).²⁶⁷

B) COMPARATIVE OVERVIEW

- 5.13 Local, national, and international policy responses that disapprove or prohibit pre-employment testing for HIV are widely spread. These include individual business HIV/AIDS employment codes, the **NACOSA National AIDS Plan** (adopted on behalf of the government on 21 July 1994),²⁶⁸ the **Southern African Development Community (SADC) Code on HIV/AIDS and Employment**, and the **Joint World Health**

²⁶⁶ Ibid sec 9(4). (This provision was formerly contained in sec 8 of the 1993 interim Constitution.)

²⁶⁷ **Brink v Kitshoff** 1996 4 SA 197 (CC) at 217D-F.

²⁶⁸ 20 October 1994 **Hansard** 3451. The **NACOSA National AIDS Plan 1994-1995** was adopted by the Department of Health in 1994 on behalf of the Government in a speech by Minister Zuma before parliament. See also fn 111 above.

Organisation and International Labour Organisation Statement on Pre-employment HIV testing.²⁶⁹

5.13.1 The European Council and Ministers for Health of the Member States in 1990 resolved:

Any discrimination against persons with AIDS or HIV-positive persons constitutes a violation of human rights and prejudices effective prevention policy because of its effects of exclusion and ostracism ... *The greatest possible vigilance must therefore be exercised in order to combat all forms of discrimination particularly in recruitment, at the workplace ...* With regard, more particularly, to accommodation and private insurance, solutions should be found which reconcile economic interests with the principle of non-discrimination.²⁷⁰ (Emphasis added.)

5.13.2 The International Labour Organisation guidelines, devised in conjunction with the WHO, advise against pre-employment testing. While they are not binding upon member states, courts may take them into account in determining the fairness of an employment practice. The guidelines state:

Pre-employment HIV/AIDS testing as part of the assessment of fitness to work is unnecessary and should not be required. ... People with the HIV virus or suffering from AIDS pose no danger to their colleagues at work. There are hence no grounds for testing potential recruits for HIV.²⁷¹

5.13.3 The Southern African Development Community's (SADC) **Code on HIV/AIDS and Employment**, which has now been adopted by the Council of Ministers of SADC, states:

There should be no direct or indirect pre-employment test for HIV. Employees should be given the normal medical tests of current fitness

²⁶⁹

Other organisations and institutions have issued non-binding resolutions, such as the **United Kingdom Declaration of the Rights of People with HIV and AIDS** of 1991 which states: "No person should be barred from employment or dismissed from employment purely on the grounds of their having HIV, or having AIDS or an AIDS related condition. Employers should ensure that their terms and conditions of employment are such as to enable people with HIV, AIDS, or and AIDS related condition to continue in their employment, and to do so in a healthy and safe working environment. Employers or their agents should not perform tests to detect the HIV status of current or prospective employees; in respect of the right to work, the right to privacy, and the right to protection from discrimination, there should be no obligation or requirement upon an individual to disclose to an employer their own HIV status or the HIV status of another person".

²⁷⁰

Social Europe 1, 1990, p 156 as cited in Goss and Adam-Smith 9.

²⁷¹

As cited in WHO **Report of an International Consultation on AIDS and Human Rights 1989** 50.

for work and these tests should not include testing for HIV. Indirect screening methods such as questions in verbal or written form inquiring about previous HIV tests and/or questions related to the assessment of risk behaviour should not be permitted.²⁷²

The adoption of the Code places an obligation on member states, including South Africa, to adopt national legislation to give effect to the Code.

5.13.4 The AIDS Law Project (a university-based nongovernmental organisation) in conjunction with the AIDS Consortium (an affiliation of organisations that deal with, advocate on behalf of, and provide services to people living with HIV and AIDS) has developed an **HIV/AIDS Employment Code of Conduct** that has been adopted by various companies and by the union federation COSATU. This states, in relation to recruitment and medical examinations:

Any medical examination undertaken either before employment or thereafter should be solely to determine functional performance, and offer a prognosis of fitness for work of the prospective employee. In this respect ... an HIV test (or any other test that is intended to assess the immune/HIV status of a prospective employee) shall not be a pre-condition of employment and shall not be required under any circumstance or for any occupation, or position ...²⁷³

5.13.5 The draft **Business South Africa National HIV/AIDS Employment Code of Conduct** recommends against "generalised pre-employment testing which denies prospective employees access to employment opportunities on the basis of their HIV status".²⁷⁴

5.13.6 The **South African Chamber of Business HIV/AIDS and Employment: Code of Conduct for Employers** states that "employers have the right to medically screen recruits for evidence of serious active life threatening conditions and fitness for the job" but that HIV status alone should not be a

²⁷² **Code on HIV/AIDS and Employment in Southern African Development Community (SADC) 1997** par 2. (See also **SADC Draft Code on HIV/AIDS and Employment 1996**).

²⁷³ Cf ALP/AIDS Consortium **HIV/AIDS Employment Code of Conduct 1994** 1, 2, 6.

motivation to exclude recruits.²⁷⁵

5.13.7 **The South African Society for Occupational Medicine Guideline on AIDS at the Workplace** states that "(T)he Society does not recommend the incorporation of HIV testing at the pre-employment examination". It emphasises that being a carrier of the virus would have no effect on an employee's work capacity, and that there is almost no risk of an infected person passing the virus on to others in the working environment. The Guideline however observes that employees with AIDS can present serious implications regarding employee benefits.²⁷⁶

5.13.8 The LRA empowers the National Economic Development and Labour Council (NEDLAC)²⁷⁷ to prepare and issue codes of good practice.²⁷⁸ The LRA requires "any person interpreting or applying" the LRA to take into account any relevant code of good practice.²⁷⁹ NEDLAC has not adopted a code affecting pre-employment testing for HIV.

5.14 Internationally a substantial body of statutes and case law protects individuals with HIV from discrimination, and prevents employers from requiring applicants for employment to undergo HIV-testing. In addition, general prohibitions against unfair labour practices have been interpreted to prevent employers from testing applicants for HIV. The statutes and judicial decisions reflect a broad consensus that generalised pre-employment testing is ineffective, discriminatory and unconstitutional.²⁸⁰ The approach adopted is that pre-employment testing for HIV may be a violation of an applicant's right

²⁷⁴ BSA **Draft National HIV/AIDS Employment Code of Conduct 1994** 1.

²⁷⁵ SACOB **HIV/AIDS and Employment Code of Conduct for Employers 1996** 3-4.

²⁷⁶ The **South African Society of Occupational Medicine Guideline on AIDS at the Workplace** issued by the South African Society of Occupational Medicine as SASOM GUIDELINE NO 5 at 3.

²⁷⁷ The Council is established in terms of sec 2(1) of the National Economic, Development and Labour Council Act, 1994 (Act 35 of 1994).

²⁷⁸ LRA sec 203(1).

²⁷⁹ Ibid sec 203(3).

²⁸⁰ Cf Albertyn and Rosengarten 1993 **SAJHR** 77-88; Cameron and Adair (Unpublished) 2-3; Greenlaw 1992 **Journal of Health and Hospital Law** 80. The Centers for Disease Control (United States) has stated that general employment testing is unwarranted because HIV is not transmissible in the workplace (CDC

to privacy that sanctions unfair discrimination while inhibiting prevention efforts by stigmatising people with HIV.²⁸¹ This approach, however, is not unqualified; in some cases it is limited by laws permitting pre-employment testing for HIV under prescribed conditions.

* **United States of America**

5.15 Thirteen out of fifty American states have specific legislative restrictions that limit pre-employment testing. These include California, Texas and Florida.²⁸² Generally the statutes prohibit pre-employment testing unless the proponent of testing can establish that HIV negative serostatus is a bona fide job qualification, or that there is a real risk of HIV transmission in the workplace which cannot be eliminated through less intrusive

Morbidity and Mortality Weekly Report 12 July 1991 5, 7).

281 Albertyn and Rosengarten 1993 **SAJHR** 85; note that countries such as Malawi and Zambia have legislated against pre-employment testing. Namibia's National AIDS Plan adopted by the Ministry of Health and Social Services propose legislation and policy guidelines that prohibit using an individual's HIV-status as a prerequisite "of entry into work, continuation of work, promotion ... or training opportunities" (**Namibia National AIDS Control Programme 1992-1997** 17, and 9 of Appendix 2).

282 California prohibits an employer from requiring an HIV test as a condition of employment (Cal Health and Safety Code ' 199.21 (f)). Hawaii prohibits conditioning provision of employment on consent to disclose HIV-related information (Haw Rev Stat ' 325-101(c)). Iowa classifies HIV as a disability, and finds requiring an HIV test as a condition of employment an unfair employment practice (Iowa Code ' 216.6). Florida, Kentucky and New Mexico prohibit requiring an HIV antibody test as a condition of employment unless the employer can show a valid, bona fide occupational qualification (Fla Stat ' 760.50; Ky Rev Stat Ann ' 207.135; NM Stat Ann ' 28-10A-1). Massachusetts prohibits an employer from requiring an HTLV-III antibody or antigen test as a condition of employment (Mass Gen L ch 111, ' 70 F). New Hampshire law prohibits an employer from requiring HCWs to consent to an HIV test as a condition of employment (NH Rev Stat Ann ' 141-F:9-a). Rhode Island prohibits conditioning employment on an HIV test unless there is a clear and present danger of transmission of the virus to others (RI Gen Laws ' 23-6-22). Texas prohibits any person from requiring another person to undergo a test for HIV, except in limited circumstances; an employer who alleges that the test is necessary as a bona fide occupational qualification has the burden of proving that allegation (Texas Health and Safety ' 81.102). (See also **Winters v Houston Chronicle Pub Co** 795 SW 2d 723, 724 n 1 (1990) which states that legislative exceptions to the employment at will doctrine include restrictions against employers from requiring HIV testing of employees.) Vermont law states that it is an unfair labour practice to request or require an applicant, prospective employee, or an employee to have an HIV-related blood test, or to discriminate against an applicant, prospective employee or employee because that person is HIV-positive (VT St Ann tit 21, ' 495). Washington law states that no person shall be required to take an HIV test as a condition of hiring, promotion, or continued employment. It goes on to prevent an employer from terminating or refusing employment based on the basis of an HIV test unless that job position presents a significant risk of transmitting HIV and there exists no means of eliminating that risk by restricting the job (Wash Rev Code Ann ' 49.60.172). Wisconsin prevents public employers from soliciting or requiring an HIV test as a condition of employment, unless that individual, through employment, poses a significant risk of transmitting HIV (Wis Stat ' 103.15). See, for more information, Barron et al 1995 **Law and Sexuality** 1 et seq; and Edgar and Standomire 1990 **American Journal of Law and Medicine** 155 et seq (Lexis Nexis).

means.

5.16 In addition, the right to privacy, which the United States Supreme Court has recognised as implicit in the United States Constitution, continues to provide a measure of protection from non-voluntary disclosure of HIV status by state actors. In **Doe v The City of New York Commission on Human Rights**, the Court stated:

Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition. In **Whalen v Roe** [1977] the Supreme Court recognized that there exists in the United States Constitution a right to privacy protecting "the individual interest in avoiding disclosure of personal matters." . . . There is, therefore, a recognized constitutional right to privacy in personal information. ...

Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over. Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself.

This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease. An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information. We therefore hold that Doe possesses a constitutional right to confidentiality under **Whalen** in his HIV status.²⁸³

5.16.1 The Fourth, Fifth, and Fourteenth Amendments to the United States Constitution prohibit government employers from subjecting their employees to unreasonable searches and seizures, and from restricting liberty without due process of law.²⁸⁴ An important aspect of the right to privacy is the individual's interest in avoiding disclosure of personal matters.²⁸⁵ As important, the United States Supreme Court made clear in **Whalen v Roe**, is the right to autonomy and independence in decision-making in personal matters.²⁸⁶

²⁸³ **Doe v The City of New York Commission on Human Rights** 15 F 3d 264 (1994) at 267.

²⁸⁴ Banta 120.

²⁸⁵ See **Whalen v Roe** 429 US 589 (1977). See also Anderson 1995 **Maryland Bar Journal** 11.

5.16.2 In some instances, United States courts have recognised that the right to privacy is not absolute, and allowed HIV testing where they found a significant risk of HIV transmission, and a compelling governmental interest in preventing that transmission.²⁸⁷ Other cases affirm that the right to privacy in the majority of instances generally prevents a state actor from requiring a citizen to take a test for HIV or disclose his or her HIV status.²⁸⁸

5.17 The combination of the Vocational Rehabilitation Act, 1973 (Rehabilitation Act²⁸⁹), the definitive United States Supreme Court decision in **School Board of Nassau County, Florida v Arline**²⁹⁰ and the Americans with Disabilities Act, 1990 (ADA²⁹¹) have also added substantially to protection against discrimination of HIV infected persons.²⁹²

5.17.1 The Rehabilitation Act - which governs federal employers, and contractors and entities receiving federal financial assistance - generally prohibits discrimination on the basis of disability. Section 504 of the Act specifically prohibits discrimination against the disabled who are "otherwise qualified".²⁹³ In the employment context, an "otherwise qualified" person is one who can perform

²⁸⁶ **Whalen v Roe** 429 US 589 (1977), 599-600.

²⁸⁷ **Anonymous Firemen v City of Willoughby** 779 F Supp 402 (1991). (The Court recognised that the testing entailed an infringement upon the privacy rights of firemen, and specifically limited its provision to testing to emergency personnel.) **Local 1812 v United States Dept of State** 662 F Supp 50 (1987).

²⁸⁸ **Glover v Eastern Nebraska Community Office of Retardation** 867 F 2d 461 8th, *cert denied*, 110 S Ct 321 (1989) (the Court found that the privacy interests of employees prevented an employer from requiring all employees to submit to HIV testing). **Woods v White** 689 F Supp 874 (1988) (the Court found that subjecting inmates to an HIV test violated their right to privacy). **Nolley v County of Erie** 776 F Supp 715 (WD NY 1991) (the Court found that the disclosure of an inmate's HIV status violated her right to privacy). **Doe v City of Chicago** 883 F Supp 1126 (1994) (a policy of forcing all applicants for employment to submit to HIV testing would violate their right to privacy). Also see DeLoach 1990 **Creighton Law Review** 693-716.

²⁸⁹ The Vocational Rehabilitation Act, 29 USC ' 794-7976 (1988).

²⁹⁰ 480 US 273 94 L Ed 307 (1987).

²⁹¹ The Americans with Disabilities Act, 42 USC ' ' 12101-12117 (Supp V 1993) 42 USC ' 12112.

²⁹² **Ontario Report** 36; Parmet **AIDS and the Health Care System** 96; McCormack 1995/1996 **The Journal of Air Law and Commerce** 279-302.

²⁹³ 29 USC ' 794(a). Sec 504 provides that "(N)o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by and Executive agency...". See also Jarvis et al 48-50; **AIDS The Legal Issues** 200; McCormack 1995/1996 **The Journal of Air Law and Commerce** 297-298.

the *essential duties of the job in question*.²⁹⁴ An employee who poses a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation is not considered to be "otherwise qualified".²⁹⁵ This provision has been interpreted by the United States Supreme Court in **Arline** to extend to persons with contagious diseases (in this case tuberculosis) when the infection does not pose a significant risk of danger to others.²⁹⁶ Section 504 states that employers "shall make reasonable accommodation" to the employee's handicap unless they can show that accommodation "would impose an undue hardship".²⁹⁷ Since **Arline** subsequent decisions of lower courts have extended the application of the Act both to individuals who have developed AIDS and to those who have asymptomatic HIV infection.²⁹⁸ In addition, courts have granted relief to students denied the opportunity to attend school because of their positive HIV status and to employees discharged from their jobs because of their HIV infection.²⁹⁹

5.17.2 As the Rehabilitation Act had limited application and did not provide comprehensive national protection against discrimination, it was followed by the passage of the federal ADA. This Act provides comprehensive protection, along the same lines as the Rehabilitation Act, against discrimination on the basis of disability - now also in private employment (of a certain size) and public accommodations that are privately owned.³⁰⁰ The term "disability" is defined

²⁹⁴ Banta 47.

²⁹⁵ Leonard **AIDS and the Law** 109,113, 115; Banta 47-49.

²⁹⁶ Jarvis et al 47, 90-91; Leonard **AIDS and the Law** 113; Banta 45-53. The answer to the question whether a person with HIV presents such a risk, is almost always that HIV infection does not present significant risk to the health and safety of others working in proximity to the infected person, even when that person has visible symptoms. The question becomes more troublesome if the employee or customer may come into close physical contact with others, but can usually be resolved on the basis of current evidence regarding the difficulty of HIV transmission in the absence of direct exposure to infected blood (Jarvis et al 49-50).

²⁹⁷ Leonard **AIDS and the Law** 114.

²⁹⁸ See eg **Chalk v United States Court, Central District of California** 840 F 2d 701 9th Cir (1988); **Doe v Centinella Hospital** 57 USLW 2034 (DC Cal 1988).

²⁹⁹ See eg **Martinez v School Board of Hillsborough County, Florida** 861 F 2d 1502 11 Cir (1988); **Doe v Dolton Elementary School District No 148** 694 F Supp 440 (ND ILL 1988); **Robertson v Granite City Community Unit School District No 9** 684 F Supp 1002 (SD ILL 1988).

³⁰⁰ **Ontario Report** 36; McCormack 1995/1996 **The Journal of Air Law and Commerce** 297-300; Banta 31-45.

with respect to an individual as -

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.³⁰¹

The ADA further prohibits employers from excluding workers based on conjecture about potential risks associated with their disabilities. The employer may still discriminate against a disabled individual if the employer shows that the individual poses a "direct threat"³⁰² which is defined as a "significant risk of substantial harm" that cannot be reasonably accommodated.³⁰³ To protect employers it is furthermore provided that employers may escape an accommodation obligation by proving that it would constitute an undue financial or other hardship.³⁰⁴ This legislation reflects a policy decision entailing that employers should bear some of the burden of disability. An employer would thus not be in a position to argue that employing a disabled person would impose increased costs, or that training of a person who is terminally ill is futile.³⁰⁵

5.17.3 Pre-employment testing for HIV is not explicitly prohibited under the ADA.³⁰⁶ However stringent restrictions are placed on any medical examination

³⁰¹ 42 USC 12102 sec 3(2). See also McCormack 1995/1996 **The Journal of Air Law and Commerce** 301.
³⁰² 42 USC ' ' 12113(a)-(b) (Supp V 1993). See also McCormak 1995/1996 **The Journal of Air Law and Commerce** 300.

³⁰³ 29 CFR ' 1630.2(r)(1994). See also McCormack 1995/1996 **The Journal of Air Law and Commerce** 300; and fn 296 above for an indication of what could constitute a significant risk.

