SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 72

Project 85

ASPECTS OF THE LAW RELATING TO AIDS:

Pre-employment HIV testing

CLOSING DATE FOR COMMENT: 31 JULY 1997

SBN: 0-621-27350-3

INTRODUCTION

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

The members of the Commission are -

The Honourable Mr Chief Justice I Mahomed (Chairperson)

The Honourable Mr Justice P J J Olivier (Vice-Chairperson)

The Honourable Madam Justice Y Mokgoro

Adv J J Gauntlett SC

Mr P Mojapelo

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The members of the Project Committee for this investigation are -

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PREFACE

This discussion paper (which reflects information accumulated up to the end of April 1997), has been prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions relating to the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

For the convenience of the reader a summary of issues discussed and requests for comment appear on the next page.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit **written** comments, representations or requests to the Commission by **31 July 1997** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have.

The researcher allocated to this project, who may be contacted for further information, is Mrs A-M Havenga. The project leader responsible for this project is the Honourable Mr Justice E Cameron.

SUMMARY

1 Although HIV cannot be transmitted casually, and transmission in the workplace is unlikely, AIDS and HIV will 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. The costs of possible benefits, retraining, and depletion of workplace morale will have to be borne. The greatest costs created by HIV will 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, productivity and production.

2 Given the current incidence of HIV, new infections will occur among those already employed as well as those applying for jobs, and the epidemic will affect all workplaces.

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

4 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 such as freedom of choice as to whom to employ; 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 job applicants with HIV. 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.

5 However, strong rationales also exist against pre-employment testing: it is generally agued that testing applicants for employment for HIV infringes upon their right to privacy, and facilitates unfair discrimination.

6 Our review of comparable systems, together with a consideration of the current scientific knowledge and the ethical, social and economical issues have led us to the conclusion that the present legal position needs to be changed, and that the most effective way of doing so is by legislation.

7 The project committee recognises that an array of competing interests and social values are at issue in the debate about statutory regulation of pre-employment testing for HIV. Any suggested statutory intervention should attempt to reconcile the main opposing approaches in a form which leaves sufficient flexibility for the accommodation both of private rights and social interests. Future developments in medical and scientific knowledge and in the economic environment should also be accommodated.

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

9 After carefully considering all the arguments and pronouncements relating to this question, the project committee is of the view that legislation should be based on the following principles and procedure. We have been impressed by the principles embodied in the Federal Rehabilitation Act, 1973 and the Americans with Disabilities Act, 1990 which generally have been reflected in other comparable jurisdictions. The principle extracted from such comparable legal systems is that the rights of the employer, while recognised, are limited by prohibiting pre-employment testing for HIV except where such testing is reasonably, justifiably and rationally warranted. This approach 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 Labour Relations Act, 1995.

10 On the basis of the above, the project committee provisionally recommends the adoption of a specific statute 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. By giving specific jurisdiction to the Labour Court to determine under what circumstances HIV testing or taking HIV status into account in hiring may be permissible, proposed legislation could give all involved parties a clear framework for resolving potential disputes.

11 A draft Bill to this effect is attached for comment. (See Chapter 7 for an explanation of the terms of the proposed draft Bill.) The project committee is unanimous in its preliminary recommendations for legislation except with regard to clause 3(3). Comment is specifically invited on the alternatives posed.

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.

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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; prohibiting the use of disposable syringes; implementing a national policy on HIV testing; and descheduling AIDS from mandatory coercive measures authorised by regulation). The report has been presented to the Minister of Justice for Tabling shortly in Parliament.

1.3 In this discussion paper, the project committee addresses the question whether statutory intervention to prohibit pre-employment testing for HIV is warranted.

1.4 It is emphasised that the discussion paper contains preliminary proposals for an interim report. It does not contain the final views of the Commission but represents the preliminary views of the Commission's project committee.

2

BACKGROUND

* **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

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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.

permanent part of the DNA[4] (the genetic material of all living cells and of certain 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]

- **Course of AIDS**

2.4 The course of AIDS 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

2.5 The initial phase begins very shortly after a person's infection with HIV has

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4 DNA is the abbreviation for "deoxyribonucleic acid".

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).

occurred. Symptoms present that 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 take place on average six to twelve weeks after exposure (in exceptional cases even later). The period before 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 will be negative in spite of infection. During the window period an infected person may be highly efficient at transmitting HIV, but will generally not test positive (seropositive) for the virus.[9]

Second phase: asymptomatic seropositivity

2.6 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 is slowly being impaired. This second phase can continue for many years while the infected person remains otherwise healthy. In this phase also infected persons are often not aware that they have HIV; they can therefore transmit the virus unknowingly to others.

Third phase: AIDS-related symptoms

2.7 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

[9] 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.

the final phase now occur.[10] 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

2.8 Only during the final phase can a person be said to have AIDS. Such a person's body is no longer capable of withstanding opportunistic diseases, the symptoms of which were observed in the preceding phase. He or she usually dies within two years as a result of these diseases. Diseases that generally occur are pneumonia, tuberculosis and Kaposi's sarcoma. Neurological and psychiatric disorders (known as AIDS dementia) may also occur in this final phase (and in rare cases may occur also earlier).[11] 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.[12] Persons with AIDS usually pose no threat of infecting others with opportunistic diseases. Notable exceptions are untreated tuberculosis and herpes which are transmissible in themselves.[13]

2.9 The course of AIDS 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 overall pattern

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[10] 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.