³⁰⁴ Sec 102(b)(5) (for the text see Banta 282-283). Hence smaller companies may have an advantage in their attempts to convince the investigator or the Court that a particular accommodation would unduly strain the employer's resources; conversely, large corporations may experience difficulty in gaining judicial acceptance of this doctrine and defence (Banta 35). See also Van Wyk 297.

³⁰⁵ Cf Van Wyk 298.

³⁰⁶ Sec 102(c) of the Act states:

"(1) ... The prohibition against discrimination ... shall include medical examinations and inquiries.

(2)(A) ... Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such a disability.

(B) ... A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

(3) ... A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may

made on an applicant for employment by an employer.³⁰⁷ This statute, applying to all employers with 15 or more employees,³⁰⁸ provides that no employer shall "discriminate against a qualified individual with a disability on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees".³⁰⁹

5.17.4 Under the ADA, an employer may not require an applicant for a job to submit to a medical examination or answer medical inquiries before a conditional job offer has been made to the applicant. After an employer has determined that an applicant possesses the necessary qualifications for a particular job, and has decided to offer the applicant the job, the employer may choose to extend to the applicant a conditional job offer. Once a conditional job offer has been extended, the employer may then require that the applicant undergo a medical examination or answer medical inquiries, and may condition the offer of employment on the results of that medical test or inquiry. However, test must be given to all applicants. Information must be kept confidential. The results of the examination cannot be used to discriminate against a person with a disability if the person is still qualified for the job. The medical examination, in total, can only help the employer determine present ability to fulfill his or her essential job functions.³¹⁰ Generally a person's HIV status is unrelated to the present ability to

condition an offer of employment on the results of such examination, if -

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is ... treated as a confidential medical record, except that -

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment'; ... and

(C) the results of such examination are used only in accordance with this subchapter".

See also, the Equal Employment Opportunity Commission's regulations on pre-employment medical exams (29 CFR ' 1630 (1994)).

307 Feldman **AIDS Agenda** 285.

308 42 USC 12111, sec 10(5).

309 Ibid sec 102(a). See also Banta 36-37. Section 504 of the Rehabilitation Act, 29 USCA 794 provides a similar prohibition on discrimination on the basis of disability; it applies to all employers who take federal funds. Insofar as interpretation, a court will interpret the meaning, precedent, and purposes of the two acts in accordance with one another.

310 29 CFR ' 1630 (1994). See also Feldman **AIDS Agenda** 286; Banta 36-37.

carry out job functions.

5.17.5 Generally people with HIV are covered under the ADA, and given some measure of protection from discrimination on the basis of their HIV status. The **Equal Employment Opportunity Commission** (EEOC), which is responsible for monitoring and enforcement of employment standards, has developed Guidance Notes that specify that asymptomatic HIV is a physiological disorder which causes physical impairment,³¹¹ which is "inherently substantially limiting" because of its effect on decisions regarding reproduction.³¹² Most courts have accepted that HIV is *per se* a disability. In some instances, courts have required a showing that a major life activity is limited by HIV before accepting that HIV is a disability.³¹³ Because HIV is considered a disability, employers are prohibited from making distinctions based upon HIV status that are not justified by the costs of accommodation or the risks of injury arising from the employee's HIV-status.

5.17.6 However, there has been a sizable body of case law concerning whether people with HIV are "qualified to perform essential job functions", when those job functions contain some risk of HIV-transmission. In **Doe v District of Columbia** the Federal District Court found that an applicant to the fire department with HIV was presently qualified to perform duties without posing risk to himself or the public.³¹⁴ In contrast, in **Doe v University of Maryland Medical System Corporation** the Appellate Federal Court found that a doctor with HIV was not "otherwise qualified to perform his duties".³¹⁵ Broadly speaking, the difference between these two cases depends upon a different appreciation of transmission risks. The first decision involved an employment offer to a fireman, where the court noted there was almost no risk of occupational

³¹¹ 29 CFR sec 1630.2(j) (Guidance) at 35741.

³¹² 28 CFR sec 36.104 (Guidance) at 35548.

³¹³ See, for various interpretations of the term "disability" in the context of HIV, **Ennis v The National Association of Business and Educational Radio Inc** 53 F 3d 55 (1995) (here the Court expected a showing that a major life activity was affected by HIV); and **Abbot v Bragdon** 912 F Supp 580 (1995) (here the Court accepted, without requiring further proof, that asymptomatic HIV was a disability).

³¹⁴ 796 F Supp 559 (1992). Cf, however, the decision in **Anonymous Firemen v City of Willoughby** referred to in fn 287 above.

HIV transmission. The second case involved the employment of a neurosurgeon with HIV, where there was a cognizable (between one out of 42 000 and one out of 417 000) risk of HIV transmission. In both cases the Court accepted that a person with HIV was covered under the ADA's definition of disability. The Act only provides protection from discrimination if the applicant is "otherwise qualified" to perform essential job functions. Where a person poses, through his or her work, a significant risk to others, that person is not considered "otherwise qualified" to perform essential job functions. **Doe v Washington University**³¹⁶ and **Bradley v University of Texas MD Anderson Cancer Center**³¹⁷ are two additional cases where the Court found that a dental student and a surgical technician (respectively) with HIV were not "otherwise qualified to perform essential job functions". In **Local 1812 v United States Dept of State**³¹⁸ the Court accepted that members of the foreign service could be required to undergo HIV testing as part of medical fitness requirements to determine whether applicants were otherwise qualified to travel abroad. In **Scoles v Mercy Health Corp**³¹⁹ the Court accepted that a doctor with HIV would only be "otherwise qualified" to perform his duties if he disclosed his HIV status to patients; this decision was based primarily upon the theory of patient autonomy.

* **Canada**

- 5.18 Canadian law generally prevents pre-employment testing and discrimination against people with HIV on the basis that it constitutes unfair discrimination on ground of disability. Fairly comprehensive legal protection exists, for example, for HIV-infected persons in the form of certain remedies available under the Ontario Human Rights Code (which governs private and public actions falling within provincial jurisdiction)³²⁰ and the Canadian Human Rights Act (which governs private and public actions falling within

315 50 F 3d 1261 (1995).
 316 780 F Supp 628 (1991).
 317 3 F 3d 922 (1993), *cert denied*, 114 S Ct 1071 (1994).
 318 662 F Supp 50 (1987).
 319 887 F Supp 765 (1994).
 320 R50 1990, c H 19.

federal jurisdiction)³²¹ to assure that both private and public employers do not adopt policies that irrationally discriminate against HIV-infected workers.³²² The Ontario Human Rights Code states that the right to equal treatment with respect to employment is infringed where a prospective employer makes any direct or indirect inquiry that "classifies or indicates qualifications by a prohibited ground of discrimination".³²³ The Ontario Human Rights Commission, in a policy document, has regarded this as the basis for a prohibition on pre-employment HIV testing.³²⁴ Both the Code and the Act provide that the testing or exclusion of an employee with HIV (after being hired), would not constitute discrimination if it is based on a bona fide occupational qualification.³²⁵ There has been considerable jurisprudence on what may constitute a "bona fide occupational qualification" - usually focusing on the question whether there is legitimate need to prevent exposing others to significant health and safety risks.³²⁶ The Ontario Human Rights Commission, in a policy statement, has indicated that "in the vast majority of work settings, it is unlikely that testing or other protective measures would be permitted as persons with HIV infection or HIV-related illness pose virtually no risk to those with whom they interact".³²⁷ This has been confirmed by the Ontario Law Commission in its report on HIV testing.³²⁸

5.19 **In Re Pacific Western Airlines Ltd and Canadian Air Line Flight Attendants Association**, an employer attempted to prevent an employee with HIV from returning to work by placing the employee on permanent sick leave. The Labour Arbitration Court rejected the employer's arguments that dismissal was appropriate in order to prevent discord or work stoppage by co-workers, or to prevent transmission to pilots or customers, or to prevent injury due to neurological impairment. The court stated:

We are unable to find that the employer established that there was any risk that the grievor could transmit the disease to fellow employees or passengers. The substance of the expert evidence was that there had never been a reported incident in which the virus had been transmitted in the aviation environment or in any form of what medical experts refer to as casual contact ... There was no

321 R S C 1985 c H 6.

322 **Ontario Report** 62-63.

323 *Ibid* 39.

324 *Ibid*.

325 *Ibid* 64 fn 206.

326 *Ibid* 39 fn 95.

327 *Ibid* 39.

328 The rationale for preventing employers from requiring applicants for employment to undergo HIV-testing has been explained thus in the report: "Because HIV transmission is sexual or blood-borne and not casual, there is no effective risk of transmission in the majority of workplaces. ... Since the mandatory HIV-related testing of employees is not rationally related to the protection of public safety, an employee's HIV-status cannot reasonably be considered a bona fide occupational qualification ...". In addition, the report found no evidence supporting the allegation that asymptomatic individuals with HIV could suffer from cognitive deficiencies (**Ontario Report** 62, 63 fn 204 and 205).

evidence adduced of the virus ever having been transmitted by non-sexual contact in any environment or circumstance equivalent or similar to the contact that occurs between employees and employees and passengers in the aviation environment. No evidence was led to the effect that the virus had ever been transmitted in circumstances equivalent or similar to the circumstances before us. The evidence relied on by the employer to support the existence of a risk consisted of opinion evidence that amounted to a theoretical possibility that such a transmission might occur.

The court declined to permit discrimination on the basis that a theoretical risk of HIV transmission could exist. The employer, the court found, sought to eliminate not the risk of HIV transmission, but the elimination of any theoretical possibility of such a risk. The court refused to countenance these kinds of "hysterical obsessions of uninformed persons".³²⁹

5.20 In **Canada v Thwaites** the Federal Court of Canada upheld a finding by the Human Rights Commission that dismissal of a serviceman because of his HIV status was discriminatory, and that no bona fide job qualification would prevent his retaining that position.³³⁰ It would seem to follow that the seronegative status in a job applicant would not constitute a bona fide job qualification.

5.21 In **Ontario Human Rights Commission v North American Life Assurance Co** the Ontario Divisional Court accepted without note that HIV was a disability under the Human Rights Code. Discrimination on the basis of HIV status in employment, it held, was unfair. In addition, the Court stated that the Ontario Human Rights Code would not permit an offer of employment to be conditioned upon enrolment in an employee benefit program, life assurance or superannuation plan. However a benefits plan could make distinctions, reasonably based upon actuarial findings, that limited coverage of HIV or AIDS related illnesses.³³¹

³²⁹ **Re Pacific Western Airlines Ltd and Canadian Air Line Flight Attendants Association** 28 LAC 3d 291 (1987).

³³⁰ **Canada v Thwaites** 49 ACWS 3d 1102 (1994).

³³¹ **Ontario Human Rights Commission v North American Life Assurance Co** 123 DLR 4th 709 (1995). The Court found that the right to equal treatment in employment without discrimination on the basis of handicap was not infringed "where reasonable and bona fide distinctions" were made in an employee benefit program. The decision turned upon the plaintiff's claim for benefits. His exclusion based upon a pre-existing condition was held to be actuarially justifiable.

* **Australia**

5.22 The federal Disability Discrimination Act, 1992 makes discrimination on the basis of disability (which is defined so as to include HIV/AIDS) illegal in the area of, *inter alia*, employment - and specifically with regard to an offer for employment. Reasonable accommodation needs are required to be provided for people with disabilities, but the Act enables respondents to argue that this may involve unjustifiable hardship, and in the area of employment that the person with a disability is unable to carry out the inherent requirements of the particular job. Furthermore, if the disability relied on to support the act of discrimination is an infectious disease, the act of discrimination can be exempted if it is reasonably necessary to protect public health.³³²

5.23 The Federal Court of Australia (Queensland District Registry General Division) in **Commonwealth of Australia v The Human Rights and Equal Opportunity Commission and 'X'**³³³ found that the exclusion of a recruit with HIV from military service constituted discrimination on the basis of disability because seronegativity was not a bona fide job qualification. The Court accepted that there might be some instances (as referred to in paragraph 5.22 above) when a person with HIV could be restricted from specific employment positions but found that in the present case the prerequisite was discriminatory. "There is no need or occasion", the Court found, "to allow employers to implement policies of discrimination against persons with disabilities in the name of occupational and workplace safety".³³⁴ The Court stated:

To sustain the argument that the (serviceman) was unable to carry out the inherent requirements of employment of a soldier, because he was HIV positive, the (Army) needed to obtain from the Commissioner as a finding of fact that it was an inherent requirement of employment as a soldier that he or she "bleed

³³² Sec 15(3), 15(4) and 48 of the Disability Discrimination Act, 1992 as referred to in **Commonwealth of Australia v The Human Rights and Equal Opportunity Commission and 'X'** No Qg 115 of 1995, 1996 Aust Fed Ct (Lexis 859); see also **Australia Final Report on AIDS** 32-33.

³³³ **Commonwealth of Australia v The Human Rights and Equal Opportunity Commission and 'X'** No Qg 115 of 1995, 1996 Aust Fed Ct (Lexis 859).

³³⁴ Ibid 40.

safely", so far as the risk to others including fellow soldiers of infection with HIV is concerned. The applicant did not seek such a finding of fact. Nor sensibly could it have sought such a finding. Risk of injury in the workplace which may give rise to bleeding or loss of bodily fluid, as a matter of theoretical possibility, exists in all employment situations. Someone may trip on a stair, fall and suffer an injury which bleeds and co-workers may run to offer assistance and come into contact with blood or bodily fluid. In this respect a soldier is in no different position to any other person in employment.

If it is lawful to discriminate against a person who wishes to enlist in the Australian Army solely on the basis that the person is HIV-positive because it is an inherent requirement of employment as a soldier that the person "bleed safely", in the sense used above, if injured, then logically such a discriminatory practice against carriers of HIV would be lawful in all employment situations. Such a result would be anathema to the statutory objects of the Act.³³⁵

5.24 The Court noted that if a job requirement included the performance of some positive act that could transmit HIV - acting as a human blood bank, for instance - then an employer could condition employment on the applicant demonstrating that he or she did not have HIV.

5.25 The law reform emphasis in Australia has been against unqualified pre-employment testing for HIV.

5.25.1 The committee tasked with proposing law reform on HIV and employment issues referred to the National HIV/AIDS strategy which states that -

(T)here is no necessity to test for HIV infection as a condition for entry into training, employment, or continuation in occupations which do not involve the risk of transmission to other people. HIV infection in itself is not a criterion by which to judge suitability for employment: suitability should be assessed on performance-based criteria (relating to both mental and physical capacity) relevant to the particular occupation.³³⁶

5.25.2 In its discussion paper on the matter the committee recommended the adoption of a prohibition on asking for information on which unlawful discrimination may be based, unless reasonably required for a non-discriminatory purpose. This prohibition could cover questioning of a job applicant as to

³³⁵

Ibid 38, 39.

whether they have had an HIV test.³³⁷ This principle has been embodied in the Commonwealth's Disability Discrimination Act, 1992 which was developed subsequent to publication of the discussion paper.³³⁸

* **European Union (European Court of Justice)**

5.26 In **X v Commission of the European Communities** the European Court of Justice held that an individual's right to privacy "require[s] that a person's refusal to undergo a test for HIV be respected in its entirety". The Court found that a pre-employment HIV test can violate two aspects of the applicant's right to a "private life": first his physical integrity, and second, "the right to decide for himself to whom he will divulge information with regard to his state of health".³³⁹ At issue in this case was not directly an HIV test, but instead a blood test to determine T4 and T8 lymphocyte counts (which may be inferred clinically to indicate HIV status). The European Court of Justice found that this requirement violated the right to privacy, regardless of consent. The Court held that while the pre-recruitment medical examination could serve legitimate interests, it must be narrowly tailored to determine the applicant's present ability to perform his or her job.

* **United Kingdom**

5.27 Under the common law, employers in England were able to distinguish between employees on any ground, and to make medical examinations a pre-requisite for an employment contract. Employers are no longer permitted to discriminate on the basis of race³⁴⁰ or sex³⁴¹ when making a job offer. In addition, the 1996 Disability Discrimination Act prohibits discrimination on the basis of disability. However

336 **Australia Discussion Paper Employment Law 25.**

337 Ibid 28.

338 **Australia Final Report on AIDS 32, 55.**

339 **X v Commission of the European Communities** European Court of Justice 1995 IRLR 320.

340 Race Relations Act 1976.

341 Sex Discrimination Act 1975.

employers are still able to require prospective employees to undergo a medical examination that could include an HIV test. It is as yet unclear whether disability includes people with asymptomatic HIV.³⁴²

* **India**

5.28 In April 1997 Justice Tipnis and Justice Trivedi of the High Court of Judicature of Bombay delivered a judgement rejecting the constitutionality of pre-employment testing by a public corporation. The Court found that it was not constitutionally permissible for the State to condemn a person with HIV to what it termed "certain economic death" before he or she becomes incapacitated due to illness. The Court stated: "If (prohibiting pre-employment testing) means putting certain economic burdens on the State or public corporations such as the Respondent Corporation or society, they must bear the same in the larger public interest". The Court accepted that an employer could test for medical fitness but that medical fitness should be decided on the basis of usual tests that indicate present ability to perform job functions. It is unclear how far reaching the order is, and whether it would also apply to private corporations as well. The Court does recognise however that the costs of HIV/AIDS in societies with high prevalence rates (like India or South Africa) must be allocated with equality and with the larger public interest in mind.³⁴³

³⁴² Schizas **The Economic and Social Impact of AIDS in Europe** 312. Schizas, at 304, notes that Belgium, France, Germany and Spain have general prohibitions on unfair discrimination which can prevent pre-employment testing, but do not have specific legislation on the matter. Italy has adopted specific legislation prohibiting employers from taking measures aimed at identifying HIV in candidates for employment.

³⁴³ The Court's judgement was delivered four years after the initial infringement on the petitioner's rights (court record of Writ Petition 213 of 1995 of the High Court of Judicature of Bombay 100 et seq, but specifically 109, 116-117 and 122 - made available to the researcher in May 1997; see also Internet<lawyers@bom2.vsnl.net.in accessed on 8 April 1997.

6 PRELIMINARY PROPOSAL IN DISCUSSION PAPER 72

6.1 The project committee's review of comparable systems, together with a consideration of the current scientific knowledge and the ethical, social and economical issues has led it to the preliminary conclusion that the present legal position needs to be changed, and that the most effective way of doing so is by legislation.

6.2 The committee further recognised that an array of competing interests and social values are at issue in the debate about the statutory regulation of pre-employment testing for HIV. Any suggested statutory intervention should therefore attempt to reconcile the main opposing views in a form which leaves sufficient flexibility for the accommodation both of private rights and social interests, as well as future development of medical and scientific knowledge and in the economic environment.