[11] **AMFAR AIDS/HIV Treatment Directory** June 1996 135-138.

[12] Hawkes & McAdam 1993 **Medicine International** 70-71.

[13] Lachman 202. Cf **AMFAR AIDS/HIV Treatment Directory** June 1996 97-134.

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.[14]

2.10 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.[15] 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.

2.11 New treatments are currently being developed that extend the life expectancy of people with HIV and AIDS.[16] Many of these are expensive.[17] 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.[18]

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

15 Evian 1991 16.

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

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

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

* Transmission of HIV

2.12 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 bodily fluids.[19]

2.13 There is thus no risk of HIV transmission from casual contact in a normal work environment.[20] 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.[21]

2.14 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, seed or organs of a person who is infected with HIV.[22]

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19 Evian 1993 11. See also, for instance, Curran 1980 **Columbia Law Review** 720 fn 2; Deloach 1990 **Creighton Law Review** 693 fn 8; Lachman 131.

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

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

22 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

* By a mother with HIV to her foetus before or during birth, or to her baby after birth by means of breast-feeding.

2.15 To infect a person, HIV must reach the bloodstream. 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.[23] The virus is also destroyed by almost any disinfectant.[24]

2.16 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.[25]

***** **Significance and functionality of testing for HIV**[26]

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 contradiction to the test for antibodies) are not at present generally used.[27]

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

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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).

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

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

25 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.

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

27 See par 2.21 below.

the Western Blot (WB) test.[28] The ELISA test is very sensitive and reacts positively to nearly any infection in the body. 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. The WB test, which is such a more specific test, is traditionally used to confirm an initial positive test. However, the WB is expensive[29] 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.[30]

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.[31]

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 developed[32] 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.[33]

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

29 The cost of a WB test is approximately R200; the cost of an ELISA test carried out by a private body varies from R70 to R90 (evidence before the Commission by Prof A Heyns and Dr R Crookes of the SA Blood Transfusion Service on 7 February 1994).

30 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 & Martin 1993 **SAMJ** 685-687).

31 Information supplied by Dr R Crookes of the SA Blood Transfusion Service on 6 June 1994. See also Gostin 1991 **American Journal of Law & Medicine** 110.

32 Gostin et al 1986 **American Journal of Law & Medicine** 10; Banta 5.

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

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.[34] New tests are being developed that test for HIV itself, rather than antibodies to the virus.[35] These can eliminate the window period. In addition, some of these tests (e g viral load tests) may more accurately predict future health status.[36] However, because of their cost they are not yet recommended for general use.[37] Tests which detect HIV in the urine, and saliva, and the polimerase chain reaction technique (internationally known as the PCR) which detects the virus itself in the blood are also available, but are not in general use - the former due to its relative unreliability and the latter due to the fact that it is complicated, difficult to execute and thus impracticable.[38]

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.[39]

2.23 An employer may seek to test applicants for employment for a variety of reasons.

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34 **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 Western Blot 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".

35 Orthmann **Law & Policy Reporter** April 1996 55.

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

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

38 Information supplied to the Commission by Dr R Crookes of the SA Blood Transfusion Service on 6 June 1994; see also Van Dyk 12; Crofts **AIDS in Australia** 26-27.

39 Colebunders & Ndumbe 1993 **The Lancet** 601; cf also **MASA Guidelines** 7.

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 pools.

* **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 with 35% from 10,44% to 14,07%.[40] 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 1995[41]) is infected.[42] The Department of Health has estimated that approximately 2,4 million adults were infected with HIV at the end of 1996.[43] 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 15,21% and 17,52%).[44] Seroprevalence rates for the sexually active population in KwaZulu-Natal and Mpumalanga were already above 15 percent at the end of 1995.[45] The greatest single increase in prevalence was North West Provence where a three-fold increase (from 8,3% to 25,13%) was found.[46]

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40 Department of Health Report on Seventh National HIV Survey 1997 5.

41 **Epi Comments** October 1996 11.

42 Doyle & Muhr (Unpublished) 1.

43 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 156 000 babies born since 1990 are infected with HIV (Department of Health Report on Seventh National HIV Survey 1997 10-11).

44 Ibid 10.

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

46 Department of Health Report on Seventh National HIV Survey 5-7.

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.[47] According to experts this can be expected as the epidemic starts approaching its mature phase.[48] Although the epidemic continues, the rate of growth is no longer exponential.

* **HIV and the workplace: overview**

2.26 Although HIV cannot be transmitted casually, and transmission in the workplace is unlikely,[49] 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.[50]

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.[51] The brunt of the illness is likely to be borne by the economically active population.[52] 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.[53] The costs of additional

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47 Ibid 11; cf also **Epi Comments** October 1996 2.

48 Doyle & Muhr (Unpublished) 1-2.

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

50 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.

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

52 Albertyn & Rosengarten 1993 **SAJHR** 77.

53 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.[54] 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.[55] 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.[56]

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.[57] 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.[58] A fundamental question in this regard therefore is whether pre-employment HIV testing with its concomitant costs is more likely to prevent HIV transmission in the workplace and limit the costs of the epidemic than other methods of containment.

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54 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.

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

56 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 50-52 above.

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

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

* **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 increasing reports of pre-employment testing of applicants for employment in the public and private sectors.[59]

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.[60] In a survey of 300 employers (overseeing about 350,000 employees), 18% admitted to pre-employment testing. Of these, 39% conceded that the tests could not be described as voluntary.[61] A majority of employers surveyed said that they would discriminate against an applicant for employment if they knew that he or she had HIV.[62] In a different survey of 33 South African companies, more than half required HIV tests; nine excluded applicants on HIV status.[63]

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.[64] 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.[65]

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59 See, for instance, London & Myers 1996 **SAMJ** 329-330; Cameron & Adair (Unpublished) 3-4; Labour Sector **1997 Response to SALC Presentation** 1-2.

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

61 Silver (Unpublished**)** 4.

62 Ibid 2-3; see also Holding 1991 **Boardroom** 12.

63 Baggaley et al 1995 **Occupational Environmental Medicine** 9.

64 9 October 1996 **Hansard** 2381; 15 October 1996 **Hansard** 2437; see also Labour Sector **1997 Response to SALC Presentation** 1-2.

65 **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

2.34 Despite widespread acceptance that the chance of a health care worker infecting a 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,[66] many health care workers are apparently subjected to tests for HIV.[67]

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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 Water Affairs or any other department".

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

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

RATIONALES FOR PRE-EMPLOYMENT HIV TESTING

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.[68] 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.

* First rationale: employers' rights

3.1 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.

3.1.1 The question, simply put, is whether the suggested benefits derived from prohibiting pre-employment testing justify infringing upon an employer's freedom to hire.

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[68] B S A **1997 Response to SALC Presentation** 2, 4.

* **Second rationale: occupational transmission**

3.2 Although occupational transmission of the virus is unlikely, it is not impossible.[69] 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.[70]

3.2.1 The occupational safety justification for testing has led to health care workers with HIV being prevented from performing specified duties.[71] Doctors or surgical technicians known to have HIV have been prohibited from performing exposure prone operations.[72] 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

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69 See fn 49 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.

70 15 October 1996 **Hansard** 2437. In response to a question from Mrs N A 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.

71 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 the applicant's present ability to safely perform essential job functions (29 CFR § 1630 [1994]).

72 **Doe v University of Maryland Medical System Corporation** 50 F 3d 1261 (1995); **Leckelt v Board of Commissioners** 909 F 2d 820 (1990)I; **Bradley v University of Texas M D Anderson Cancer Center** 3 F 3d 922 (1993), *cert denied,* 114 S Ct 1071 (1994).

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**[73] - discrimination against the doctor was fair and justifiable.

3.2.2 The occupational transmission rationale has also been advanced as a justification for testing applicants for employment in the military and in emergency service organisations.[74] 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 attached to national security.[75]

3.2.2.1 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 servicemen to another.[76]

3.2.2.2 In the United States, the military is allowed to test servicemen for HIV.[77] Until 1996 service members who tested HIV positive were not automatically discharged.[78] In February 1996, the United States Congress passed legislation authorising the discharge of all service members who test positive for HIV.[79] President Clinton however ordered the United States Department of Justice to refrain from defending the provision from legal challenge.[80] In April 1996, the

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73 See fn 166 and par 5.17-5.17.3 below.

74 9 October 1996 **Hansard** 2381.

75 Ibid.

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

77 Gunderson et al 193 fn 3.

78 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).

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

80 See Orthmann **Law & Policy Reporter** April 1996 55.

controversial legislation was repealed.[81]

3.2.3 In certain instances, emergency service organisations - such as police and fire departments - have attempted to test applicants for HIV.[82] 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, and that mandatory HIV testing "implicated job applicants' right to privacy", the court accepted that the City could take reasonable precautions (i e testing) to prevent such a transmission.[83]

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81 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.

82 **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).

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

* **Third rationale: impairment of employment-related capacity**

3.3 It is suggested that people with HIV, while not yet symptomatic, may experience psychoneurological 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. If the AIDS-related impairment is perceptible, or the impairment perceptibly affects job performance, employment-related HIV testing may not be needed. However, 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 pilot[84] 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 the infringement upon 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 of pilots who are on anti-viral medication or who already have clinically defined AIDS (as opposed to HIV infection).[85] It has also been argued that doctors whose judgment is impaired by AIDS dementia may put patients at risk.[86]

3.3.1 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.[87]

3.3.2 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.[88] There is no consensus on whether

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84 Harding et al 4.

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

86 Fleming (Unpublished) 4-5.

87 Baily & Mandal 1995 **AIDS** 711-712; cf however **AIDSScan** December 1995 9.

88 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".

the possibility that AIDS dementia might occur in asymptomatic individuals can be ruled out, and how dangerous such an onset of dementia might be.

3.3.3 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 other symptom.[89]

* **Fourth rationale: costs associated with recruiting, training and supporting employees with HIV**

3.4 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 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.[90]

3.4.1 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.[91]

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

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

91 Solomon 1996 **AIDSScan** 5.

3.4.2 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.[92] The argument is that it is justifiable to use knowledge about eventual unwellness in order to assist in making hiring decisions.

* **Fifth rationale: cost of and risk to employee benefits**

3.5 Pre-employment testing may also derive from concern to protect benefit programmes from financial risk or insolvency.[93] 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 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.[94]

* **Sixth rationale: beneficent protection of employees in the workplace**

3.6 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.[95] This argument is based on the interest that individuals may have in finding out their HIV status to enable them to avoid

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92 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.