6.3 It was also clear that only a balanced and responsible approach to the issues will be successful in addressing practical problems without alienating concerned segments of society.

6.4 The project committee provisionally concluded that the rights of the employer, while recognised, should be limited by prohibiting pre-employment testing for HIV except where such testing is reasonably, justifiably and rationally warranted. This approach has been reflected in comparable jurisdictions. It also accords with the basic trend world-wide to curtail absolute freedom of contract, and accords with the limitation clause of our own Constitution. It is furthermore in line with the provisions of the LRA.

A) PRINCIPLE PROPOSED IN DISCUSSION PAPER 72

6.5 On the basis of the above, it was in principle proposed in Discussion Paper 72 to

prohibit pre-employment HIV testing except where such testing is reasonably, justifiably and rationally warranted.

B) STATUTORY ENACTMENT OF THE PRINCIPLE

6.6 To this end it was provisionally recommended that a specific statute be adopted in order to regulate those instances where an employer may ask an applicant for employment to take an HIV test, and to prevent an employer from refusing an individual employment on the grounds of that person's HIV status or perceived HIV status, unless such refusal is deemed fair and justifiable. In the proposed draft Bill the Labour Court was given specific jurisdiction to determine under what circumstances HIV testing or taking HIV status into account in hiring may be permissible in order to give all involved parties a clear framework for resolving potential disputes. Since then, the prospect of the enactment of a prohibition by including it in the Department of Labour's Employment Equity Bill has arisen (this is discussed in paragraph 7.58 below). Furthermore, in the light of comments received, the Commission has adapted the draft Bill (see ANNEXURE B to this interim report).

C) INPUT ON PRELIMINARY PROPOSAL REGARDING A PROPOSED BILL

6.7 The project committee has received guidance on the terms of the Bill from responses on preliminary proposals circulated to the business and labour sectors of NEDLAC³⁴⁴ by the committee's Chairperson in November 1996. Both responses recognised the need to prevent unfair discrimination against people with HIV, and to protect people with HIV from unfair denial of the opportunity to work and to participate actively in the economy.³⁴⁵ However, in the light of Business South Africa's response

³⁴⁴ See fn 277 above.

³⁴⁵ **BSA 1997 Response to SALC Presentation** at 1 stating: "BSA is totally opposed to unfair discrimination on the basis of HIV/AIDS. BSA accepts that it is necessary to have protection for individuals who are HIV positive, in light of the fact that HIV positivity alone does not give any indication of short- and even medium-term prognosis or outlook and such individuals should not be denied the opportunity to work, earn

to the preliminary proposal³⁴⁶ several key modifications were made to the terms of the proposed Bill.

6.7.1 A provision for criminal sanctions in the event of violation was removed. The Labour Court is, under the proposed Bill, given the authority to interdict any contravention or threatened contravention of the provisions.

6.7.2 A prohibition on unfair discrimination in the provision of benefits on the ground of HIV status was removed in order to narrow the interventive scope of the legislation and to eliminate confusion regarding the effect of such a prohibition. The regulation of permissible differentiation in post-employment benefits has been left to existing LRA provisions.³⁴⁷

6.7.3 In response to concerns that prohibiting HIV testing itself might not inhibit all invidious forms of discriminatory conduct, the language of the prohibition was amended to prohibit an employer from refusing to make an employment offer on the grounds of real or perceived HIV status.

6.7.4 The language of the exemption that the Bill envisages was broadened to allow testing for HIV and the consideration of the HIV status of the applicant for employment where an employer can establish that the test and such consideration is fair and justifiable. The Bill grants the Labour Court extensive scope to determine the fairness of the test and the consideration of HIV status. An employer may justify HIV testing and consideration of the HIV status of an applicant for employment with arguments of social policy, general health, employment conditions, (in one proposed formulation, the inherent requirements

a living and live a full and productive life". See also **Labour Sector 1997 Response to SALC Presentation 10**.

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BSA 1997 Response to SALC Presentation.

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An unfair labour practice is defined in Schedule B of the LRA to include -

"2(1)(a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex ... disability ... marital status or family responsibility;

(b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee".

of the particular job) and currently available medical knowledge.

D) PROPOSED DRAFT BILL

6.8 The following draft Bill was included in Discussion Paper 72 for comment:

REPUBLIC OF SOUTH AFRICA

PROHIBITION OF PRE-EMPLOYMENT HIV TESTING BILL, 1997

(As introduced)

(MINISTER FOR LABOUR)

B I L L

To prohibit pre-employment testing for HIV unless authorised by the Labour Court.

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context indicates otherwise -

"employee" means an employee as defined in the Labour Relations Act, 1995 (Act No. 66 of 1995), and includes an applicant for employment whether or not he or she is an existing employee.

"employment" includes the promotion, training, transfer, redeployment or re-assignment of an existing employee.

"HIV" means the Human Immunodeficiency Virus.

"test" includes any question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, the HIV status or perceived risk behaviour of an applicant for employment, and specifically includes an inquiry whether for the purpose of obtaining employment he or she is prepared to undergo HIV testing in any form.

"Labour Court" means the Labour Court, including the Labour Appeal Court, having jurisdiction under the Labour Relations Act, 1995 (Act No. 66 of 1995).

Prohibition of pre-employment testing for HIV

2. Subject to section 3, no person shall -

- (a) subject an applicant for employment to a test for HIV;
- (b) take the HIV status or perceived HIV status of an applicant for employment into account in refusing him or her employment.

Authorisation for pre-employment testing for HIV

3. (1) An employer may apply to the Labour Court for authorisation to subject an applicant for employment or a category of applicants for employment to testing for HIV and/or to take the HIV status of such an applicant for employment into account in deciding whether to refuse him

or her employment.

(2) Before hearing the matter, or at any stage hereafter, the Labour Court may give directions as it considers fit regarding service of the application on specified bodies or individuals, including any who in its opinion may assist it by the provision of information or submissions regarding medical facts, employment conditions and social policy.

(3)

[Option 1:]

The Labour Court shall grant authorisation if it is satisfied that consideration of the HIV status of an applicant for employment is, in the light of medical facts, employment conditions and social policy, fair and justifiable.

[Option 2:]

The Labour Court shall grant authorisation if it is satisfied that consideration of the HIV status of an applicant for employment is, in the light of medical facts, employment conditions, social policy and the inherent requirements of the particular job, fair and justifiable.

(4) The onus to satisfy the Labour Court lies on the employer seeking authorisation.

(5) The Labour Court may grant authorisation on such terms as it considers suitable, including conditions relating to -

- (a) the provision of counselling;
- (b) the maintenance of confidentiality;
- (c) the period during which the authorisation applies;
- (d) the category or categories of jobs or applicants for employment in respect of which the authorisation applies.

Interdicts

4. The Labour Court has jurisdiction, at the instance of any person who has standing under section 38 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), to interdict any contravention or threatened contravention of this Act.

Short title

5. This Act shall be called the Prohibition of Pre-employment HIV Testing Act, 1997.

E) EXPLANATORY NOTES ON THE BILL AS PROPOSED IN DISCUSSION PAPER 72

*** Aim of statutory intervention**

6.9 While bringing clarity to the law, the proposed legislation aims at providing a flexible standard. It generally prohibits testing applicants for employment for HIV. However, it recognises that specific instances of testing may be proved to be fair and justifiable. Furthermore, it recognises that employers might - as the course of the epidemic advances - develop new rationales for testing which would deserve a fair hearing in an impartial court of law.

*** Scope of intervention**

6.10 The proposed prohibition only applies to job applicants. This was based on a specific consensus in the project committee that the extent of the problem relating to pre-employment HIV testing is such that it warrants urgent intervention and should be addressed individually. The agreement was reached subject thereto that should later research prove that other employment matters are in need of reform, these matters could be addressed in a more general statute.³⁴⁸

*** Prohibition of pre-employment HIV testing**

6.11 The general prohibition reflects the understanding that pre-employment testing is generally unwarranted and unjustifiable. In the great majority of cases a person's HIV status of itself is unrelated to his or her ability to perform job functions safely and effectively. Where a decision to test an applicant for employment is based upon

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Minutes of project committee meeting on 6 and 11 March 1997.

irrational fear or a motive to discriminate unfairly, that behaviour should be prohibited.

* **Authorisation of pre-employment HIV testing**

6.12 Where testing an applicant for HIV, or taking an applicant's HIV status into account to deny employment, is fair and justifiable the proposed Bill grants the Labour Court jurisdiction to authorise HIV testing and the consideration of the HIV status of the applicant for employment. If there is evidence, for instance, that certain work activities pose cognizable risks of HIV transmission or HIV related injury, then an employer will have a fair and justifiable rationale for testing applicants for employment for HIV.

* **Choice of forum for adjudication of disputes**

6.13 The Labour Court is the appropriate forum for determining the fairness of workplace-related discrimination. Other legislation has given the Labour Court jurisdiction to adjudicate disputes involving the employment setting.³⁴⁹

* **Burden of proof**

6.14 An employer will be better situated to advance a claim in court that it has a need for knowing (or basing a decision upon) the HIV status of an applicant. As far as onus is concerned, the employer is also best equipped to establish why the HIV status of an applicant for employment is relevant to a specific job position.

* **Jurisdiction of the Labour Court**

6.15 The Labour Court's jurisdiction to determine whether ascertaining or taking into

³⁴⁹

Cf Mine Health and Safety Act (Act 29 of 1996) sec 82(1) which states: "The *Labour Court* has exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of *this Act* except where *this Act* provides otherwise".

account an applicant's HIV status is fair and justifiable is not limited to determinations concerning the applicant's capacity to perform job requirements. It extends to any other justification which an employer may fairly seek to advance. Again, it appears that an employer will be in a better position to establish the social and economic impact of a prohibition on pre-employment testing, and to justify its own exemption from a generic prohibition.

*** Need for an impartial forum to determine whether HIV testing is fair and justifiable**

6.16 The proposed Bill aims to provide an opportunity for an impartial forum to establish, given all information then available, whether HIV testing of applicants for employment and the consideration of their HIV status in a given industry or for a specific position is fair and justifiable. The proposed Bill aims to ensure that HIV testing is done only in accordance with law, and without impermissible infringement upon constitutional rights.

6.16.1 The proposed Bill gives the Labour Court wide authority to issue instructions regarding counselling, confidentiality, and the circumstances under which an employer may test applicants for employment for HIV.

6.16.2 The proposed Bill further provides the Labour Court with the authority to "give directions as it considers fit regarding service of the application on specified bodies or individuals, including any who in its opinion may assist it by the provision of information or submissions regarding medical facts, employment conditions and social policy". The wide procedures mandated by this provision enable the Labour Court to invoke *amicus curiae* briefs in deciding whether HIV testing and the consideration of HIV status is fair and justifiable.

6.16.3 A party may appeal to the Labour Appeal Court. The Labour Appeal Court may similarly authorise HIV testing and consideration of HIV status if it

finds that knowledge of the applicant for employment's HIV status is fair and justifiable in the light of medical facts, (job requirements), employment conditions and social policy.

6.16.4 The Labour Court has jurisdiction to hear any person who has standing under section 38 of the 1996 Constitution. This wide confirmation of standing will assist in eliminating problems that individual applicants for employment may have. Since such persons will frequently not enjoy union membership, they may experience difficulty in procuring legal representation, determining their legal rights or maintaining legal action.

*** Uncertainty regarding grounds for justification of pre-employment HIV testing and consideration of the HIV status of an applicant for employment**

6.17 The project committee was not unanimous on whether the inherent requirements of the particular job should be included (together with medical facts, employment conditions and social policy) as justification of HIV testing and consideration of the HIV status of an applicant for employment. This option was included in the proposed Bill as set out in Discussion Paper 72 and comment was specifically invited thereon.

7 COMMENTS ON DISCUSSION PAPER 72A) **CONSULTATION WITH STAKEHOLDERS**

7.1 Discussion Paper 72 was distributed to 668 identified parties. These include the business and labour sectors, persons and bodies concerned with HIV/AIDS and workplace issues, non-governmental organisations concerned with human rights and HIV/AIDS issues, the medical and health professions, relevant research institutions, government departments, and the South African legal fraternity. The release of the Discussion Paper was advertised in the **Government Gazette** and by way of a media statement. A further 120 copies of the paper were subsequently distributed.

7.2 The closing date for comment was 31 July, extended on request to 15 August 1997. Submissions received thereafter were also considered.

7.3 It was agreed between the project committee and NEDLAC³⁵⁰ that the Council would not respond on the proposed Bill as an organisation but that NEDLAC parties (business, labour and government) could respond individually. NEDLAC will respond officially after Cabinet approval on the proposed legislation has been obtained.³⁵¹

7.3.1 The National Economic, Development and Labour Council Act, 1994 (Act 35 of 1994) requires that NEDLAC consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament.³⁵² The Act also provides that any report of NEDLAC, including a report on any proposed legislation, shall be submitted to the Minister of Labour and be tabled in the National Assembly.³⁵³

350 See fn 277 above.

351 NEDLAC Report on the South African Law Commission's Proposals on Aspects of the Law relating to HIV/AIDS as noted by the NEDLAC Executive Council on 29 August 1997.

352 The National Economic, Development and Labour Council Act, 1994 sec 5(1)(c).

353 Ibid sec 8.

- 7.3.2 A special procedure had thus to be found to include consideration by NEDLAC within the Law Commission's established process of consultation and subsequent report to the Minister of Justice and Parliament in terms of the South African Law Commission Act, 1973 (Act 19 of 1973). The procedure agreed on between the project committee and the NEDLAC Labour Market Chamber consisted in the project committee presenting the Labour Market Chamber with preliminary outline recommendations on 28 November 1996. The project committee's preliminary view was that statutory intervention prohibiting pre-employment testing for HIV is necessary. There was, however, divergence in the committee as to whether there should be an "escape clause" permitting pre-employment testing where it might be necessary for reasons such as possible pre-symptomatic psycho-neurological impairment. These preliminary views together with a subsequent draft Bill (prepared by the project leader) were circulated to NEDLAC's Labour Market Chamber in an attempt to seek middle ground and to elicit responses. Labour Market Chamber parties tabled responses to these recommendations on 20 February 1997. These responses have been taken into account in formulating proposals for inclusion in Discussion Paper 72.³⁵⁴
- 7.4 Written comments on the Discussion Paper were received from 65 respondents. These include members of the legal fraternity, private citizens, the medical and health professions, insurance industry, representatives of organised business and labour, non-governmental organisations concerned with HIV/AIDS and human rights issues, health departments of local authorities, government departments, research institutions and members of the judiciary.
- 7.5 Some of the comments reflect the views of interest groups of considerable influence while others represent the views of private individuals, researchers or small organisations.
- 7.6 A list of respondents appears in ANNEXURE A to this report.

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See par 6.7 above.

B) COMMENT ON THE PRINCIPLE OF ENACTING A STATUTORY PROHIBITION ON PRE-EMPLOYMENT HIV TESTING

7.7 Commentators are divided on the issue of prohibiting and regulating pre-employment HIV testing. The majority, however, supports the principle of no pre-employment HIV testing as formulated by the project committee, as well as statutory enactment of a prohibition as proposed. Of those who expressly indicated a preference for one or the other options in clause 3 of the proposed Bill, the majority by far favour option 2 (which requires justifying HIV testing and consideration of the HIV status of an applicant for employment also in terms of the inherent requirements of the particular job).

7.8 Comments can roughly be divided in the following three main categories:

A: Those supporting the principle of no pre-employment HIV testing (except where reasonably, justifiably and rationally warranted) **as well as statutory enactment of this principle** (i.e. the Bill as proposed with either option 1 or 2 of clause 3).

B: Those supporting the principle of no pre-employment HIV testing in general, but opposing statutory enactment of a prohibition on such testing.

C: Those supporting pre-employment HIV testing and thus opposing the proposed statutory prohibition.

7.9 The Actuarial Society of South Africa offers comments which pose certain questions and suggested an alternative without expressing a view either in favour of or against the preliminary proposals in Discussion Paper 72. The Society's views are reflected in paragraph 7.69 below.

7.10 Several commentators supporting the principle proposed, offered specific comments on the terms of the proposed Bill while those who were not in favour of the

proposal suggested alternatives. These are discussed below.

* **Comment in Category A (Support for statutory prohibition)**

7.11 The majority of commentators (53)³⁵⁵ support the project committee's basic proposals.

7.11.1 This group include mainly members of the medical and health professions; non-governmental organisations concerned with human rights and HIV/AIDS issues; medical and health researchers; health departments of local authorities; certain government departments - including the Departments of Health, Labour, Welfare and the South African Police Service as well as two regional offices of the Department of Justice and the Gauteng and Western Cape Departments of Health; a single private individual, one parastatal business institution³⁵⁶ and the Chemical Workers Industrial Union (CWIU).³⁵⁷ While the Department of Correctional Services could not provide express comment, it indicated that it has amended its HIV/AIDS policy so that currently no pre-employment testing is being carried out. The South African Medical Service (within the National Defence Force) indicated that it fully support the general policy of no pre-employment HIV testing in the public sector as suggested by Cabinet earlier this year.³⁵⁸ The Interim South African Medical and Dental Council stated that it does not support a practice of pre-employment HIV testing - it however refrained from expressing a view on the detail of the proposed Bill. The Judge President of the Labour Courts indicated that, if the prohibition was enacted, his Courts would be able to deal "expeditiously" with the issue.

7.11.2 Respondents in this category mostly reiterated unequivocally their

³⁵⁵ Comments numbered 1, 3, 5, 6, 7A and B, 9, 11, 14, 15A and B, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59, 50, 61, 62, 63 and 64 in Annexure A.

³⁵⁶ ESKOM.

³⁵⁷ The CWIU stated in its comments that it believed that the Congress of South African Trade Union (COSATU) holds similar views.

opposition to pre-employment HIV testing as a means of unfairly discriminating against persons with HIV. Some supplied additional motivation and confirmed the rationales relied on by the project committee in arriving at its preliminary conclusion.

7.11.3 They welcomed and supported the proposed legislation which they hope will clarify the existing legal position and thereby assist to curb the unfairly discriminatory, futile and counter-productive practice of pre-employment HIV testing that exclude thousands of otherwise healthy people from the workplace.³⁵⁹

7.11.4 Twenty-four³⁶⁰ of the 53 commentators in this category expressly favour the option including the inherent requirements of the particular job as one of the factors to be taken into account in determining whether HIV testing is fair and justifiable. These include the National Association of People Living with HIV/AIDS (NAPWA), non-governmental organisations concerned with HIV/AIDS and human rights issues, the Medical Association of South Africa (MASA), the South African Police Service, the Department of Health and the Department of Welfare, the Gauteng Department of Health, the Western Cape MEC of Education and Cultural Affairs, most of the local authorities commenting on the Bill and ESKOM. (The Department of Labour preferred not to express an opinion on this.) Four further commentators (the LOA, SACOB, the AHI, and the Pretoria City Council Medical Officer of Health) although opposing statutory intervention, agreed that should legislation be enacted this particular option would be most suitable. Although the CWIU did not agree with creation of an escape clause as proposed, they indicated that should it be included in a Bill they would support this option. Only one commentator (ATICC Western Cape) expressly favoured the option not including the inherent requirements of the particular job. The ATICC is of the opinion that including reference to the inherent requirements of the particular job would provide a loophole for

³⁵⁸ See par 2.33 above.

³⁵⁹ See eg comments numbered 6, 23, 24, and 50.

³⁶⁰ Comments numbered 5, 7A and B, 14, 15A and B, 18, 19, 20, 30, 31, 33, 34, 35, 37, 38, 41, 42, 48, 50, 52,

employers seeking to justify pre-employment HIV testing practices. The remaining commentators in this category did not expressly favour one or the other option.

7.11.5 Commentators who favoured including the inherent requirements of the particular job as one of the decisive factors are of the view that this option would require employers to prove that testing is a reasonable and fair requirement and thus protecting the rights of applicants with HIV to a greater degree than proposed in the alternative option.³⁶¹ HIV Management Services (Pty) Ltd and the ALN believe this option places a more onerous responsibility on an employer to justify the need for HIV testing and that it provides for a much tighter and fairer test. The Dental Association of South Africa, from the perspective of health professionals as employees, stated that there exists a certain degree of risk as part of their professional duties and that there may be instances when it would be necessary for the profession when employing staff, to require pre-employment HIV tests to safeguard both the professionals and their patients.

7.11.6 Several commentators³⁶² (specifically those active in the field of HIV/AIDS and human rights issues) who favoured including the inherent requirements of the particular job as a decisive factor, state clearly that they accept this provision as a compromise in balancing the rights of persons with HIV with those of the employer. The ALN observes that this approach is also in accordance with the LRA where discrimination against any of the protected grounds is justifiable only if it is based on an inherent job requirement.³⁶³

7.11.7 A single commentator (Dr Rajen Naidoo of the University of Natal's Occupational Health Programme) contends unconditionally that the escape clause provided in clause 3 (either option) is unacceptable and will provide employers with an unfair advantage against individuals or groups of prospective job

54, 56, 57, 60 and 63.

³⁶¹ See eg the comments of NAPWA.

³⁶² Eg HIV Management Services (Pty) Ltd; the AIDS Consortium; ALN; and the National Progressive Primary Health Care Network.

³⁶³ Cf sec 2(2)(c) of Part B of Schedule 7 of the LRA.

applicants. He believes that a wealthy industry like the mining industry will have the resources to enable it to produce strong arguments for being excluded from the prohibition while prospective applicants will neither have access to the same resources nor will they have access to organisational support in the form of trade unions (not yet having been employed). He submits that from a public health perspective the need for pre-employment testing is irrelevant, and that providing an escape clause is contradictory to the contents presented in Discussion Paper 72. He suggests that if there are particular jobs or sectors for which testing is necessary those should be identified clearly in the Bill. The CWIU also preferred this view, but indicated that it would support option 2 should an escape clause nevertheless be enacted.

* **Comment in Category B (Opposition to discrimination but also to statute)**

7.12 Five commentators - representing mainly the business fraternity (including the LOA, AHI and SACOB) - are strongly opposed to statutory enactment of a prohibition against pre-employment HIV testing. They in general regard the 1996 Constitution and the LRA as providing adequate protection for persons with HIV. The fourth commentator in this category, Dr Clive Evian, also supports this view.

7.13 It should be noted that the LOA, AHI and SACOB represent considerable business interests.

7.14 Although not in favour of the proposed legislation, all commentators in this category submitted comments on the terms of the Bill, should it be decided to proceed with it. The LOA, SACOB, the AHI and the City Council of Pretoria Medical Officer of Health expressed themselves to be in favour of the option including the inherent requirements of the particular job as a decisive factor should the Bill be enacted. Dr Clive Evian did not comment on the choice of options.

* **Comment in Category C (Opposition to statute stemming from support for testing)**

7.15 A minority of six commentators³⁶⁴ hold this view. They represent divergent interests and include single members of the legal fraternity, Prof Alan Whiteside from the University of Natal Economic Research Unit, the Chamber of Mines of South Africa, the City of Durban Pension Fund and a private individual.

7.16 Commentators in this category express the view that the Bill is inappropriate and premature; unnecessary and unwarranted; and that there is little rationale in allowing testing for other medical conditions but not for HIV.

³⁶⁴ Comments numbered 2, 4, 10, 13, 16 and 51.

C) SPECIFIC CONCERNS RAISED REGARDING THE PRINCIPLE OF PROHIBITING PRE-EMPLOYMENT HIV TESTING AND ENACTMENT OF SUCH PRINCIPLE

7.17 Several reasons were advanced by opponents of a prohibition on pre-employment HIV testing and the enactment of such a principle. However, two main issues underlie these arguments: AIDS exceptionalism and the cost implications of prohibiting HIV testing - with AIDS exceptionalism as the most significant concern.

7.18 The main reasons advanced for not supporting the project committee's proposals include the following:

* **AIDS exceptionalism**

7.19 This was the major argument emphasised by all opponents of a statutory prohibition on pre-employment HIV testing.

7.20 Dr Clive Evian, while he agrees that HIV/AIDS lends itself to the potential for unfair discrimination and may need special consideration in a Bill as proposed, submits that singling out HIV for a special Bill may draw undue attention to the issue and in turn promote more subtle discriminatory practices. He requests the Commission to seriously consider whether existing legislation such as the LRA and the 1996 Constitution do not provide sufficient protection to the job applicant. He suggests that what may rather be needed is some guidance on interpreting the current law in terms of HIV. SACOB supports this view and suggests that as sufficient legislation already exists to protect persons with HIV, there may be a problem with lack of knowledge of this legislation on the part of those whom it is designed to protect. Instead of introducing further legislation attention should be focussed on educating people about the nature of their rights and the protection already afforded them under such existing legislation.

7.21 The preferred view of the LOA is not to have HIV specific legislation, but rather

legislation which affords those who suffer from any life threatening condition protection from discrimination. The LOA believes that by enacting HIV-specific legislation, emphasis will be placed on the exclusivity of HIV with resultant stigmatisation. The LOA furthermore draws attention to the fact that no precedent exists which specifically prohibits pre-employment testing in international law. However, HIV has been interpreted by the courts as a disability in terms of the Americans with Disabilities Act, 1990.³⁶⁵ The Australian Disability Discrimination Act, 1992 expressly outlaws discrimination on the basis of HIV/AIDS.³⁶⁶

7.22 According to Judges of the Northern Cape Division of the High Court of South Africa the considerations favouring pre-employment testing outweigh those against such testing. They ask why persons with HIV should be specially protected as opposed to those with other diseases, for instance, heart disease.

7.23 RS Green comments that the draft Bill infringes on the rights of others in that the Bill will result in additional expense and loss for employers. He finds the proposed legislation unnecessary and unwarranted.

7.24 The City of Durban Pension Fund draws the Commission's attention to the Fund's policy of discretionary HIV testing: The Fund holds the opinion that it must test for HIV (since not testing would also preclude testing for any other restricting ailment - which would be unacceptable to any benefit provider) but not discriminate against a person with HIV. This could be achieved by testing only in cases where the City Medical Officer of Health considers testing to be necessary; and by confidential reporting to the Fund, not of the test result, but only that restricted membership of the Fund is to be given (in the case of a positive test result).

7.25 Prof Alan Whiteside regards the Bill as unnecessary, premature and undesirable since, amongst others, the Bill singles out (and thus maintains the stigma surrounding) HIV/AIDS; the Bill is premature as it is unknown what the impact of the epidemic will

³⁶⁵ Cf par 5.17-5.17.6 above.

be; new tests are available which will allow for identifying how far advanced HIV disease is - these need to be considered as well as the potential for genetic screening for other diseases and the Bill should not focus just on HIV.

7.26 The Chamber of Mines of South Africa supports the comments of Prof Whiteside. It states that the proposed legislation represents a radical intervention and that the justification for dedicated legislation, issues concerning occupational health, the appropriateness of certain public health measures and the epidemiology of the disease require further consideration. The Chamber is of the opinion that dedicated legislation is not justified: Special legislative treatment of HIV is likely to increase rather than decrease stigma. Future developments in testing for HIV (which may render testing more cost effective and reliable) have not been taken into account. The Chamber submits that the Bill concentrates exclusively on the rights of infected persons whilst ignoring all other sectoral and individual rights and the costs of the epidemic to society.

7.27 The Actuarial Society of South Africa is also concerned that legislation specifically aimed at addressing issues pertinent to HIV/AIDS may serve to strengthen negative perceptions about the disease which could have serious repercussions on, *inter alia*, occupational health issues.

* **An employer should not be obliged to take on an applicant with "advanced disease"**

7.28 SACOB records that although the individual with HIV should not be denied the opportunity to work and earn a living, any protection for such individuals should not be at the expense of other stakeholders. As stated in paragraph 3.6.2.1 above, the Chamber is of the view that the important issue for employers is not so much whether an employee has HIV infection, but rather his or her health status in light of the infection and particularly the short-term prognosis. Dr Clive Evian shares this view. Both SACOB and Dr Evian express concern about the prospect of employers being forced to employ,

train, and promote employees who may already have "advanced HIV disease". Dr Evian states that an employer should not be obliged to employ an applicant with advanced disease. SACOB further believes that when at any pre-employment examination there is clinical evidence that a prospective employee may be suffering from AIDS, medical personnel have the right to test that individual to confirm the diagnosis as with any other medical condition. Should a prospective employee already have clinical AIDS, confirmed by such testing, he or she may not be able to fulfill their employment contract and therefore the employer should be able to refuse such applicant employment.

* **The project committee's preliminary proposal creates an imbalance between the rights of all parties involved**

7.29 SACOB believes that a provision requiring an employer to apply to the Labour Court for authorization to subject an applicant for employment to testing for HIV places an unfair onus on the employer to justify any exception and fails to strike a balance between the rights of all parties involved. Since the normal role of the Labour Court is to ensure that rights are enforced, they find it inappropriate to place on the Court the role proposed. The whole process would also be expensive and time-consuming for the employer. MASA added that the costs of Labour Court applications may prohibit the small employer from applying for justifiable exceptions.

* **Costs**

7.30 The AHI observes that our country cannot afford anything that will increase production costs or influence job creation and productivity negatively or will further regulate an already highly regulated labour market. The AHI is of the view that the proposed Bill will have all these negative effects on the labour market and the economy.

7.31 The Chamber of Mines of South Africa expressed the opinion that the economic consequences of the Bill for employers have not been addressed satisfactorily in the Bill

or the Discussion Paper.

7.32 The City Council of Pretoria Medical Officer of Health is concerned about the cost implications of the proposed court procedure for smaller businesses and states that with more than 50% of businesses in our country being small, we cannot afford the proposed legislation. He argues that the cost of testing is small in relation to the cost of the envisaged court procedure. He submits that workers with HIV are already accommodated in the same way as applicants for employment suffering from a variety of medical conditions while more and more workers with chronic diseases are put on surveillance programmes. The same could be done with persons with HIV. He concludes that knowledge of the health of a worker benefits everyone - including the employee. If employers are willing to budget for the cost of testing, it takes a burden off the government and other benefit providers. Testing can prove to be most valuable as the results can be utilised to determine the real onslaught of HIV and anticipate effects on the economy and society. The AHI is of the view that pre-employment HIV testing may be warranted under certain circumstances, and even though the proposed Bill leaves this option open, it will be a costly and time-consuming exercise especially for small and medium size enterprises.

*** A prohibition on pre-employment HIV testing will not address discrimination against persons with HIV/AIDS successfully**

7.33 The Actuarial Society of South Africa accepts that it is in public interest that persons with HIV remain productive within the country for as long as they are capable of performing an occupation for financial gain. However, to ascertain whether the proposed legislation would achieve this objective, it is suggested that the macro-economic impact of the proposed Bill be examined. The AHI does not consider that the prohibition will succeed in effectively addressing the discrimination and stigmatisation that persons with HIV/AIDS will have to cope with and which it believes is the driving force behind the proposed Bill. The AHI believes that because of lack of a national strategy to cope with the disease, different initiatives attempt to deal with the problem in

ignorance of one another - they find the Bill to be an example of such a well-meant effort.

* **A prohibition on pre-employment HIV testing will not assist the public health aims of prevention of the spread of HIV**

7.34 Dr T L Patycki (from the St Helena Hospital, but commenting in his private capacity), states that the project committee's approach is aimed at the protection of infected persons with no or little concern about the spread of the pandemic. Dr Patycki is in favour of HIV testing forming part of general pre-employment medical tests. He emphasises that HIV infection is problematic in the sense that the illness can represent a spectrum of conditions with unpredictable consequences in the work environment and predicts that the proposed Bill will make controlling the epidemic even more difficult.

7.35 According to the Chamber of Mines of South Africa the project committee has especially failed in not taking into account the particular link between HIV and tuberculosis which is of very real consequence to the mining industry (the single largest industry employer of labour in the country). Exposure to silica dust is one of the factors that increases the risks of contracting tuberculosis. The mining industry therefore constitutes an environment where a high risk of tuberculosis infection is present. The Chamber states that the proposed Bill overlooks the fact that employers may run the risk of incurring increased liability for their failure to protect employees and prospective employees with HIV from exposure to tuberculosis in the mining sector. In this regard the Bill is difficult to reconcile with the provisions of the Mine Health and Safety Act, 1996 which place a duty on employers to maintain a healthy and safe work environment. It is thus submitted that the testing of employees to determine their suitability for employment in occupations with a high risk of contracting tuberculosis should not be deemed to be unfair discrimination.

7.36 The Chamber further states that experience has shown that the strategies adopted for the containment of HIV thus far have been ineffective. In the longer term the

programme of education to achieve behavioural changes which would prevent further transmission must be made to succeed. However, in the short and medium term active management of the disease is vital and in this regard the proposed Bill would seriously hamper public health responses to the spread of HIV through the identification of HIV positive individuals and appropriate counselling and management. The Chamber submits that prevention of new infections depends on knowledge of who is infected. It points to recently proposed legislation in Zimbabwe which emphasises the rights of women in this regard. The Chamber suggests that high risk groups who might legitimately qualify for screening with the intention of prevention would include new recruits for employment. It observes that the LRA does not preclude public health intervention possibilities.

* **Unfair selection**

7.37 The Actuarial Society of South Africa expresses concern that the prohibition of pre-employment HIV testing could give rise to unfair selection against employees by employers: the introduction of the proposed Bill may have the desired effect of denying employers the opportunity of carrying out unauthorised pre-employment testing, but it may result in unfair discrimination against people who are refused employment on unjustifiable suspicions as to their HIV status.

7.38 Prof Alan Whiteside supports this and states that prohibition of pre-employment HIV testing may lead to other forms of selection, for instance, employment of older women and introducing questionnaires on life style.

7.39 Dr Aart Hendriks of the Department of Health Law, University of Amsterdam argues that prohibiting all pre-employment HIV testing may obstruct the employment opportunities of persons with HIV: some people with HIV would need an employer to accommodate their needs (for instance to enable them to take their drugs or to have regular breaks) and risk harming their own health by not revealing their health status.

D) COMMENTS ON TERMS OF THE DRAFT BILL

The following comments were offered on the terms of the proposed Bill:

* **Scope of the Bill**

7.40 Dr Aart Hendriks questions the narrow scope of the Bill. He suggests extending it to include all medical conditions or impairments irrelevant to the performance of the essential job-related functions. As an alternative to this he proposes prohibition of all forms of pre-employment exams (tests), unless carrying out a medical examination is reasonably warranted, and refers the project committee to the Dutch "Wet op de Medische Keuringen".³⁶⁷

* **Voluntary disclosure of HIV status**

7.41 The National Progressive Primary Health Care Network expresses concern about protection of individuals (presumably both employees and applicants for employment) who voluntarily disclose their HIV status.

* **Access to employment versus access to employment benefits**

7.42 The City Council of Pretoria Personnel Services Department submits that the

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This Act proposes to strengthen the legal position of persons subjected to medical examinations in general by protecting them against "an investigation specifically aimed at obtaining knowledge of a possibility of a serious disease for which there is no remedy ... or knowledge of a present and untreatable disease which may manifest only after a long period" (article 3). Furthermore, examinations in connection with the commencement of an employment relation are performed only if the fulfillment of the function to which the employment relation refers makes particular demands regarding medical fitness. Medical fitness for the function is defined as "the protection of the health and safety of the examinee and of third parties during the performance of the work in question" (article 4). However, a medical examination for "AIDS or seropositivity for AIDS" may be carried out when insurance exceeds a certain limit (article 5). (Our translation of the Dutch Wet op de Medische Keuringen - Eerste Kamer vergaderjaar 1996-1997, 23 259, nr 91.)

real problems regarding HIV/AIDS in the workplace are related to employment benefits. It suggests that the proposed Bill clearly distinguish between testing for employment purposes and testing for the sake of determining status of access to benefits.

7.43 The AHI strongly endorses the view that the right to underwrite be protected at all times. They emphasise that this distinction between access to employment and access to risk benefits should be maintained, in the event of legislation being enacted. If anything, the matter could be made even more clear by indicating that the prohibition on pre-employment testing in no way affects the right to conduct a proper benefit or risk assessment.

7.44 The LOA submits that a distinction should be drawn between pre-employment and pre-benefit testing on the basis that taking into account the rights of non-HIV infected individuals in determining access to benefits would not be discriminatory. An alternative would be to offer persons with HIV alternative benefits taking into account their unique circumstances. The Association suggests that such alternatives be investigated.

* **Statutory exception or escape clause (clause 3 of the proposed Bill)**

7.45 Dr Rajen Naidoo recommends the removal of the escape clause from the proposed Bill on the basis of the unfair advantage being created by it in favour of employers against individuals or groups of prospective job applicants. He is of the view that if, as the escape clause implies, there are particular job descriptions or job sectors for which pre-employment HIV testing is necessary, it is the task of the Commission to identify these jobs or sectors and to include them in the Bill. He suggests including such a list in a schedule to the Bill. He submits that the list or schedule be finalised either through NEDLAC structures or other appropriate tripartite statutory bodies.