93 For a discussion, see Cameron & Adair (Unpublished) 5.

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

95 Ibid 2, noting the susceptibility of individuals with HIV to TB bacillus.

or take precautions against opportunistic infections. Instances include health care workers and others whose work has a tendency to include exposure to untreated tuberculosis.

3.6.1 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.

3.6.2 In the United States, members of the foreign service (and other government employees[96]) 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.[97]

* **Seventh rationale: social benefits derived from ascertaining the HIV status of applicants**

3.7 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.

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

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

* **Eighth rationale: fears of co-workers and clientele**

3.8 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.

* **Ninth rationale: costs of regulation**

3.9 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.

* **Tenth rationale: "AIDS exceptionalism"**

3.10 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.[98] 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.

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[98] BSA **1997 Response to SALC Presentation** 6.

4 RATIONALES AGAINST PRE-EMPLOYMENT TESTING

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.[99] 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.[100] Furthermore, there is no responsibility to employ those who from unwellness are incapacitated from doing their jobs: the employment contract may be terminated, after compliance with legislative prescriptions, in the case of those too ill to fulfill their job requirements.

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99 Albertyn & 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 & Myers 1996 **SAMJ** 329-330; **SALUS** December 1994 10-11; **Australia Discussion Paper Employment Law** 25-27.

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

* **First rationale: rights of applicants for employment**

4.1 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).[101] 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.[102] 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,[103] and may even extend to unwarranted interference in decision making regarding personal matters.[104]

4.1.1 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.[105]

4.1.2 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 hardly be argued that an application for employment in itself constitutes an unreserved waiver of the rights of the applicant for employment.

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101 Van Wyk 128-155; Van Wyk 1991 **Medicine & Law** 144-147; Van Oosten **Essays in Honour of S A Strauss** 282-283, 286, 289.

102 Van Oosten **Essays in Honour of S A Strauss** 282.

103 **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.

104 **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.

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

4.2 Testing may facilitate unfair discrimination against applicants with HIV. A decision to test is often based upon stereotype and irrational fear.[106] 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.

4.3 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.

4.4 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 voluntary to the test in any real sense of the word.[107]

* **Second rationale: occupational transmission**

4.5 In most job occupations there is no danger of occupational transmission of HIV.[108] Even in health care, where blood-prone procedures may be involved,

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106 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.

107 Neethling 106, 274; Neethling **Huldigingsbundel vir W A Joubert** 118; cf also Van Wyk 129, 278-279. See fn 139 below for a definition of "mandatory testing".

108 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

retrospective studies involving health care workers with HIV have shown a minimal risk of HIV transmission to patients.[109]

4.5.1 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.[110] The risk in occupations that involve less blood and bodily fluids, such as the police or fire force, is even more negligible.[111] In **Doe v District of Columbia** the 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.[112]

4.5.2 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.[113] 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.[114]

4.5.3 Even where (or if) HIV could create a danger in the workplace, testing

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to other employees". See also Cameron 1993 **Employment Law** 8-10; London & Myers 1996 **SAMJ** 329-330; Matjila (Unpublished) 6-8; Labour Sector **1997 Response to SALC Presentation** 6-7.

109 Matjila (Unpublished) 7; Bell & Chamberland 1992 **Annals of Internal Medicine** 871; McIntyre (Unpublished) 1, 6; Wicher 1993 (MEDLINE Abstract); A U S appellate court has noted that there was between a 1 in 42 000 and a 1 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.)

110 CDC **Morbidity & Mortality Weekly Report** 12 July 1991 1.

111 Matjila (Unpublished) 7, 8.

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

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

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

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.

4.5.4 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.[115] This is most obviously necessary in the health care field where universal precautions are in any event needed to prevent transmission of infections between patients and/or health care workers.[116]

* **Third rationale: impairment of employment-related capacity**

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115 South African Law Commission **Interim Report Project 85** November 1995, par 3.1-3.25.

116 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 to 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".

4.6 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.[117]

4.7 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.

~~4.7.1~~ 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. [118]

4.7.2 Recent studies suggest that, in spite of the presence of HIV in the central nervous system, people with HIV will remain neurologically intact during the incubation period.[119] 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.[120]

4.7.3 One study testing the value of using neuropsychological impairment as an indicator of early illness (morbidity) acknowledged that asymptomatic HIV-

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

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

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

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

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".[121]

4.7.4 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.[122]

4.7.5 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 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. [123] (Emphasis added.)

4.7.6 If it is effectively demonstrated that people with HIV experience, while still asymptomatic, HIV-related neurological impairment, it may be fair and

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

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

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

justifiable for certain employers to limit the access of people with HIV to specific professions.

4.7.7 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".[124]

* **Fourth rationale: costs associated with recruiting, training and supporting employees with HIV**

4.8 As stated earlier, the epidemic will have an overall effect on the economy, and employers will unavoidably be faced with higher labour costs.[125] The brunt of the illness will be borne by the economically active population. [126] 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). Legally an employer is not required to retain employees who, from illness, are no longer able to perform their essential job functions.[127] Neither the state, nor individuals, nor employers are expected to bear the

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

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

126 Albertyn & Rosengarten 1993 **SAJHR** 77.

127 Sec 2(2) of Schedule 8 of the 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.

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.[128]

4.8.1 Expenditures for testing applicants may waste resources because tests can only determine 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 have HIV. Medication, and other interventions including lifestyle adaptation, may extend the length of time employees with HIV can work.