7.46 Several commentators proposed that express categories of exception be incorporated within the proposed Bill rather than being left to the discretion of the

Labour Court. These include Dr Clive Evian, the Breede River District Council AIDS Action Committee, the LOA, the South African Catholic Bishops' Conference, and Dr Leslie London and Ms Catherine Mathews. The LOA urges that recommendations in this regard be based on sound medical and scientific research.

7.47 The CWIU shares this view. Its major concern is that the envisaged court driven process would operate to the benefit of companies because of their advantaged position as regards resources (financial and legal.) Prospective job applicants will not have access to such resources. The CWIU therefore proposes that the escape clause provides also for the following :

- + Where an application for authorisation of HIV testing is made, it should not be in respect of any individual but in respect of a category of employment. The case should be considered a public interest case and not merely between applicant and individual employee.
- + Trade unions representing employees in any category of work that may be affected by a determination by the Labour Court should be entitled to representation or participation.
- + Where a determination has been made, a trade union should be able to make application for it to be revised or withdrawn.
- + The role of the trade unions in this case would be as a representative of the public interest and relevant public resources should be made available including the use of experts employed by the state, disclosure of information at the request of the parties; and the power of the state to subpoena witnesses on application of the trade union movement.

7.48 Along the same lines SG Abrahams recommends that there should be compulsory pre-employment testing for HIV in "high risk" cases with the onus on the prospective employee to justify departure from this standard, while testing should be

prohibited for "low risk" cases. The Greater Benoni City Council Health Department and the City Council of Pretoria Medical Officer of Health supported these views.

* **Clarification of terms and definitions**

7.49 Several commentators³⁶⁸ requested that specific terms used in the Bill be clarified. These terms included "medical facts", "social policy", "inherent requirements of the particular job", and "employment conditions" as criteria in the exception clause. The LOA observed that the definition of "employment" makes no reference to the inclusion of employee benefits (which by implication would entitle an employer to test employees for access to benefits). The Association suggests that the definition be amended to include access to fund benefits.

* **Concerns regarding jurisdiction of the Labour Court**

7.50 Several commentators including MASA, Dr Leslie London and Ms Catherine Mathews, ESKOM and the City of Durban Medical Officer of Health expressed concern about the practical implications of granting the Labour Court the proposed jurisdiction.

7.51 Commentators' concerns related to the costs of Labour Court applications which may prohibit small employers from applying for justifiable exceptions; sufficient access to the process of the Labour Court for it to be effective - especially for individuals with neither knowledge nor means to approach the Court; and a need for applications to be processed expeditiously so as not unduly to delay the staff recruitment process. ESKOM recommend that the Commission for Conciliation, Mediation and Arbitration (CCMA)³⁶⁹ be vested with jurisdiction to conciliate such matters on an urgent basis. They further suggest that the matter should proceed to the Labour Court only on failure of

³⁶⁸ Eg comments of Dr London and Ms Mathews, the Breede River District Council AIDS Action Committee, the ALN, HIV Management Services (Pty)Ltd, the Department of Welfare, the AHI and the LOA.

³⁶⁹ Established by sec 112 of the LRA. For more detail see par 8.52 below.

conciliation.

7.52 HIV Management Services (Pty) Ltd is concerned about a possible lack of HIV literacy in the Labour Court. While it accepts that the Court would probably call for expert opinion, it suggests that such expertise be identified early on as a panel for referral and that the ALN provide intermediate training and sensitivity to Court officials. In this regard the City of Durban Medical Officer of Health draws attention to provision in the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993) for the establishment of Medical Advisory Panels on a regional basis. Dr Clive Evian supports this and recommends that a specific body of expertise representing recognised HIV-clinical specialists, public health or occupational health specialists, representatives of people with HIV/AIDS, and representatives from the organised business, labour and government sectors be appointed to advise the Labour Court. Dr Evian further suggests that the Court may need to have the power to commission independent research to establish if any specific occupation is indeed detrimental to an individual with HIV and to permit exclusion on this basis.

* **Possible appeal against decision of the Labour Court**

7.53 The LOA observes that no express reference is made in the Bill to an appeal against any decision by the Labour Court.

* **Costs**

7.54 The City Council of Pretoria Medical Officer of Health enquires as to who will bear the costs of the court application and the testing.

* **Practical application of the proposed legislation**

7.55 The National Progressive Primary Health Care Network observes that changing the legal framework would be hollow unless substantial efforts are made to inform and educate the public. It suggests that strategies be envisaged to inform individuals and the business fraternity about their rights, responsibilities and choices and that the Commission include recommendations in this regard in an interim report. The Network further suggests that government departments (including the Departments of Labour and of Health) as well as other stakeholders need to be involved in efforts to ensure implementation of law reform.

*** Distinction between applicants and existing employees**

7.56 The City Council of Pretoria Personnel Services Department submits that the proposed Bill should not be restricted to job applicants. They maintain that should the Labour Court agree with an employer that HIV testing is necessary for a specific job applicant or category of applicants, it follows that existing employees exposed to the same risk factors should also be tested.

7.57 The National Progressive Primary Health Care Network is concerned about protection of existing employees who are known to be HIV positive and who could be subjected to HIV testing. The LOA suggests that the proposed Bill must reflect that HIV testing of existing employees is prohibited in certain circumstances.

E) ALTERNATIVES SUGGESTED TO THE PROPOSED LEGISLATION

*** Proposal by the Department of Labour to integrate legislation on pre-employment HIV testing into the Department's draft Employment Equity Bill**

7.58 The Department of Labour (the Department), in its supportive comment³⁷⁰ on

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As set out in a departmental letter of 2 August 1997 and elaborated on at a meeting between project committee members and representatives of the Department (Mr Les Kettleidas, Deputy Director-General: Labour Relations, Human Resources Development and Career Services; Mr Loyiso Mbabane, Director: Employment Equity; and Ms Lisa Seftel, Director: Minimum Standards) on 8 August 1997 and in a submission to the full project committee by Ms Seftel at a project committee meeting on 30 August 1997.

Discussion Paper 72, expressed a preferred view that the project committee's legislative proposals for a prohibition on pre-employment HIV testing as embodied in the Prohibition of Pre-employment HIV Testing Bill (HIV Bill) be included in the Department's Employment Equity Bill³⁷¹. The main reason for this was that such inclusion will be in accordance with the Department's policy of dealing with labour issues in a few comprehensive key statutes rather than a number of smaller statutes. The Department derives further motivation for its proposal from the following:

- + The Department regards discrimination against persons with HIV as part of employment discrimination which falls in the same category of discrimination as that addressed in the Employment Equity Bill.
- + The HIV Bill utilises terms and institutions created in existing labour legislation (the LRA).³⁷²
- + The institutions and possibilities created in the Employment Equity Bill are in accordance with the goals of the HIV Bill - for instance provision is made in the Employment Equity Bill for the establishment of an advisory body (the Commission for Employment Equity) which will be empowered to advise the Minister of Labour on the development of codes of good practice related to employment equity practices within the framework of the Bill.³⁷³ This will provide an opportunity for affording legal status to a document such as the SADC Code on HIV/AIDS and Employment.³⁷⁴
- + The Employment Equity Bill establishes a broader background against which provision could be made for other HIV related issues such as employee benefits. (By enacting a separate HIV Bill in the form envisaged in Discussion Paper 72, only HIV testing is covered. Inclusion of a reference to pre-employment HIV

³⁷¹ Reference throughout is to Draft 14 of the Bill.

³⁷² The HIV Bill eg utilises the definition of "employee" (see sec 2(2)(a) of Part B of Schedule 7 of the LRA) and invokes the jurisdiction of the Labour Court (see sec 151 of the LRA).

³⁷³ Employment Equity Bill, clauses 25 and 27.

³⁷⁴ See par 5.13.3 above.

testing in the Employment Equity Bill will provide the possibility for protection against other HIV related discrimination relevant to the workplace.)

- + Inclusion of the HIV provisions in the Employment Equity Bill will give the latter Bill a broader focus away from only race and gender discrimination. It will thus assist in furthering the purpose of the Bill, namely to strengthen the general anti-discrimination provisions of the LRA.
- + Concerns within the project committee about the enforceability of a proposed statutory prohibition on pre-employment HIV testing can be met by the availability of accountability mechanisms provided for in the Employment Equity Bill.
- + Whether the two Bills be joined or not, the contents of the HIV Bill will in any event have to be compatible with the broader framework of existing and prospective labour legislation administered by the Department of Labour.

7.59 The Department's proposal carries the support of the Minister of Labour.

* **Defining HIV as a disability in general labour legislation**

7.60 SACOB believes it is preferable to define HIV/AIDS as a disability so that it will be covered under the LRA. They submit that this would be in line with international practice since few countries have HIV/AIDS legislation of the type contemplated.

* **Regarding existing legislation (the 1996 Constitution and the LRA) as affording sufficient protection to applicants for employment**

7.61 Commentators from the business sector (the LOA, Chamber of Mines of South Africa, AHI) as well as Prof Alan Whiteside and Dr Clive Evian appealed to the

Commission to consider whether the existing legislation such as the LRA and the 1996 Constitution do not provide sufficient protection to the job applicant.³⁷⁵ Dr Evian suggested that guidance on interpreting the current law is possibly necessary, while the AHI observed that there may be lack of knowledge of existing legislation on the part of those whom it is designed to protect. The AHI suggested that this could be rectified by education and information rather than further regulation.

* **Developing a national guideline for testing for HIV in the workplace**

7.62 The City Council of Pretoria Medical Officer of Health suggests that as an alternative to legislation, guidelines concerning pre-employment HIV testing be drawn (as is the case with for instance diabetes mellitus, hypertension etc) by MASA and the South African Society for Occupational Medicine (SASOM).

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See also the arguments submitted on AIDS exceptionalism in par 7.19-7.27 above.

7.63 Dr Aart Hendriks is of the opinion that the seemingly conflictive interests that may be reflected in a prohibition on pre-employment HIV testing (on the one hand promoting, but in fact possibly also obstructing the employment opportunities of persons with HIV³⁷⁶) could probably best be reconciled by precisely defining the role, tasks and competencies of physicians performing pre-employment medical examinations. These professionals should, first of all, be bound to the principle of confidentiality and respect the right to privacy of a candidate worker. In this context he suggests inviting MASA to develop a code of conduct for physicians performing pre-employment medical examinations instead of commissioning the Labour Court with the task of authorising pre-employment testing. He observes that by focussing on the role of physicians performing pre-employment medical examinations, the negative results that a prohibition of HIV testing may have, could possibly be avoided.

* **Enacting broader legislation which would include other comparable medical conditions and not only HIV**

7.64 Instead of HIV specific legislation, the LOA would prefer legislation that affords those who suffer from any life threatening condition protection from discrimination. This is supported by Dr Aart Hendriks who suggested extending the narrow scope of the HIV Bill to include all medical conditions or impairments irrelevant to the performance of essential job-related functions.³⁷⁷

* **Deal with the issue of pre-employment HIV testing by way of general anti-discrimination legislation**

7.65 The National Progressive Primary Health Care Network expresses the opinion that additional discussion and proposals need to be put forward in relation to general protection from unfair discrimination of individuals living with HIV. The Network

³⁷⁶ See the reference to his comments in par 7.39 above.

submits that such discussion needs to go beyond the current discussion of pre-employment HIV testing.

- * **Pursuing a traditional public health approach by focussing legislation instead on prevention of transmission of HIV - as for instance in the United States HIV Prevention Act, 1997**

7.66 The Chamber of Mines of South Africa argues that the Commission should adopt legislative intervention similar to the HIV Prevention Act of 1997 which has recently been introduced in the House of Representatives in the United States. This Act (which is currently still at committee discussion stage) covers HIV testing of sexual offenders; improved HIV epidemic measurement; partner notification; protections for patients and health care providers; HIV notification for insurance applicants and adoptive parents; criminalisation of intentional HIV transmission; and strict confidentiality for implementation of the provisions of the Act.³⁷⁸

- * **Assessment of the severity of the health condition instead of just HIV status**

7.67 Dr Clive Evian suggests that the Bill make provision for an employer to be able to assess the health status of an applicant, including HIV, and to assess the severity of the condition. He stresses that an employer should have the right to reject employees who show objective evidence of "very advanced disease". He observes that an individual with HIV can appear superficially fit for work even though he or she has a very advanced stage of HIV infection. In practice the assessment of the stage of HIV infection could be done after an initial employment contract has been entered into.

- * **More research and evaluation on the economic impact of the proposed legislation before introducing such principles**

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See also par 7.40 above.

7.68 Prof Alan Whiteside as well as the Chamber of Mines of South Africa suggests that, at the very least, far more research and thought needs to go into a Bill as proposed and its possible implications.

7.69 The Actuarial Society of South Africa is of the view that the introduction of legislation to promote some form of societal change may be justified insofar as it actually succeeds in achieving its aims. The Society accepts that it is in public interest that persons with HIV remain productive within the economy for as long as they are capable of performing an occupation for financial gain. To ascertain whether the proposed Bill would achieve this objective it is suggested that the macro-economic impact the proposed Bill may have in the long term, be examined.

8 EVALUATION AND RECOMMENDATION

8.1 In evaluating the comments, concerns and suggestions of respondents in the context of non-discrimination and equality, the Commission's aim was to find a solution which would serve to protect the rights of persons with HIV while at the same time accommodating and balancing the major concerns of opponents of its preliminary recommendations.

A) ACCEPTANCE OF THE PRINCIPLE ON NO PRE-EMPLOYMENT HIV TESTING

8.2 It is clear from the comments on the Commission's preliminary recommendations in Discussion Paper 72 that the overwhelming majority of stakeholders support the principle of no pre-employment HIV testing unless such testing is reasonably, justifiably and rationally warranted.

8.3 The minority of respondents who did not support this principle³⁷⁹ mainly relied on the argument of AIDS exceptionalism. They submitted either that there is little or no reason for singling out persons with HIV for special protection, or that such emphasis on HIV/AIDS will maintain the present stigma surrounding HIV/AIDS. The concern related to AIDS exceptionalism was also raised with regard to the need for a statutory intervention and is addressed in par 8.14 to 8.16 below.

8.4 Although these comments were of a small minority, the Commission has endeavoured to accommodate them in its interim recommendations.

³⁷⁹ See par 7.15-7.16 and 7.22-7.26 above for more detail.

B) THE NEED FOR STATUTORY INTERVENTION

8.5 The need for statutory intervention was supported by the majority. However, strong arguments were also advanced against statutory intervention - although almost exclusively by the business sector. Opponents to legislative intervention generally regarded the 1996 Constitution and the LRA as providing adequate protection for persons with HIV. AIDS exceptionalism and the cost implications of prohibiting HIV testing are the two major issues underlying this opposition. In this regard opponents argued that in the light of existing legal protection, to develop HIV-specific legislation would be to further increase stigma and discrimination against persons with HIV and create undue hardship for businesses by directly increasing their operational costs.

8.6 Specific concerns raised against the proposed legislative intervention may be evaluated as follows:

* The availability of current legislation

8.7 Several commentators argued that the 1996 Constitution and the LRA provided sufficient legal protection and that there was therefore no need for further statutory intervention.³⁸⁰ The Commission however does not agree with this argument.

8.8 With regard to constitutional protection, the Commission is of the opinion that although the 1996 Constitution protects *inter alia* the rights to equality, human dignity, freedom and security of the person, privacy, and fair labour practices, these are broad constitutional principles which the drafters intended and required to be further developed by the courts and through legislation.³⁸¹ Thus the rights to human dignity,³⁸² freedom and security of the person,³⁸³ privacy,³⁸⁴ and fair labour practices³⁸⁵ simply set out the

380 Cf par 7.61.

381 The 1996 Constitution sec 9(4) and sec 39. See also par 5.5, 5.5.6, and 5.12 above.

382 The 1996 Constitution sec 10.

383 Ibid sec 12(2).

broad framework of the extent of the individual rights in the relation to protection from state interference. Without further development by the courts or the legislature they remain as principles rather than specific prohibitions. As the Constitutional Court explained in **Prinsloo v Van der Linde**:

Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity. Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender. In our view, unfair discrimination ... principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.³⁸⁶

8.8.1 It is to be noted that the 1996 Constitution primarily applies vertically (between state and subject).³⁸⁷ Section 8 within the Bill of Rights states :

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or juristic person, and so to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

It seems clear from this section that the drafters intended only a limited horizontal application of the Bill of Rights. This position is however subject to an exception in the equality clause where the drafters specifically set out that this clause will apply to "anyone".³⁸⁸ Hence the constitutional rights will not necessarily on their own protect individuals working outside of the state

384 Ibid sec 14.

385 Ibid sec 23.

386 **Prinsloo v Van der Linde** 1997 3 SA 1012 (CC) at 1026 [31].

387 Cheadle and Davis 1997 **SAJHR** 55; Smidt 1996 **JBL** 153-154.

388 The 1996 Constitution sec 9(4).

service.³⁸⁹

8.8.2 Section 7(2) of the Constitution further provides that "(T)he state must respect, protect, promote and fulfil the rights in the Bill of Rights". It is clear therefore that the state has a duty to develop these rights in such a manner that they protect a myriad of different situations. The Commission considers that the protection of the dignity of persons with HIV requires that their access to continued employment be protected legislatively. Such legislation will constitute an embodiment of the constitutional principles referred to above.

8.8.3 The Constitution does not prohibit pre-employment HIV testing per se. Instead it prohibits unfair discrimination on several grounds, including "disability".³⁹⁰ The relevant provisions with regard to unfair discrimination on ground of "disability" have as yet not been interpreted by our courts to include HIV/AIDS and thus presently offer no express assurance of protection for persons with HIV. In order to claim protection under the equality clause, a job applicant or employee would have to show that the state or any other person used the results of an HIV test to discriminate unfairly against them.

8.8.4 Finally the Commission is of the view that leaving it up to job applicants or employees themselves to procure enforcement of their constitutional rights would not meet the principle of a prohibition on pre-employment HIV testing which would be accessible and cost-effective to use. Should a person wish to claim protection from a constitutional right, they could become involved in very expensive and protracted legal action requiring the assistance of specialist constitutional lawyers.

8.9 The LRA protects both job applicants and employees from being prevented from exercising any right conferred by the Act.³⁹¹ This would mean that any employer who

³⁸⁹ See also par 5.5 above.

³⁹⁰ The 1996 Constitution sec 9(3) and (4).

³⁹¹ Sec 5(2)(b) and 5(2)(c)(iv) of the LRA. Cf also clause 47 of the Employment Equity Bill.

uses an employee's HIV status to discriminate unfairly against him or her, would have committed an unfair labour practice.³⁹² These provisions however only protect an employee from unfair discrimination and do not prohibit an employer from requesting an employee or job applicant to submit to an HIV test.