4.8.2 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.[129]

4.8.3 Even as testing becomes more sophisticated - and viral load tests may begin to estimate how long an employee will be able to perform job functions[130] -

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128 Colebunders & Ndumbe 1993 **The Lancet** 601; Kimball & Myo 1996 **The Lancet** 1670.

129 Arendse 1991 **ILJ** 226-227.

130 Orthmann **Law & 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.

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.[131] Conversely, otherwise healthy employees should be permitted to work.[132]

4.8.4 As scientific and genetic tests become more sensitive, doctors will be able to calculate risks for cancer, diabetes and heart disease. Ultimately, it might 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 legal, ethical and social problems in efforts to justify denying employment based upon one of the myriad factors which may result in shortened life expectancy.[133]

4.8.5 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. However, an employee is 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.[134]

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131 For a definition of incapacity see: **Burdekin v Dolan Corrugate Containers LTD** 1972 IRLR 9; **Hebden v Forsey & Son** 1973 ICR 607; **Marshall v Harland & Wolff Ltd** 1972 ICR 101; **Seeboard Plc v Fletcher** 1990 EAT 471; **Tan v Berry Bros & 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).

132 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 for a long time".

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

134 Ibid 109.

4.8.6 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 while 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.

4.8.7 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 regulation.

4.8.8 Even if pre-employment testing cannot eliminate people with HIV from the workplace, it could be argued that it would 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 employing people with HIV 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 grounds 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. Employers will eventually, in all likelihood, be affected by these costs.

4.8.9 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.

* **Fifth rationale: cost of and risk to employee benefits**

4.9 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.[135] Once a person is taken into employment, it is possible to structure all benefit plans to contain costs without offering unlimited coverage to anyone. 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 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.

4.9.1 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.

4.9.2 The Ontario Court of Appeals in **Ontario Human Rights Commission v North American Life Assurance,** accepted that a company could make distinctions

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

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.[136]

* **Sixth rationale: beneficent protection of employees**

4.10 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 AIDS)[137] or exposure to opportunistic infection, it is argued that the employee is best situated to determine his or her own interests. Non-voluntary testing is unlikely to enhance an individual's ability to determine those interests.[138] 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.

* **Seventh rationale: social benefits of ascertaining the HIV status of applicants**

4.11 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. It is unlikely that these

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

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

138 Labour Sector **1997 Response to SALC Presentation** 7.

decisions will be encouraged by non-voluntary workplace testing.

4.11.1 Widespread mandatory testing - as a means of reducing the rates of HIV transmission - has been disavowed by almost all public health officials.[139] Unfair discrimination against people with HIV is invidious and impedes national prevention efforts by creating disincentives to counselling and testing of the infected.[140]

* **Eighth rationale: fears of co-workers and clientele**

4.12 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.[141]

* **Ninth rationale: costs of regulation**

4.13 A legislative prohibition on pre-employment testing is not in all respects strictly comparable to legislation that creates regulatory burdens on employers. The legislation

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139 The **Draft UNAIDS Policy on HIV Counselling and Testing 1996**, developed after discussion at the Workshop of HIV Counselling and Testing Experts in the Asian Region, December 1996, defines "mandatory testing for HIV" as inclusive of those situations in which "refusal of testing 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).

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

141 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 tolerate them".

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, while 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, in their wage and other expenditures, for the risks undertaken by them, and the social burdens they may have to bear.

4.13.1 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. 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.

***** **Tenth rationale: "AIDS exceptionalism"**

4.14 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.[142] To realise that principle in practice, however, special measures may be warranted.

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[142] **NACOSA National AIDS Plan** as adopted by the Government.

4.14.1 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.[143]

4.14.2 In addition, no other disease appears to face the extent of stigma and discrimination that confront people with AIDS and HIV. 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 might be argued to be necessary in these cases as well.

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

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.[144] Since that time and until the late 1970's 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".[145]

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".[146]

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. How

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144 Atiyah 355.

145 Ibid 356.

146 Ibid 356.

to protect the interests of the poor, the disabled, those unable to care adequately for themselves and those unfairly discriminated against? Up to the 1970's 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".[147]

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.

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147 Ibid 360-361.

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 including, *inter alia*, race, sex, sexual orientation, disability, and HIV status.[148] However, the Constitution of the Republic of South Africa[149] ("the 1996 Constitution") and the Labour Relations Act 66 of 1995 ("the LRA") both proscribe in certain respects unfair discrimination. It may also be argued that pre-employment testing for HIV trenches upon principles underlying the Constitution. Neither the 1996 Constitution nor the Labour Relations Act 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/AIDS 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.[150] The finality and enforceability of this decision is not yet certain.

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

149 The Constitution of the Republic of South Africa (Act 108 of 1996).

150 **The Citizen** 26 March 1997.

* **The 1996 Constitution**

5.4 The 1996 Constitution entrenches, *inter alia*, the rights to dignity,[151] privacy[152] and equality,[153] the right to be free from unfair discrimination [154] and from (state or private) unfair discrimination based upon disability,[155] the right to bodily and psychological integrity,[156] and the right to fair labour practices.[157] It also grants each citizen the right to choose a trade, occupation, and profession freely.[158] The 1996 Constitution provides for the limitation of these rights in certain instances where the limitation is reasonable and justifiable.[159] 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.[160] Regarding unfair discrimination specifically, the Bill of Rights provides: "No person may unfairly discriminate directly or indirectly on one or more grounds" including race, gender, sex, pregnancy, sexual orientation or disability.[161] 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

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151 The 1996 Constitution, sec 10.

152 Ibid sec 14.

153 Ibid Sec 9(1).

154 Ibid sec 9(2).

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

156 Ibid sec 12(2).

157 Ibid sec 23(1).

158 Ibid sec 22.

159 Ibid sec 36.

160 Ibid sec 8(1).

161 Ibid sec 9(4).

duty imposed by the right".[162] It is therefore still unclear to what extent the Constitutional right to privacy is enforceable against private entities,[163] or to what extent the common law right to privacy may be expanded or developed to give 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 Constitution[164] - 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.[165] 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

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

163 Ibid sec 8(2).

164 Ibid sec 39(1)(c).

165 See, for instance, the U S 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 governmental workers. See also Mello 67-68.

discrimination on the basis of disability.[166]

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.[167] 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.[168]

5.5.5 The 1996 Constitution guarantees the right to choose an occupation freely.[169] This does not appear to create any form of right to a specific job. However, the right to choose an occupation freely may weigh against the

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166 The **Americans with Disabilities Act** 42 USC § 12112 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 the Supreme Court decision of **School Board of Nassau County 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** 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.
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).

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

167 Cf Silver (Unpublished) 3-4.

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

169 The 1996 Constitution, sec 22.

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.

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.

* **The Labour Relations Act 66 of 1995 ("LRA")**

5.6 Pursuant to the right to fair labour practices conferred by section 23[170] of the 1993 interim Constitution, 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.[171]

5.7 Unfair discrimination on the basis of disability, or on any arbitrary ground, constitutes an unfair labour practice.[172] Disability discrimination is unfair in terms of the LRA unless it is "based on an inherent requirement of the particular job".[173]

5.8 Discrimination based upon HIV status could thus constitute discrimination either

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

171 LRA, sec 2(a) of Part B of Schedule 7, subject to sec 2 - see fn 173 below.

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

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

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 "inherent requirement of that particular job", that discrimination will not be unfair.[174]

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,[175] the LRA does not apply to these bodies.[176] 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**,[177] 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.

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174 Ibid sec 188(1)(a).

175 See par 5.5 and fn 160 above.

176 LRA, sec 2.

177 1993 4 SA 842 (A).

5.11.2 In **C v Minister of Correctional Services**,[178] 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 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.[179]

5.11.3 The right to privacy, which in South African law derives from the right to dignity,[180] 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.[181] 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".[182]

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.[183] In South Africa, the Constitutional Court in **Bernstein v Bester**,[184]

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178 1996 4 SA 292 (T).

179 1996 4 SA 292 (T) at 301.

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

181 **S v A** 1971 2 SA 294 (T).

182 **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.

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

184 1996 4 BCLR 449 (CC) per Justice Ackermann. Justices Chaskalson P, Mahomed DP, Madala, Langa, Mokgoro, Sachs, and Ngoepe AJ concurred.

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.
>
> ... 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.[185]

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,[186] 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.[187] Furthermore, forced discovery of one's own HIV status may further have an extremely grave impact on one's life.[188] Requiring applicants for employment to undergo an HIV test may thus affect their right to privacy, by imposing upon them, prematurely and inopportunely, invasive decisions or knowledge regarding

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185 1996 4 BCLR 449 (CC) 65F, 68E, 68F, citing **Financial Mail (Pty) Ltd v Sage Holdings Ltd** 1993 2 SA 451 (A) at 462F.

186 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.

187 1996 **Draft UNAIDS Policy Statement on Counselling and Testing 1996** 3.

188 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).

their bodily and psychological integrity.[189]

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.

5.11.5.1 In concurring opinions in **Case v Minister of Safety and Security**,[190] Justices Langa and Didcott noted the backdrop of South African history and the need to be aware of violations of the right to privacy:[191]

> 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.[192]

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.[193]

5.11.5.3 In **Ferreira v Levin and Vryenhoek v Powell**[194] Justice Ackermann explained that:

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189 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).

190 1996 5 BCLR 609 (CC).

191 Ibid 91, 100.

192 Ibid 100 (Justice Langa).

193 See fn 185; 1996 5 BCLR 609 (CC) at 650. See in particular fn 185, 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.

194 1996 1 BCLR 1 (CC) at 28.

> 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."[195] Against the constitutional background sketched above, including this injunction, it may be argued that 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.[196] 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).[197]

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195 The 1996 Constitution, sec (8)(3)(a).

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

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

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),[198] the draft **Southern African Development Community (SADC) Code on HIV/AIDS and Employment,** and the **Joint World Health Organisation and International Labour Organisation Statement on Pre-employment HIV testing**.[199]

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.[200] (Emphasis added.)

5.13.2 The International Labour Organisation guidelines, devised in conjunction

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198 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.

199 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".