8.9.1 The unfair labour practice definition found in section 2(1) of Schedule 7 of the LRA is part of a schedule of transitional arrangements, pending express further legislation, and would thus not remain on the statute books indefinitely - hence the departmental initiative in enacting the Employment Equity Bill.³⁹³ Although this definition may currently provide protection against "unfair discrimination" on several grounds including any "arbitrary ground" or "disability"³⁹⁴ and against "the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee",³⁹⁵ it is not envisaged that this protection will exist indefinitely within the LRA. The Commission is therefore of the view that a statutory vehicle should be found which would provide long term protection against pre-employment HIV testing.

8.9.2 Although the LRA provides protection against unfair discrimination to both employees and job applicants, the question remains as to whether the courts would actually confer this protection on persons being subjected to HIV testing. Uncertainty exists in that the terms of "any arbitrary ground" and "disability" have not been defined. It is therefore still a matter of debate as to whether they could be used to protect persons with HIV.

8.9.3 The Commission further notes that the LRA does not cover those employed within the South African National Defence Force, the National

³⁹² Sec 2(1)(a) of Part B of Schedule 7 of the LRA. See also par 5.6-5.10 above.

³⁹³ "Explanatory Memorandum, Transitional Arrangement" Labour Relations Bill (Notice 97 of 1995 in **GG** 16259 of 10 February 1995). Cf also Mischke 1997 **JBL** 22-23.

³⁹⁴ Sec 2(1)(a) of Part B of Schedule 7 of the LRA.

³⁹⁵ Ibid sec 2(1)(b).

Intelligence Agency and the South African Secret Service.³⁹⁶

8.9.4 Finally the Commission was concerned that despite the LRA having been operational for more than 12 months the practice of pre-employment HIV testing has palpably continued.³⁹⁷

8.10 In the light of the above the Commission is of the view that with the current uncertainty regarding the legality of pre-employment HIV testing and the potential for unfair discrimination regarding HIV/AIDS, a specific statutory intervention is warranted.³⁹⁸

* **Economic implications of the proposed intervention**

8.11 The suggestion of the Actuarial Society of South Africa³⁹⁹ that the macro-economic impact of the proposed legislative intervention be ascertained before its enactment, was not pursued beyond an enquiry for further particulars of such proposed study. The Commission was of the opinion that although further research may assist with the development of our understanding of the nature of the costs to individual employers and the economy as a whole, such research was not necessary at this point as the Commission had taken cost issues into account in its proposals.

8.11.1 First, embodying a proposal for a statutory prohibition on HIV (and other forms of) testing in a prohibition does not in itself impose direct costs on employers - instead it simply prohibits them from certain exclusionary action. Second, the Commission's proposals allow for a flexible standard which enables cost factors to be taken into account in determining what is fair and justifiable in the circumstances. Third, the recommendations made, deal expressly with the

³⁹⁶ Cf par 2.33 above. Cf also par 8.26 and 8.43.1 below.

³⁹⁷ See par 2.32 above.

³⁹⁸ Cf also Mischke 1997 **JBL** 22.

³⁹⁹ See par 7.69 above.

issue of pre-benefit testing. In doing so the proposals aim to provide leeway for employers and unions concerned with the cost implications of the HIV/AIDS epidemic on their benefit schemes.

8.12 It was accepted within the project committee that economic realities may induce the business sector to evade the proposed prohibition by exploring and finding alternatives to replace any perceived forced employment of persons with HIV, for instance by avoiding employing people at all or employing only people in certain categories (for example older people). In doing so it would not be necessary for employers to test for HIV. The Commission accepts that such evasive action is not readily susceptible to legislative control.

8.13 As stated in paragraph 4.10 above, the costs of the epidemic will not be contained by simply excluding persons with HIV from the workforce. Thus an approach based on exclusionary principles would not reduce or remove the costs - it would simply displace them.

* **AIDS exceptionalism**

8.14 The strongest opposition to the Commission's proposal for a specific prohibition of HIV testing lies in the argument of AIDS exceptionalism. The Commission took note of the concerns of several commentators who expressed the view that by creating HIV-specific legislation discrimination and stigma against persons with HIV is perpetuated. Others could not find motivation for singling out HIV as a disease for specific legislative treatment. The latter concern was also emphasised by the Department of Labour in the context of integrating the HIV provisions with the Department's Employment Equity Bill.

8.15 Accordingly the Commission amended its proposals in order to cover testing for

any medical condition and not just testing for HIV.⁴⁰⁰

- 8.16 It is submitted that this adapted approach of placing HIV/AIDS issues firmly into the same category as testing for "any other medical condition" is an approach which is also more consistent with international precedents.⁴⁰¹

* **Employing people with "advanced disease"**

- 8.17 Some commentators felt that employers should not be obliged to employ persons with "advanced disease" and that they should therefore be entitled to test for HIV to determine an employee's ability to perform in the future.⁴⁰²

8.17.1 The Commission is of the view that its proposals do not require employers to employ incapacitated workers.⁴⁰³ This is so because pre-employment medicals may still be undertaken under the proposed legislation provided they are used to objectively determine an employee's *ability to meet the inherent requirements of the particular job* and that arbitrary tests or criteria are not used.

8.17.2 Furthermore, in an environment of non-discrimination and the protection of the rights of persons with HIV, more people will be encouraged to voluntarily disclose their HIV status to their employer. This would lead to destigmatation of HIV/AIDS. The involvement of people with HIV in workplace prevention programmes would enhance the opportunity for employers to supply information and education aimed at the behaviour change necessary for containment of the

⁴⁰⁰ See principles for legislative intervention in par 8.26 below; clause 2 of the Prohibition of Testing of Employees for Any Medical Condition Bill (ANNEXURE B); and clause 5(4) of the 14th Draft of the Employment Equity Bill (ANNEXURE C).

⁴⁰¹ Eg the Americans with Disabilities Act, the Australian Disability Discrimination Act, the Dutch Wet op de Medische Keuringen, the Ontario Human Rights Code and the Canadian Human Rights Act - for more detail see par 5.18, 5.22, 7.40. 7.64 and fn 367 above.

⁴⁰² Cf par 7.28 above.

⁴⁰³ Cf par 3.6 above.

spread of HIV.⁴⁰⁴

* **Unfair selection**

8.18 A few commentators noted that the proposed prohibition would place an unfair burden on employers as they would be unable to select "the best person" for the job.

8.18.1 However the Commission is of the opinion that the criteria for employment remain objective criteria which are related to the inherent requirements of the job. The proposals therefore do not infringe on an employer's right to select the most suitable candidate for a job - they simply require the employer to use objective and rational criteria in the employment process.⁴⁰⁵

* **Proposals for alternative legislative options**

8.19 Several commentators proposed that alternative legislative vehicles be used to protect the rights of persons with HIV. Each of these proposals will be dealt with separately.

+ ***Define HIV as a "disability"***

8.19.1 Some commentators felt that if HIV was defined as a "disability" this would enable existing legislation to be used to protect the rights of persons with HIV.

8.19.2 The Commission submits that this is not an appropriate route at this point. Firstly, the White Paper on Disability (which will set out the Government's

⁴⁰⁴ See par 2.35-2.50 above for the role of a prohibition on pre-employment HIV testing in the public health context.

⁴⁰⁵ Cf also the comments referred to in par 4.6.1 above.

policy on disability and protective legislation for people with disabilities) is yet to be published. Secondly, the issue of whether HIV would be classified as a "disability" in terms of either the constitutional definition or the provisions within the LRA have not yet come before our courts - we are therefore uncertain of the approach they will take and do not want to rely solely on this natural progression of the law.⁴⁰⁶

+ ***Include option for applicants or employees to consent to disclosure or testing***

8.19.3 The Commission has given careful consideration to arguments that the right of individual autonomy in the context of contractual freedom should encompass the right of a job applicant or employee to consent to disclosure of his or her HIV status or to undergo HIV testing. In addition to the considerations underlying these arguments, the Commission recognises that job applicants may themselves in an effort to enhance their chances of being employed, volunteer their negative HIV status. It is neither feasible nor desirable to seek to legislate against this possibility. What is more, the Commission recognises that employers supplied with this information may, in selecting whom to employ, covertly discriminate unfairly against those applicants who do not volunteer this information.⁴⁰⁷ This possibility will in practice also prove difficult to curtail.

8.19.4 The Commission has nevertheless come to the conclusion that a general exception for consent to disclosure or testing, except where such disclosure or testing is otherwise justifiable, would subvert the main intended effect of the prohibition.

8.19.5 Whether in the context of a job application a disclosure or submission to testing can ever be truly voluntary is debatable. In any event, even if the

⁴⁰⁶ Cf par 5.5-5.5.6 and 5.6-5.10 above.

⁴⁰⁷ Cf however clause 47(3) of the Employment Equity Bill which provides that "(N)o person may advantage, or promise to advantage, an employee in exchange for that employee not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act". Clause 47(5) states that for purposes of clause 47 "employee" includes an applicant for employment.

"consent" can indeed be regarded as authentic, public policy in the view of the Commission requires that discrimination against those applicants who refrain from volunteering, or refuse to proffer, similar consent should be impermissible.

8.19.6 Furthermore, as observed earlier, the overall economic advantages of permitting otherwise healthy employees with HIV to remain in employment are substantial.

+ ***Use existing legislation***

8.19.7 The Commission's views on the inadequacy of existing legislation to adequately cover the prohibition of pre-employment HIV testing are set out in paragraphs 8.7 to 8.10 above.

+ ***Develop broader HIV/AIDS anti-discrimination legislation***

8.19.8 The Commission believes that although there are many strong arguments for the use of broad HIV/AIDS anti-discrimination legislation, any such proposals could be opposed on the basis of AIDS exceptionalism. It has in any event not ruled out the possibility of developing such a statute in future. Pre-employment HIV testing was seen as an on-going and urgent problem which the project committee considered should be dealt with as soon as possible.

+ ***Enact legislation on public health issues***⁴⁰⁸

8.19.9 Attempts to return to the traditional public health approach with regard to HIV/AIDS, as set out in paragraph 2.47 above, have met with fierce

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See also par 2.35-2.50 above.

opposition in the United States.⁴⁰⁹ Opponents denounced these initiatives as an attempt to federalize policies that do nothing but stigmatise and punish people living with HIV/AIDS. They moreover submit that these measures replace education and personal responsibility with "Big Brother" intrusion and control, and view them as failed policies that do nothing to prevent any other persons from becoming infected with HIV. Although traditional procedures may identify more infected people, no plan is offered in the new legislative proposals for helping those with HIV (many of whom have no access to health care, and little education, and many of whom are homeless) after they have been identified. A return to the traditionalist approach will cost money and its critics submit that those who advocate such an approach should concede that more money is needed. Ultimately, it seems that there is no guarantee that traditional epidemiology applied to HIV/AIDS would markedly bolster the success of public health efforts.⁴¹⁰ Moreover, in South Africa, there is the additional consideration that the institutions and mechanisms to enforce the appropriate controls and follow-ups that the traditional public health approach entail, does not exist or that money for that is not available.

8.19.10 Although, as indicated in paragraph 2.48 above, containment and prevention efforts could play an important role as part of an overall strategy for combatting HIV/AIDS, they have not been shown to be overly effective by themselves because of possible lack of understanding and education on the public's side.⁴¹¹ This may permit HIV-related prejudices to flourish and may drive persons with HIV underground in an effort to avoid the discrimination associated with the disease. As a result, persons with HIV who do not receive adequate treatment and care may be more likely to infect others. Discrimination also perpetuates misinformation and stereotypes about how the disease is spread and the types of people who are affected. The resulting negative attitudes cause HIV/AIDS to remain a forbidden subject, and as a

⁴⁰⁹ Burr **The Atlantic Monthly** June 1997 65-67.

⁴¹⁰ Ibid 67.

⁴¹¹ Grimm 1997 **Human Rights Brief** (Internet accessed on 31 October 1997).

result, people are likely to remain uninformed about risky behaviour which they should avoid in order to remain uninfected.⁴¹²

+ ***Integrate the HIV proposals in employment equity legislation currently being prepared by the Department of Labour***

8.19.11 As indicated in the previous Chapter, it has been suggested by the Department of Labour that the Commission's legislative proposals be incorporated in the Employment Equity Bill.⁴¹³

8.19.12 The purpose of the HIV Bill (proposed in Discussion Paper 72) is to expressly prohibit HIV testing and taking into account the HIV status or perceived HIV status of an applicant for employment in refusing him or her employment except where such testing or consideration is reasonably, justifiably and rationally warranted. The need for the proposed prohibition stems mainly from the present uncertainty as to the interpretation of the term "disability" in both the 1996 Constitution and the LRA. The Commission also wished to introduce some form of statutory intervention which would expressly prohibit what it sees as an ongoing and unfair labour practice.

8.19.13 The notion of employment equity within the workplace flows from an acceptance of the importance of the principle of *substantive equality* in creating a workplace which promotes equal opportunities and fair treatment, takes positive steps to redress the previous disadvantages of black people, women and people with disabilities and ensures that people of all groups are equitably represented at all levels of the workforce.⁴¹⁴ Employment equity therefore goes beyond simply ensuring that unfair discrimination does not occur in the workplace and examines the underlying causes of inequality by trying to identify and remove barriers which prevent certain groups from achieving their

412 Ibid.

413 See also par 7.58-7.59 above. (Reference throughout is to the 14th Draft of the Employment Equity Bill.)

414 Clause 1 of the 14th Draft of the Employment Equity Bill.

full potential. It further requires employers to take positive steps to redress past imbalances in order to achieve a workplace which reflects the diversity and nature of the community at large.

8.19.14 Generally speaking, the underlying purpose of the Employment Equity Bill seems to be wide enough for it to include provisions on HIV. The foreword to the Green Paper⁴¹⁵ preceding the Bill indicates that the Bill would intervene to do away with "all forms of discrimination". The preamble to the Bill states that "black people, women and *people with disabilities* are the most disadvantaged groups in our country" and that the Bill is therefore enacted "to eliminate *unfair discrimination* in employment". In a broad sense, moreover, the Employment Equity Bill seems to be compatible with the aim of the HIV Bill. The Employment Equity Bill contains general provisions against unfair discrimination in any employment policy or practice on the ground of disability and echoes the HIV Bill's qualification of such a right on the basis of the inherent requirements of a job.⁴¹⁶ However, the Employment Equity Bill focuses for the largest part mainly on the establishment of affirmative action plans aimed at equitable employee representation⁴¹⁷ in respect of women, black people, and people with disabilities in general. The term "people with disabilities" is defined in the Bill as "people who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment".⁴¹⁸ *It is significant to note that no (other) single or specific "disability" is expressly referred to or provided for in the Employment Equity Bill.*⁴¹⁹

⁴¹⁵ Notice 804 of 1996 in GG No 17303 of 1 July 1996.

⁴¹⁶ Cf clause 5(2)(b). The HIV Bill may however be argued to go further in that it expressly requires that the qualification or exception only applies in cases where it is "fair and justifiable" and it further refers more clearly to inherent requirements of *the particular* job.

⁴¹⁷ Cf clause sec 16 and 17.

⁴¹⁸ Clause 59. Cf other definitions of disability: "A condition of being unable to perform a task or function because of a physical or mental impairment" (Collins Dictionary of the English Language Second Edition 1986). "A physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment" (Americans with Disabilities Act, 1990 (42 USC 12102 sec 3(2)).

⁴¹⁹ This has been the case before the integration of the HIV provisions in the latest drafts of the Employment Equity Bill.

8.19.15 From the express formulation of the Employment Equity Bill it is evident that the purpose of the Bill is two-fold: firstly to promote equality through the elimination of unfair discrimination;⁴²⁰ and secondly to promote positive measures to be taken to advance people from the "designated groups" [including people with disabilities].⁴²¹ The Employment Equity Bill deals expressly with elimination of unfair discrimination: the relevant provisions in general prohibit direct or indirect unfair discrimination in respect of any employment policy or practice, including recruitment procedures and selection criteria.⁴²² "Unfair discrimination" includes any distinction, exclusion or preference *inter alia* on the ground of "disability".⁴²³ Distinctions, exclusions or preferences based on the inherent requirements of a job are not "unfair discrimination".⁴²⁴ The Employment Equity Bill further deals with affirmative action, mainly in the context of the establishment, implementation, administrative monitoring and enforcement of affirmative action plans based on a statistical profile of an employer's workforce.⁴²⁵ It also makes provision for procedures for dispute resolution with regard to exercising of rights by employees, and in regard to unfair discrimination in general.⁴²⁶ Finally the Bill provides for the establishment of a Commission for Employment Equity, and the promulgation of codes of good practice and regulations.⁴²⁷

8.19.16 The Commission concedes that it is of paramount importance, as the Department of Labour has pointed out, that a legislative prohibition on HIV testing, being labour-related, be compatible with current and prospective labour legislation - whether it proves to be possible to include it in the Employment

⁴²⁰ See Chapter II of the Bill.

⁴²¹ Chapter III. See also par 1.1.5-1.1.7 and 3.4.1 of the Green Paper referred to in par 8.19.14 and fn 415 above.

⁴²² Clause 5(1) and the definition of "employment policy and practice" in clause 59.

⁴²³ Clause 5(1) and 5(2)(b).

⁴²⁴ Clause 5(2)(b).

⁴²⁵ Clauses 16, 10 and 12.

⁴²⁶ Clauses 24 and 6.

⁴²⁷ Clauses 25 and 49.

Equity Bill or not.

* **Non-statutory proposals**

+ *Development of national guidelines for HIV testing*

8.20 Some commentators felt that there was no need for a statutory intervention as national guidelines could be produced setting out appropriate standards and protocols on medical examinations or testing within the employment relationship. The Commission is of the opinion that such national guidelines would only be effective if they could be supported by a legislative enforcement mechanism. On their own national guidelines would be difficult to enforce and thus provide little protection for employees and job applicants. The Commission however would not be opposed to the development and proclamation of national guidelines to supplement the proposed legislative interventions and to provide clarity on issues such as, for instance, counselling and confidentiality.

+ *More research and debate*

8.21 Two commentators noted that further research ought to be undertaken on the implications of a statutory prohibition on pre-employment HIV testing. Following careful consideration of their comments the Commission has decided that further research was not necessary at this point as it would not significantly alter the principles accepted by the Commission. Furthermore, the flexible standard proposed by the Commission for authorisation of HIV testing would allow for the law to adapt to changes in our approach to dealing with the epidemic as our knowledge of it unfolded.⁴²⁸ Finally, both the CCMA⁴²⁹ (with respect to the HIV provisions as integrated in the Employment Equity Bill) and the Labour Court (with respect to the HIV

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See clause 3 of the HIV Bill (ANNEXURE B).

Bill) will be able to call upon experts within the field to undertake further research for them as and when needed during the dispute resolution and adjudication process.⁴³⁰

C) CONCLUSION

8.22 Having evaluated the concerns and suggestions for alternative action to legislative intervention, the Commission remains of the opinion that statutory intervention is necessary to promote the public interest aim of maintaining otherwise healthy persons with HIV in productive employment, and to protect the rights of persons with HIV in the workplace. Such intervention, whatever form it may take, will however have to take into account the primary concerns of respondents regarding AIDS exceptionalism and costs and will have to fit the framework of existing and proposed labour legislation.

8.23 In the development of final recommendations regarding the formulation of statutory provisions for a prohibition on pre-employment HIV testing, the Commission was faced with two options:

- + Pursuing its original intention of a separate and specific statutory intervention, including amendments based on the comments received.
- + Endorsing the Department of Labour's proposition of integrating the proposed provisions on a prohibition on pre-employment HIV testing into the Employment Equity Bill.

Both these alternatives are set out and evaluated below.

8.24 In view of the fact that the final formulation of the Employment Equity Bill is subject to the parliamentary process, the Commission has at this stage accepted certain principles for legislative intervention regarding pre-employment HIV

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Established in terms of sec 112 of the LRA.

testing. These are also set out below. The Commission however does not at this stage make a final recommendation on any specific legislative option for realising these principles. The Commission endorses the principles accepted in a proposed Bill (attached as ANNEXURE B) and also offers comment on the latest available draft of the Employment Equity Bill (the 14th Draft) presented to Cabinet. The 14th Draft includes provisions regarding a prohibition on pre-employment HIV testing, the formulation of which has been developed by the Department of Labour in conjunction with the Commission's project committee. A final report on pre-employment HIV testing will be submitted by the Commission, should it prove to be necessary.

D) ACCEPTED PRINCIPLES AND CONSIDERATIONS FOR A LEGISLATIVE PROHIBITION ON PRE-EMPLOYMENT HIV TESTING

8.25 The Commission is convinced that its main aim in setting principles for a legislative prohibition on pre-employment HIV testing should be to balance the seemingly conflicting interests of the need for statutory intervention and the negative repercussions this may have in terms of AIDS exceptionalism and possible costs. This has led it to accept certain principles for statutory intervention. Whether they will be realised in the form of a separate statute or as part of existing or prospective labour legislation remains open for decision.

8.26 Principles the Commission recommends for legislative intervention are as follows:⁴³¹

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

⁴³⁰ See sec 142(1)(c) of the LRA and clause 3 of the HIV Bill (ANNEXURE B).

⁴³¹ Cf for more detail also the explanatory notes on the Commission's proposed Bill in Discussion Paper 72 as set out in par 6.9-6.17 above; the suggestions and concerns expressed by commentators as set out in par

- + 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 to testing 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 severally 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 workplace.

- + 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 is 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 which would include issuing instructions regarding the provision of counselling, the maintenance of confidentiality, and eliciting 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.
- + So as to integrate the main opposing argument regarding AIDS exceptionalism, statutory intervention need not be HIV/AIDS specific.

E) POSSIBLE LEGISLATIVE OPTIONS TO GIVE EFFECT TO THE PRINCIPLES RECOMMENDED FOR LEGISLATIVE INTERVENTION

8.27 As indicated above, the main options for realising the principles recommended would be to enact a prohibition on HIV testing either as a separate entity or as part of existing or prospective labour legislation.

* **A legislative prohibition on pre-employment HIV testing enacted as a separate statute**

8.28 A prohibition on pre-employment HIV testing, enacted as a separate statute, would in essence consist of the HIV Bill as proposed in Discussion Paper 72, amended to accommodate specific concerns and suggestions of commentators (including that of the Department of Labour regarding the compatibility with existing or prospective labour legislation). These would in principle mainly relate to arguments of AIDS exceptionalism and costs. However, suggestions relating to technical matters and clarity of the law have also been accommodated in the draft Bill.

8.29 The HIV Bill as revised since publication of Discussion Paper 72, and in the light of comments received, is attached as ANNEXURE B.

8.30 The explanatory notes on the first draft for an HIV Bill as set out in paragraphs 6.9 to 6.17 above illuminate the terms also of the present Bill which has however been altered in the manner indicated in the text.

8.31 The reformulated draft Bill (attached as ANNEXURE B) reflects two significant modifications in the light of comments received. First, in consonance with the Department of Labour's approach in the Employment Equity Bill, and in response to pronounced resistance to "AIDS exceptionalism", the present Bill applies not only to HIV testing but to testing for "any medical condition". It is to be noted however that the mandate of the project committee that prepared the Commission's interim report is limited to research on an investigation concerning HIV/AIDS. The extension of the terms of the Bill to medical conditions generally is therefore not sourced on any specific research undertaken by the project committee. Second, to meet concerns raised by primarily the business community regarding a reflected desire for clarity on whether HIV testing was permissible in relation to the provision of employment benefits, the reformulated Bill includes this consideration as an acceptable basis for testing.

* **A legislative prohibition on pre-employment HIV testing integrated in draft Employment Equity legislation**

8.32 Several possibilities for integration of the two Bills have been discussed with the Department of Labour. These varied from inserting the Commission's Bill as a separate chapter in the Employment Equity Bill; expressly defining HIV as a disability; expressly defining pre-employment HIV testing as unfair discrimination unless the testing is fair and justifiable; promulgating a code of good conduct dealing either with HIV as an entity, or with medical examinations in the workplace in general, or with pre-employment HIV testing in particular. However, echoing the major concern of opponents to the Commission's preliminary recommendations, it has not been acceptable to the Department to include HIV provision alone in the employment equity legislation if this would result in an exclusive focus on HIV, as opposed to dealing with other medical conditions.

8.33 Accepting the Department of Labour's suggestion that the most viable way of integrating the HIV Bill into their legislative framework would be to include express reference to HIV under Chapter II of the Employment Equity Bill (which deals with unfair discrimination in relation to the workplace) specific proposals for such integration has been tentatively endorsed and have been included in the 14th Draft of the Bill. This Draft encompasses many of the principles for legislative intervention regarding HIV testing in the workplace accepted by the Commission. Of necessity a range of other provisions contained in the Employment Equity Bill also becomes relevant to the integration of the Bills. These include, for example, the possibility of developing codes of good practice with relation to HIV/AIDS in the workplace, and the availability of accessible enforcement mechanisms.

8.34 A copy of the 14th Draft of the Employment Equity Bill, embodying the integration of the Commission's proposals regarding pre-employment HIV testing, is attached as ANNEXURE C.

F) COMMENT ON TERMS OF THE PROPOSED INTEGRATION AS FORMULATED IN THE 14TH DRAFT OF THE EMPLOYMENT EQUITY BILL

8.35 The Commission is satisfied that the 14th Draft of the Employment Equity Bill broadly embodies its principal recommendations regarding a prohibition on HIV testing in the workplace. The relative advantages and disadvantages of this proposal have been evaluated in discussion with the Department of Labour.

8.36 The Commission offers the following comments on matters bearing on the integration of its proposals into the Employment Equity Bill. Although these deal mostly with technical matters, some principles are also at stake.

*** The Employment Equity proposals have the support of the Department of Labour**

8.37 Any legislative proposals regarding the regulation of the employment contract have to have the firm support of the Department of Labour since this Department prepares and guides the legislative process through parliament, and will, once the proposals become law, be responsible for monitoring and enforcement.

- * **By including a prohibition on pre-employment HIV testing the Employment Equity Bill places HIV/AIDS issues firmly within the broad spectrum of employment equity**

8.38 The Department of Labour expressed its firm support for the principle that employment equity be viewed broadly as including all forms of unfair discrimination in the workplace. This further deals with the views of many commentators who were opposed to AIDS exceptionalism.

- * **Pre-employment HIV testing is prohibited per se**

8.39 A statutory prohibition on pre-employment HIV testing was the project committee's original intention with the HIV Bill. The Department of Labour's proposal thus appears to be the closest compromise that could be achieved which reflected the project committee's consensus that "the extent of the problem relating to pre-employment HIV testing is such that it warrants urgent investigation and should be addressed".⁴³² Many of the other proposals put forward for integration of the Bills would have outlawed unfair discrimination on the basis of HIV status but not HIV testing per se.

- * **Taking into account a job applicant or employee's perceived HIV status**

8.40 The current formulation of the Employment Equity Bill does not cover the HIV Bill's protection against an employer using the job applicant or employee's perceived HIV status to discriminate. The project committee clearly felt that not only HIV testing but using a person's perceived HIV status ought to be covered by the HIV Bill. The current formulation will mean that the courts may have to further develop protections regarding discrimination on the basis of perceived HIV status.

⁴³² Minutes of project committee meeting of 6 and 11 March 1997.

- * **Flexibility is maintained in that an employer may still require an employee to undergo an HIV test provided this is justifiable in the circumstances**

8.41 The proposed formulation is consistent with the HIV Bill's provision in clause 3 that an employer would be entitled to approach the Labour Court for authorisation to subject a job applicant or a category of applicants to pre-employment HIV testing. It is furthermore consistent with the formulation in option 2 in the HIV Bill which was favoured by most of the respondents on Discussion Paper 72 in that it provided the fairest means of accessing when the testing was in fact fair and justifiable.

- * **The prohibition in the Employment Equity Bill deals with both employees and job applicants**

8.42 By integrating the HIV Bill into the Employment Equity Bill both job applicants and employees are provided with protection from unjustifiable testing.⁴³³ This is a holistic approach which is in line with current legislation such as the LRA. Furthermore it ensures that the rights within the HIV Bill are extended to all employees including those already in employment. This deals with the concerns of many commentators that employees would not be protected by the HIV Bill.

- * **Not all employees are covered by the Employment Equity Bill**

8.43 The South African National Defence Force, the South African Secret Service and the National Intelligence Agency are all expressly excluded from the ambit of the Employment Equity Bill. The HIV Bill had a much broader application in that it did not specifically exclude any employers. This formulation was based upon the project committee's original concern that the ambit of the prohibition should be broad, with employers approaching the Labour Court for authorisation to test in certain

⁴³³ Clause 5(4) and (5) of the Employment Equity Bill.

circumstances.

8.43.1 Although the Commission initially endeavoured to cover all employees in a prohibition on HIV testing, it is accepted that this would not be compatible with the broader framework of existing labour legislation. The LRA from its inception excluded the named agencies from its ambit. The whole scheme of legislation regulating fair employment practice thus from the outset excluded the named agencies.

* **AIDS exceptionalism arguments are accommodated**

8.44 Many of the respondents commentating on Discussion Paper 72 felt that the HIV Bill promoted AIDS exceptionalism in that it singled out HIV testing for special treatment. They argued that this approach of singling out HIV/AIDS for special treatment promoted discrimination and stigma against persons with HIV as it emphasised the difference between HIV and other diseases. By moving away from an HIV-specific Bill and integrating the proposals in the draft employment equity legislation these concerns are taken care of. The broader formulation of the prohibition on pre-employment HIV testing within the Employment Equity Bill focuses on testing for "any medical condition" thus placing HIV testing firmly within the broad category of a range of tests which may be required during an employment medical.⁴³⁴

* **Testing for the purposes of entry into an employee benefit scheme is clearly dealt with**

8.45 Many commentators, particularly those from the business sector, were concerned that the HIV Bill did not deal with the issue of employee benefits. Although they objected to any form of interference in the rules regarding access to employee

⁴³⁴ Cf clause 5(4) of the Employment Equity Bill.

benefit schemes they nevertheless submitted that the HIV Bill, in not dealing with the issue at all, would create uncertainty in the law.

8.45.1 The current proposal integrates the issue of testing for the purposes of access to employment and access to employment benefit schemes. It provides in clause 5(4) that testing may be "justifiable in the light of medical facts, employment conditions, social policy, and the fair distribution of employee benefits or the inherent requirements of a job". Therefore, testing as part of the application process for joining an employee benefit scheme may be lawful provided the employer can show that such testing is justifiable in the light of the fair distribution of employee benefits. This formulation provides the clarity that the business sector sought in that it sets out both the basic principle and the criteria which will be used by the courts to evaluate it. Furthermore it allows for flexibility and for development of the law regarding employee benefits. The current proposal also takes into account the concerns of many commentators regarding the cost implications of extending employee benefits equitably to all employees. This is achieved by including "the fair distribution of employee benefits" as a criterion that will be used in determining what is justifiable in the circumstances.⁴³⁵

* **Fairness and justifiability**

8.46 The formulation of the escape clause in clause 5(4)(b) of the Employment Equity Bill omits reference to fairness as a criterion for justifying testing for HIV.⁴³⁶

8.46.1 Although determining whether testing is justified will involve the fairness of the action, "fairness" in this formulation simply becomes one of several factors examined to ascertain whether the action is justifiable - whereas

⁴³⁵ Cf also par 8.46 below.

⁴³⁶ Cf clause 3(3) of the HIV Bill and the explanatory notes with regard to the original Bill in par 6.16, as well as the principles referred to in par 8.26 above.

in the formulation in clause 3(3) of the HIV Bill both the criteria of justification and fairness must be met equally. The Commission would submit that the latter constitute a broader and stronger test. Including fairness as a criterion would furthermore be in accordance with other anti-discrimination provisions in the LRA and in the 1996 Constitution. Using this criterion would thus place (HIV)testing in the same context as other discriminatory acts. Including "fairness" would also reflect the original consensus reached in the project committee on the formulation of an escape clause. The consensus was specifically aimed at accommodating employer anxieties with regard to a prohibition of HIV testing.

* **Authorisation for HIV testing not required in terms of the Employment Equity Bill**

8.47 Whilst in terms of the HIV Bill employers are required to approach the Labour Court for authorisation for HIV testing, they may according to the Employment Equity Bill continue with HIV testing provided it is justifiable. An employee will thus have to take the initiative to register perceived unjustifiable testing for HIV with the CCMA.

* **The Employment Equity Bill contains the HIV Bill's provisions regarding the broad powers of the Labour Court to place conditions on the nature and manner of HIV testing - however it is not applicable to HIV testing**

8.48 The HIV Bill in its clause 3(5) provides the Labour Court with broad powers to grant authorisation on any terms it considered suitable including conditions relating to counselling, confidentiality, the period of the authorisation for testing and the category or categories of applicants to which the authorisation would apply. In terms of the current formulation this proposal is included as clause 46(5) of the Employment Equity Bill. This provision will however not in the present formulation be applicable to proceedings regarding HIV testing in view of the narrow definition of "employee" (excluding job applicants) in clause 59 the Employment Equity Bill (which is applicable

to all provisions bar those in Chapter II). This is doubtless a technical oversight which can be remedied by an appropriate reformulation.

*** The burden of proof regarding the establishment of HIV testing as justifiable is unclear**

8.49 Chapter II of the Employment Equity Bill does not contain a clear provision on the burden of proof.

8.49.1 The HIV Bill, in clause 3(4) places the onus on the employer seeking authorisation to subject an applicant or a category of applicants to HIV testing. This is in accordance with the project committee's notion that the employer is best equipped to advance and establish why HIV status is relevant in that it remains the employer's responsibility to establish the reasons why undertaking tests to establish the HIV status of an applicant or an employee is justifiable in the circumstances.

8.50 Although, in terms of the formulation in the Employment Equity Bill, the employer will not have to apply for prior authorisation before testing, employees will - through the CCMA - be able to initiate unfair discrimination proceedings as soon as they are requested to undergo an HIV test. They will not have to wait until an employer discriminates against them on the basis of the test results since the Employment Equity Bill in clause 5(4) provides that testing an employee for "any medical condition" must be justifiable. An employee would thus be able to argue that the test requested is discriminatory in the circumstances. This will require trade unions, human rights organisations and the Department of Labour to place great emphasis on education programmes for employees so that they are empowered to initiate CCMA proceedings should they be faced with being discriminated against on the basis of their HIV status.

8.51 However, the drafter of the Employment Equity Bill suggested that the project committee's original proposal (presently contained in clause 3(4) of the HIV Bill as reflected in ANNEXURE B) can be incorporated at the end of Part B of Chapter V

("Legal Proceedings") of Draft 14 of the Employment Equity Bill.

* **Enforcement mechanisms are available within the Employment Equity Bill**

8.52 The Employment Equity Bill provides administrative dispute resolution mechanisms for any party claiming an infringement of Chapter II of the Bill.⁴³⁷ In the first instance a grievant would be entitled to approach the CCMA for conciliation of the dispute and if this does not resolve the issue the parties may then either proceed to the Labour Court or to arbitration under the CCMA.⁴³⁸ The CCMA is an independent dispute resolution body established in terms of section 112 of the LRA. Its primary functions are to resolve any dispute referred to it for conciliation; to arbitrate any unresolved dispute if the LRA requires it to do so; to assist in the establishment of workplace forums; and to compile and publish information on its activities.⁴³⁹

8.52.1 The process of applying for conciliation through the CCMA is both accessible and simple. The CCMA has offices in every province of the Republic who are able to assist employees and employers with the conciliation process. (For purposes of prohibiting testing for any medical condition in terms of clause 5(4) of the Employment Equity Bill "employee" includes and applicant for employment.⁴⁴⁰) In order to apply for conciliation an employee must apply to the CCMA in writing within 30 days if the dispute relates to a dismissal and within 12 months if the dispute relates to any other act or omission that allegedly constitutes unfair discrimination.⁴⁴¹ If the dispute remains unresolved after the conciliation process then either party may refer the matter to the Labour Court for adjudication or all the parties to the dispute may consent to arbitration by the CCMA.⁴⁴² If the parties to a dispute elect to go to arbitration under the auspices of the CCMA in terms of clause 6(6) of the

437 Clause 6 of the Employment Equity Bill.

438 Ibid clause 6(6).

439 Section 115 and 135 (1) and (3) of the LRA.

440 Clause 5(5) of the Employment Equity Bill.

441 Ibid clause 6(2).

442 Ibid clause 6(6).

Employment Equity Bill, such arbitration is final and binding⁴⁴³ and can be made an order of the Labour Court.⁴⁴⁴

8.52.2 The LRA provides commissioners of the CCMA with a wide discretion to determine an appropriate process which will assist the parties in resolving the dispute. In the conciliation process they may use mediation techniques, embark on a fact finding mission or make a recommendation to the parties in the form of an advisory arbitration.⁴⁴⁵ Commissioners may also call or subpoena any expert witness.⁴⁴⁶ This could prove to be extremely useful as it would enable a commissioner to call upon experts in the HIV/AIDS field to assist the parties in resolving a dispute. This wide discretion provides commissioners both with the flexibility to find the most appropriate manner of resolving the dispute and can assist employees who are possibly not in a position to settle the dispute on their own. The CCMA provides further assistance by providing a wide range of advice services to the parties including advice on the process that will be followed in resolving a dispute,⁴⁴⁷ and in arranging legal representation from the Legal Aid Board.⁴⁴⁸

8.52.3 The accessibility of the CCMA conciliation proceedings is further enhanced by section 135(4) of the LRA which states that a party to the dispute may appear in person or be represented by a co-employee, a fellow trade union member or office bearer of the party's trade union or employers' organisation, or if the party is a juristic person, by a director or employee. The exclusion of legal representation at this level appears to be designed to assist with equalising power imbalances between the parties and creating a climate conducive to settling the dispute through mediation.