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

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.[201]

5.13.3 The Southern African Development Community **Draft Southern African Code on HIV/AIDS and Employment,** which has not yet been adopted by South Africa, states:

> There should be no direct pre-employment test for HIV. Employees should be given the normal medical tests of current fitness for work and these tests should not include testing for HIV. 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.[202]

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

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

202 SADC **Draft Code on HIV/AIDS and Employment 1996** 7.

circumstance or for any occupation, or position ...[203]

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".[204]

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 motivation to exclude recruits.[205]

5.13.7 The LRA empowers the National Economic Development and Labour Council (NEDLAC)[206] to prepare and issue codes of good practice.[207] The LRA requires "any person interpreting or applying" the LRA to take into account any relevant code of good practice.[208] 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.[209] The approach

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

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

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

206 The National Economic, Development and Labour Council Act, 35 of 1994.

207 LRA, sec 203(1).

208 Ibid sec 203(3).

209 Cf Albertyn & Rosengarten 1993 **SAJHR** 77-88; Cameron & Adair (Unpublished) 2-3; Greenlaw 1992 **Journal of Health and Hospital Law** 80. The Centers for Disease Control has

adopted is that pre-employment testing for HIV may be a violation of an applicant's right to privacy that sanctions unfair discrimination while inhibiting prevention efforts by stigmatising people with HIV.[210] 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.[211] Generally

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stated that general employment testing is unwarranted because HIV is not transmissible in the workplace (CDC **Morbidity & Mortality Weekly Report** 12 July 1991 5, 7).

210 Albertyn & 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).

211 California prohibits an employer from requiring an HIV test as a condition of employment (Cal Health & 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, accept 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 & 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 employer 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 & Sexuality** 1 et seq; and Edgar & Standomire 1990

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 means.

5.16 In addition, the right to privacy, which the United States Supreme Court has recognised as implicit in the US 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.[212]

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.[213] An important aspect of the right to privacy is the individual's

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American Journal of Law and Medicine 155 et seq (Lexis Nexis).

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

213 Banta 120.

interest in avoiding disclosure of personal matters.[214] As important, the United States Supreme Court made clear in **Whalen v Roe** (1977), is the right to autonomy and independence in decision-making in personal matters.[215]

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.[216] 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.[217]

5.17 The combination of the Vocational Rehabilitation Act, 1973 ("Rehabilitation Act"),[218] the definitive United States Supreme Court decision in **School Board of Nassau County, Florida v Arline**[219] and the Americans with Disabilities Act, 1990 ("ADA")[220] have also added substantially to protection against discrimination of HIV infected persons.[221]

5.17.1 The Rehabilitation Act - which governs federal employers, and

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

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

216 **Anonymous Firemen v City of Willoughby** 779 F Supp 402, 199. (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).

217 **Glover v Eastern Nebraska Community Office of Retardation** 867 F 2d 461, *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.

218 The Vocational Rehabilitation Act, 29 USC § 794-7976 (1988).

219 480 US 273, 94 L Ed 307 (1987).

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

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

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".[222] In the employment context, an "otherwise qualified" person is one who can perform the *essential duties of the job in question.*[223] 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".[224] 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.[225] Section 504 state that employers "shall make reasonable accommodation" to the employee's handicap unless they can show that accommodation "would impose an undue hardship".[226] 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.[227] 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

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222 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.

223 Banta 47.

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

225 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).

226 Leonard **AIDS and the Law** 114.

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

infection.[228]

5.17.2 As the Rehabilitation Act had limited application and does 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.[229] The term "disability" is defined 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.[230]

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"[231] which is defined as a "significant risk of substantial harm" that cannot be reasonably accommodated.[232] To protect employers it is furthermore provided that employers may escape an accommodation obligation by proving that it would constitute an undue financial

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228 See, for example, **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).

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

230 42 USC 12102 sec 3(2). See also McCormack 1995/1996 **The Journal of Air Law and Commerce** 301.

231 42 USC §§ 12113(a)-(b) (Supp V 1993). See also McCormak 1995/1996 **The Journal of Air Law and Commerce** 300.

232 29 CFR § 1630.2(r)(1994). See also McCormack 1995/1996 **The Journal of Air Law and Commerce** 300; and fn 225 above for an indication of what could constitute a significant risk.

or other hardship.[233] 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.[234]

5.17.3 Pre-employment testing for HIV is not explicitly prohibited under the ADA.[235] However stringent restrictions are placed on any medical examination made on an applicant for employment by an employer.[236] This statute, applying to all employers with 15 or more employees,[237] 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

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233 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.

234 Cf Van Wyk 298.

235 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 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)).

236 Feldman **AIDS Agenda** 285.

237 42 USC 12111, sec 101 (5).

discharge of employees".[238]

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.[239] Generally a person's HIV status is unrelated to the present ability to 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,[240] which is "inherently substantially limiting" because of its effect on decisions regarding reproduction.[241] Most courts have

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238 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.

239 29 CFR § 1630 (1994). See also Feldman **AIDS Agenda** 286; Banta 36-37.

240 29 CFR sec 1630.2(j) (Guidance)at 35741.

241 28 CFR sec 36.104 (Guidance) at 35548.

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.[242] 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.[243] 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".[244] 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 HIV transmission. The second case involved the employment of a neurosurgeon with HIV, where there was a cognizable (between 1 out of 42, 000 and 1 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

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242 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).

243 796 F Supp 559 (1992). Cf, however, the decision in **Anonymous Firemen v City of Willoughby** referred to in fn 213 above.

244 50 F 3d 1261 (1995).

qualified" to perform essential job functions. **Doe v Washington University**[245] and **Bradley v University of Texas M D Anderson Cancer Center**[246] 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**[247] 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**[248] 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)[249] and the Canadian Human Rights Act (which governs private and public actions falling within federal jurisdiction)[250] to assure that both private and public employers do not adopt policies that irrationally discriminate against HIV-infected workers.[251] 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

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245 780 F Supp 628 (1991).

246 3 F 3d 922 (1993), *cert denied*, 114 S Ct 1071 (1994).

247 662 F Supp 50 (1987).

248 887 F Supp 765 (1994).

249 R50 1990, c H 19.

250 R S C 1985 c H 6.

251 **Ontario Report** 62-63.

"classifies or indicates qualifications by a prohibited ground of discrimination".[252] The Ontario Human Rights Commission, in a policy document, has regarded this as the basis for a prohibition on pre-employment HIV testing.[253] 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.[254] There has been considerable jurisprudence on what may constitute a "bona fide occupational qualification" - usually focussing on the question whether there is legitimate need to prevent exposing others to significant health and safety risks.[255] 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".[256] This has been confirmed by the Ontario Law Commission in its report on HIV testing.[257]

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

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252 Ibid 39.

253 Ibid.

254 Ibid 64 fn 206.

255 Ibid 39 fn 95.

256 Ibid 39.

257 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).

> the griever 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 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".[258]

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.[259] 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** 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

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

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

AIDS related illnesses.[260]

* **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.[261]

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'**[262] 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 5.23 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

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260 **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.

261 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.

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

implement policies of discrimination against persons with disabilities in the name of occupational and workplace safety."[263] 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 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.[264]

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

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263 Ibid 40.

264 Ibid 38, 39.

should be assessed on performance-based criteria (relating to both mental and physical capacity) relevant to the particular occupation. [265]

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 whether they have had an HIV test.[266] This principle has been embodied in the Commonwealth's Disability Discrimination Act, 1992 which was developed subsequent to publication of the discussion paper.[267]

***** **<u>European Union (European Court of Justice)</u>**

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".[268] 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.

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

266 Ibid 28.

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

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

* **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 race[269] or sex[270] when making a job offer. In addition, the 1996 Disability Discrimination Act prohibits discrimination on the basis of disability. However 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.[271]

* **India**

5.28 In April 1997[272] 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

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269 Race Relations Act 1976.

270 Sex Discrimination Act 1975.

271 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.

272 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 information on the Internet at "The Lawyers Collective<lawyers@bom2.vsln.net.in" on 8/4/97).

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.

6 PRELIMINARY CONCLUSION AND RECOMMENDATION

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 us to conclude that the present legal position needs to be changed, and that the most effective way of doing so is by legislation.

6.2 The project committee recognises that an array of competing interests and social values are at issue in the debate about statutory regulation of pre-employment testing for HIV. Any suggested statutory intervention should attempt to reconcile the main opposing approaches in a form which leaves sufficient flexibility for the accommodation both of private rights and social interests. Future developments in medical and scientific knowledge and in economic environment should also be accommodated.

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

6.4 After carefully considering all the arguments and pronouncements relating to this question, the project committee is of the view that legislation should be based on the following principles and procedure. We have been impressed by the principles embodied in the Federal Rehabilitation Act, 1973 and the Americans with Disabilities Act, 1990 which generally have been reflected in other comparable jurisdictions. The principle extracted from these legal systems is that the rights of the employer, while recognised, are limited by prohibiting pre-employment testing for HIV except where such testing is reasonably, justifiably and rationally warranted. This approach 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.

6.5 On the basis of the above, the project committee provisionally recommends

the adoption of a specific statute 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. By giving specific jurisdiction to the Labour Court to determine under what circumstances HIV testing or taking HIV status into account in hiring may be permissible, proposed legislation could give all involved parties a clear framework for resolving potential disputes.

6.6 A draft Bill to this effect is attached for comment.

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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.

7 TERMS OF THE PROPOSED BILL

7.1 While bringing clarity to the law, the proposed legislation provides 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.

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

7.1.2 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 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. 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.

7.1.3 As far as onus is concerned, the employer is best equipped to establish that the HIV status of an applicant for employment is relevant to a specific job position.

7.1.4 The Labour Court's jurisdiction to determine whether ascertaining or

taking into 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.

7.1.5 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.[273]

7.2 The Project Committee has received guidance on these issues from responses on preliminary proposals circulated to the business and labour sectors of NEDLAC by the committee's chairperson. 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.[274] However in the light of Business South Africa's response to the preliminary proposal[275] several key modifications have been made to the proposed Bill.

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

7.2.2 A prohibition on unfair discrimination in the provision of benefits on the

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273 Cf Mine Health and Safety 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".

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

275 BSA **1997 Response to SALC Presentation**.

ground of HIV status has been 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.[276]

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

7.2.4 The language of the exemption that the Bill envisages has been 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 of the particular job) and currently available medical knowledge.

7.3 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

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[276] An unfair labour practice is defined in Schedule B or 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".

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.

7.3.1 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.

7.3.2 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.

7.3.3 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.

7.3.4 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.

7.4 **The project committee is unanimous in its preliminary recommendations for legislation except with regard to clause 3(3). Comment is specifically invited on the alternatives posed.**