443 LRA, sec 143(1).
444 Ibid sec 158(1)(c).
445 Ibid sec 135(3).
446 Ibid sec 142(1)(c).
447 Ibid sec 148(1).
448 Ibid sec 149(1)(a) and (b).

8.52.4 Parties to a dispute which is being resolved by the CCMA have in certain circumstances a choice over the type of commissioner appointed to resolve their dispute. They may also in certain circumstances request the services of a senior commissioner to deal with the matter. This would enable the parties to request a commissioner experienced in HIV/AIDS matters so as to ensure that a fair and equitable settlement to the dispute is found.⁴⁴⁹

8.52.5 Finally the CCMA process is speedy: attempts must be made to ensure that every dispute referred to it for conciliation is resolved within 30 days of the referral unless the parties agree to extend this period.⁴⁵⁰ If all parties to the dispute agree to refer it to arbitration under the auspices of the CCMA then the arbitration award must be made within 14 days of the date of the conclusion of the arbitration proceedings.⁴⁵¹ Thus the focus is on ensuring that disputes are speedily dealt with.

8.52.6 Any party alleging a defect in any arbitration proceedings may apply to the Labour Court for setting aside the arbitration award made.⁴⁵²

* **Attempt to resolve a dispute before access to CCMA**

8.53 The Commission is concerned that the requirement in clause 6(4)(b) of the Employment Equity Bill (which requires that the referring party has made a reasonable attempt to resolve the dispute) would place an unreasonable duty on employees to attempt to resolve a dispute regarding HIV testing on their own first before being able to approach the CCMA. In a situation where an employer requests an employee to undergo an HIV test and the employee refuses, the question arises as to what steps the CCMA would require the employee to have taken before he or she is entitled to apply for

449 Ibid sec 137.

450 Ibid sec 135(2).

451 Ibid sec 138(7).

452 Ibid sec 145(1).

conciliation proceedings. It appears that the Employment Equity Bill is silent on this issue.

* **Settlement of a dispute in terms of clause 47**

8.54 Clause 47(4) of the Employment Equity Bill states that "(N)othing in this section precludes the parties to a dispute arising out of an alleged breach of a right conferred by this Part, from concluding an agreement to settle the dispute". The Commission is concerned that settling a dispute in terms of this clause may be detrimental to the job applicant in the instance where an applicant refuses to be tested for HIV and the matter is "settled" through the employer agreeing not to proceed with the test - but nevertheless also not taking such applicant into employment.

8.55 The drafter of the Employment Equity Bill however responded that the proposed provision is aimed purely at protection of employees from victimisation by employers for exercising their rights (and thus presumably not at unfair discrimination in general as dealt with in Chapter II of the Employment Equity Bill). In this context, according to the drafter, "discriminate" in the clause "(N)o person may discriminate against an employee⁴⁵³ who exercises any right conferred by this Act"⁴⁵⁴ would have a narrow meaning consistent with the LRA. Following this reasoning, clause 47(4) would thus not apply in relation to a dispute arising from the provisions of Chapter II. The Commission is however not convinced that this response adequately addresses the concern raised, and suggests that the formulation of clause 47(4) be revisited in order to reflect clearly the intended purpose of the provision.

* **Definition of "employee"**

8.56 Only in clauses 5(5) and 47(5) of the Employment Equity Bill is the definition of "employee" broadened so as to include job applicants. Other clauses of the Employment Equity Bill do not expressly extend to job applicants. Some of the

⁴⁵³ For purposes of this clause "employee" includes an applicant for employment (clause 47(5)).

disadvantages of this are that the powers of the Labour Court as set out in Part B of Chapter V of the Bill do not extend to job applicants.⁴⁵⁵

* **Definition of "testing"**

8.57 The definition of "testing" in clause 59 of the Employment Equity Bill refers explicitly only to testing for HIV. It is submitted that referring to "any medical condition" in clause 5(4) would not have the effect of prohibiting testing for any medical condition under the present narrow formulation of "testing". If the prohibition is to apply in respect of any medical condition, testing would have to be defined broadly. The purpose of the narrow definition of "testing", and the distinction made in this regard in clause 5(4) and the definition of "testing" are not clear.

* **Broad employment equity legislation provides for the development of codes of good practice**

8.58 The Employment Equity Bill confers authority on the Minister of Labour to issue codes of good practice after consultation with the Commission for Employment Equity.⁴⁵⁶

8.58.1 Such codes are intended to provide employers with information that may assist them in implementing the Employment Equity Bill.⁴⁵⁷

8.58.2 The possibility of the development of a code of good practice on HIV/AIDS in the workplace has several advantages, including the following:

⁴⁵⁴ Clause 47(1) of the Employment Equity Bill.

⁴⁵⁵ See also par 8.48 above.

⁴⁵⁶ Clause 49 of the Employment Equity Bill.

⁴⁵⁷ Ibid clause 49(1)(a) fn 12.

- + It embodies a holistic approach which will provide employers and employees with a comprehensive guide to effectively managing HIV/AIDS in the workplace.
- + A considerable amount of work has already gone into developing such codes. SADC accepted a code of good practice on HIV/AIDS at its meeting of Labour Ministers in April 1997. This code provides clear guidelines on regional standards for dealing with HIV/AIDS. Furthermore, following a consultative process with stakeholders, the ALN together with the AIDS Consortium in 1995 developed a local code of good practice.⁴⁵⁸
- + It will allow several issues such as education, counselling, testing, confidentiality, dealing with incapacitated staff and benefits to be dealt within one instrument.
- + An enforcement procedure is created with respect to codes of good practice in that the Labour Court has jurisdiction to determine any dispute about the application of such codes.⁴⁵⁹
- + In terms of clause 49(1)(b) of the Employment Equity Bill, codes of good practice would be changed and replaced by a procedure similar to that of subordinate legislation. This would not be as time consuming or as cumbersome as changing legislation which requires parliamentary procedure for amendment. In this sense a code of good practice could provide a more flexible mechanism for dealing with the continuously changing context of HIV/AIDS.

8.58.3 Finally, the current formulation creates a distinction between testing for employment purposes and testing as part of an assessment for entry to employee benefit schemes. This approach is in line with the consensus reached

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See also par 5.13 above.

within the project committee regarding legislative proposals on pre-employment testing.

G) INTERIM RECOMMENDATION

8.59 The Commission recommends that any legislative intervention regarding pre-employment HIV testing be in accordance with the principles accepted in paragraph 8.26 above.

8.60 In the light of the possibility that the Commission's proposals may be integrated into the Employment Equity Bill, a final position is not adopted at this stage on any specific form in which such principles should be realised. The Commission is satisfied that the current formulation of the Employment Equity Bill, as embodied in the 14th Draft, broadly satisfies the needs of both proponents and opponents of a statutory prohibition on pre-employment HIV testing. In particular, the proposal accommodates the following:

- + Pre-employment HV testing is prohibited per se. The 14th Draft does this through expressly prohibiting the testing of an employee for any medical condition unless it can be shown to be justifiable in the circumstances. This provision deals with the major opposing argument regarding AIDS exceptionalism raised in regard to the Commission's original proposal.

+ The proposed formulation in the 14th Draft further allows for HIV testing as part of an entrance requirement to an employee benefit scheme provided such a test is justifiable in the light of the fair distribution of employee benefits. This provision would allow an employer flexibility in structuring access to employee benefits whilst on the other hand not completely excluding persons with HIV/AIDS from benefit schemes. Following this route of action takes into account many of the business concerns raised regarding the possibility of increased costs if persons with HIV/AIDS were entitled to unlimited access to employee benefits. The fact that the considerations listed in clause 5(4)(b) of the Employment Equity Bill appear to be posed as alternatives ("or") does not seem to be significant since a Court will doubtless in determining justifiability, give consideration to all the factors mentioned.⁴⁶⁰

8.61 After completion of this report and before the Commission finally adopted the report 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 in the Government Gazette corresponds with the 14th Draft of the Bill (attached as ANNEXURE C) and accommodates the recommendations in principle as set out in Chapter 8 of this report. However the published Bill contains the following relevant editorial changes: additional clauses were inserted between clause 37 and clause 38, and clause 52 and 53 respectively, with a resultant change in numbering of certain clauses referred to in Chapter 8. In addition, the definition of medical "testing" in clause 59 of the 14th Draft has been adapted (refer to clause 61 of the re-numbered and published Bill).

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"Now the words 'and' and 'or' are sometimes inaccurately used; and there are many cases in which one of them has been held to be the equivalent of the other. Much depends on the context and the subject-matter" (**Barlin v Licensing Court for the Cape** 1924 AD 472). See also **Binda v Binda** 1993 2 SA 123 (W) where, referring to **Barlin**, it was held that the context and subject-matter of the provision should be examined against the background of the particular statute as a whole (at 126 C); and **Zulu v van Rensburg** 1996 4 1236 (LCC) at 1254.

ANNEXURE A

RESPONDENTS TO DISCUSSION PAPER 73 IN ORDER OF RECEIPT OF
SUBMISSIONS

- 1 Greater Benoni City Council Health Department (Dr MAR Selane, Medical Officer of Health)
- 2 Judge President Northern Cape Division (Mr Justice JJ Kriek)
- 3 SG Abrahams
- 4 RS Green (Cox Yeats Attorneys)
- 5 Prof M Hobdel (Dean Faculty of Dentistry, University of the Western Cape)
- 6 ATICC Western Cape (Ms Sally Matin-Dale Tucker)
- 7A City of Cape Town Health Department (Dr A Grimwood)
- 7B City of Cape Town Health Department (Dr Helene Visser)
- 8 Dr Clive Evian
- 9 Human Sciences Research Council (Ms Anna Meyer-Weitz, Chief Researcher Health Promotion Programme)
- 10 Prof Alan W Whiteside (Economic Research Unit, University of Natal)
- 11 Interim South African Medical and Dental Council
- 12 South African Chamber of Business (SACOB)
- 13 Dr TL Patycki (St Helena Hospital, Eerstemyn - responding in his personal capacity)
- 14 Breede River District Council AIDS Action Committee (Sr BJ Van der Merwe, Chairperson)
- 15A Southern African Catholic Bishops' Conference Parliamentary Liaison Office (Rev Peter-John Pearson, Parliamentary Liaison Officer)
- 15B Southern African Catholic Bishops' Conference AIDS Programme (Ms Linda Maepa)
- 16 City of Durban Pension Fund (DA Dorrofield, General Manager Pensions)
- 17 Dr Aart Hendriks (Faculty of Law, University of Amsterdam)
- 18 Department of Safety and Security (A Cachalia, Secretary Safety and Security; Director JA Du Plessis, Manager Organizational Health and Safety, South African Police Service)
- 19 National Association of People Living with HIV/AIDS (NAPWA) (PG Busse)
- 20 Department of Welfare
- 21 The Actuarial Society of South Africa
- 22 Department Correctional Services (KM Mabena, Deputy Director Medical Support Services)
- 23 Department of Justice Regional Representative Giyani
- 24 Centre for Health Policy University of the Witwatersrand (Ms Joanne Stein, AIDS Project Co-ordinator)
- 25 Occupational Health Programme Faculty of Medicine University of Natal (Rajen Naidoo)
- 26 Afrikaanse Handelsinstituut (AHI)
- 27 Life Offices' Association of South Africa (LOA)
- 28 Medical Association of South Africa (MASA)
- 29 Ms Catherine Mathews (CERSA, Medical Research Council) and Dr Leslie London (Department of Community Health University of Cape Town)
- 30 AIDS Programme Greater Johannesburg Metropolitan Council (Pierre Brouard)
- 31 City Council of Pretoria Personnel Services Department (R Bouwer, Executive Director Personnel Services)
- 32 Department of Justice Regional Representative Mmabatho
- 33 City Council Bloemfontein Medical Officer of Health (Dr Ann Hiemstra)
- 34 HIV Management Services (Pty) Ltd (Ms Gillian Gresak)
- 35 Democratic Nursing Association of South Africa (Miss T Gwagwa, Executive Director)
- 36 University of Cape Town Disability Unit and HIV/AIDS Educator Co-ordinator (Dr

- Kate Jagoe and Ms Cal Volks)
- 37 AIDS Consortium (Ms Morna Cornell, Co-ordinator)
- 38 The Dental Association of South Africa (Dr TJ Barnard, Executive Director)
- 39 Society for Family Health (Mitchell Warren)
- 40 Ms K Niewoudt
- 41 City of Durban Medical Officer of Health (Dr CA Pieterse)
- 42 Senior Medical Superintendent Groote Schuur Hospital (Dr KR Ramiah)
- 43 Diocesan AIDS Co-ordinating Committee of South Eastern Transvaal
- 44 Arepp Educational Trust (Ms A Brokensha)
- 45 ATICC East Rand (Ms E Roos, ATICC Administrator East Rand)
- 46 Judge President of the Labour Courts (Mr Justice JF Myburgh)
- 47 City Council of Pretoria Medical Officer of Health (Dr JH Olivier)
- 48 ESKOM (Ms Dolly Mokgatle, Executive Director Corporate Affairs)
- 49 South African Health and Social Services Organisation (Dr Mvuyo Tom, SAHSSO President)
- 50 AIDS Legal Network (ALN) (Mark Heywood, Head AIDS Law Project) (Submission endorsed by the National Union of Mineworkers and the ALN Kwa Zulu Natal)
- 51 Chamber of Mines of South Africa
- 52 National Progressive Primary Health Care Network (Bea Abrahams, Senior Policy Analyst)
- 53 Town Secretary of the Transitional Local Council of Krugersdorp
- 54 Social Law Project University of the Western Cape (Ms Mary Ceasar)
- 55 Department of Labour (Ms Lisa Seftel, Director Minimum Standards)
- 56 Gauteng Provincial Department of Health (Mr Amos Masondo, MEC for Health)
- 57 Department of Health (Mr S Ramasala, Legal Unit; Ms Rose Smart, Director HIV/AIDS and STDs)
- 58 Chemical Workers Industrial Union (Muzi Buthelezi, General Secretary)
- 59 South African Medical Services (Brig R Cloete, Surgeon General)
- 60 National AIDS Coalition of South Africa (Pooven Moodley, NACOSA National Lobbyist)
- 61 Gauteng Department of Welfare and Population Development (Ms M Davids, Department Head)
- 62 Provincial Administration Western Cape Department of Health (Dr S Kariem, Chief Director Health Care)
- 63 MEC Education and Cultural Affairs Western Cape (Ms ME Olckers)
- 64 Ms Val Taylor (National Adviser for Health, National Council of Women of South Africa)
- 65 Dr Jim Murphy (Group Medical Officer, Barlow Ltd)

ANNEXURE A

**RESPONDENTS TO DISCUSSION PAPER 73 IN ORDER OF RECEIPT OF
SUBMISSIONS**

REPUBLIC OF SOUTH AFRICA

**PROHIBITION OF TESTING OF EMPLOYEES
FOR ANY MEDICAL CONDITION BILL, 1997**

(As introduced)

(MINISTER FOR LABOUR)

B I L L

To prohibit testing an employee for any medical condition, including HIV unless authorised by the Labour Court.

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context indicates otherwise -

"employee" means an employee as defined in the Labour Relations Act, 1995 (Act No. 66 of 1995), and includes an applicant for employment whether or not he or she is an existing employee.

"employment" includes the promotion, training, transfer, redeployment or re-assignment of an

existing employee.

"employment benefits" include any advantage or benefit an employee derives or may derive from employment.

"HIV" means the Human Immunodeficiency Virus.

"test" includes any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, any medical condition, including the HIV status of an applicant for employment, and specifically includes an inquiry whether for the purpose of obtaining employment he or she is prepared to undergo HIV testing in any form.

"Labour Court" means the Labour Court, including the Labour Appeal Court, having jurisdiction under the Labour Relations Act, 1995 (Act No. 66 of 1995).

Prohibition of testing for any medical condition including HIV

2. Subject to section 3, no person shall -

- (a) subject an employee to a test for any medical condition including HIV;
- (b) take any medical condition including the HIV status or perceived HIV status of an employee into account in refusing him or her employment or to determine the fair distribution of employment benefits.

Authorisation for testing for any medical condition including HIV

3. (1) An employer or other person or entity offering or providing employment benefits may apply to the Labour Court for authorisation to subject an employee or a category of employees to testing for any medical condition including HIV and/or to take any medical condition

including the HIV status of such an employee into account in deciding whether to refuse him or her employment or to determine the fair distribution of employment benefits.

(2) Before hearing the matter, or at any stage hereafter, the Labour Court may give directions as it considers fit regarding service of the application on specified bodies or individuals, including any who in its opinion may assist it by the provision of information or submissions regarding medical facts, employment conditions, social policy, the fair distribution of employment benefits and the inherent requirements of the particular job.

(3) The Labour Court shall grant authorisation if it is satisfied that consideration of any medical condition including the HIV status of an employee is, in the light of medical facts, employment conditions, social policy, the fair distribution of employment benefits and the inherent requirements of the particular job, fair and justifiable.

(4) The onus to satisfy the Labour Court lies on the employer seeking authorisation.

(5) The Labour Court may grant authorisation on such terms as it considers suitable, including conditions relating to -

- (a) the provision of counselling;
- (b) the maintenance of confidentiality;
- (c) the period during which the authorisation applies;
- (d) the category or categories of jobs or employees in respect of which the authorisation applies.

Interdicts

4. The Labour Court has jurisdiction, at the instance of any person who has standing under

section 38 of the Constitution of the Republic of South Africa, 1996 (Act No.108 of 1996), to interdict any contravention or threatened contravention of this Act.

Appeal against authorisation by Labour Court

5. (1) Any party to any proceedings before the Labour Court in terms of this Act, may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any authorisation by the Labour Court.

(2) In respect of an appeal in terms of this section, the relevant provisions of part E of Chapter VII of the Labour Relations Act, 1995 (Act No. 66 of 1995) apply, read with the changes required by the context.

Short title

6. This Act shall be called the Prohibition of Testing of Employees for any Medical Condition Act, 19...

ANNEXURE C

EMPLOYMENT EQUITY BILL - DRAFT 14