

# HUMAN RIGHTS

This programme is about human rights and rights of people living with HIV/AIDS.

In South Africa we have a legal framework that protects our rights as citizens, as workers, as consumers and as patients. This legal framework is intended to protect us from unfair discrimination.

## CHAPTER ONE: WHAT IS THE CONSTITUTION?

- Our most fundamental rights are defined in our Bill of Rights, which is part of our national constitution, which is the supreme law of the land.
- It is important for people living with HIV that the constitution gives us the right to equality, and to protection against unfair discrimination, whether by others, or by the government itself.
- The constitution also says we have the right to human dignity, and the right to life. Also bodily and physical integrity; privacy; fair labour practices and to a healthy environment.
- Very importantly, the Bill of Rights specifies that we have the right to health care, food, water and social security; and to emergency medical services.
- These are our rights whether we black or white, whether we have a particular religion; or whether we are pregnant; or whether we are a man or a woman. It does not matter; we all have rights to protect us.
- No law can be passed that conflict with these values.
- For poor people the constitution is probably one of the most important documents in this country because it provides a framework for how our government structures will work and how democracy will work to protect us.
- The state must respect, protect, promote and uphold the Bill of Rights.

## **There are Specific Laws to Protect People with HIV**

- No pre-employment HIV testing unless the labour court gives specific permission.
- No employer can discriminate against you at work based on your HIV status.
- We have the right to access medicines that protect our children from HIV transmission.
- Children have the right to education and non- discrimination regardless of their HIV status.
- We have the right to access medicines that prevent HIV transmission if we have been raped.
- We have the right to treatment for HIV, including ARVs.

### **Discussion points:**

- How are our human rights defended?
- Give some examples of rights specified in our constitution.
- How do people make sure that they demand their rights?
- Which laws specifically protect people with HIV?

## CHAPTER TWO: PRE-EMPLOYMENT TESTING

- It is against the law for an employer to ask us to have an HIV test when we apply for a job, unless they have specific permission from the labour court. Nobody can test us for HIV without our informed consent. Compulsory testing has been outlawed in South Africa
- In one case a man applied for a job with SAA and signed an informed consent form to be given an HIV test but he was given no pre-test counseling.
- He was not told his HIV test result straight away - in those days it was the ELISA tests that took seven days – and had to go to SAA at Cape Town International Airport to get his results.
- He was then asked if he knew he was HIV positive. This was the first time he was told his HIV test result. Then he was told that there was no way he could have the job.
- He took the company to court and won his case. As a result no employer can exclude people from being employed based on their HIV status.
- One important thing about the Employment Equity Act is that it doesn't just cover employees. It also covers job applicants. So if you apply for a job and you are unfairly discriminated against because of your HIV status you can take it up.
- So what the Employment Equity Act has done - which is very good in terms of providing protection for people - is made sure that nobody can be tested for job related reasons unless the employers go to the labour court to get permission first.

## **Summary of Laws Governing Pre-Employment Testing**

- There must be informed consent before conducting any medical test.
- Patient confidentiality must be respected at all times.
- If you are over 14, you do not need your parents consent for testing.
- You have the right to respectful, non-judgemental and confidential counselling.
- No one can force you to go for an HIV test (not even your parents or employers).
- No one can test you in order to discriminate against you for example: pre-employment testing.
- Only you can give permission to disclose your results to you: family, employer or insurance company.

### **Discussion points:**

- What must you sign before having an HIV test?
- Why are HIV tests confidential?
- Do you need your parent's consent to have an HIV test?
- Can your employer force you to have an HIV test?
- What is the name of the court to which an employer must apply if they need you to have an HIV test in order to apply for a job?

## CHAPTER THREE: RIGHTS AT WORK

Besides the Constitution, there are eight laws, which determine our rights as HIV positive employees. These are:

- The Employment Equity Act
  - The Labour Relations Act
  - The Occupational Health and Safety Act
  - The Mine Health and Safety Act
  - The Compensation for Occupational Injuries and Diseases Act
  - The Basic Conditions of Employment Act
  - The Medical Schemes Act
  - The Promotion of Equality and Prevention of Unfair Discrimination Act.
- If you're living with HIV your employer must give you different more suitable work to do before taking a decision to dismiss you. Dismissal is only considered fair if the specific demands of a job are not being met and if the procedures are fair.
  - For example if someone has had TB and is in an environment that had a lot of dust they should be taken out of that environment and given a different job to do.
  - Then there are other pieces of legislation to protect the rights of people living with HIV/AIDS.
  - The Labour Relations Act, for example, where we can use the laws around dismissals due to ill health. Then you have legislation like the Protection of Equality and Promotion of Unfair Discrimination acts. That legislation also specifically mentions and includes HIV/AIDS and sets up structures called Equality Courts. So where people feel they are being unfairly discriminated against just because of their HIV status they can go to the Equality Court with their case.

## **Summary:**

- You have the right to work even if you have HIV.
- Your work place must be a safe and healthy environment.
- The Employment Equity Act claims to create an environment of equality and non-discrimination in the work place.
- It prohibits unfair discrimination based on HIV status, gender, race and religion.
- It strengthens the protection provided by the constitution and the Labour Relations Act.

## **Unfair Discrimination and Unfair Dismissal at Work**

- The Labour Relations Act is used when people are dismissed or when we want to argue that it's an automatically unfair dismissal based on HIV/AIDS, pregnancy etc. There has to be a good reason – these are called “substantially fair reasons” - and there has to be a fair procedure.
- So an employer has to follow due procedure before they can fire someone. Even if they have a good reason for firing someone (because they have done something that can harm the company for example), if they don't follow the proper procedure in dismissing someone they would be guilty of “procedural misconduct” towards an employer.

**Summary:**

- The Labour Relations Act protects employees against unfair discrimination at work such as unfair dismissal because of HIV status.
- You cannot be excluded from medical aid based on your HIV status.
- There must be a fair dismissal procedure if you are unable to work because of your health e.g. there must be a substantively fair reason before dismissing somebody from work.

**Discussion points:**

- Which laws determine our rights as HIV positive employees?
- What steps can you take if you feel you are unfairly dismissed or discriminated against on account of your HIV?
- What is the Employment Equity Act?
- What is the Labour Relations Act?

## **CHAPTER FOUR: ACCESSING INSURANCE POLICIES**

- The Medical Schemes Act and the Promotion of Equality and Prevention of Unfair Discrimination Act also guarantee our rights to medical aid and financial services (such as insurance).

### **Funeral Policies**

- Some funeral companies sell funeral policies and that target poor people and black people predominately and people normally pay a monthly premium of about R50. If the person dies the company pays the costs of the funeral. They pay the costs of the coffin etc. What the companies don't always explain properly is that if you die of AIDS or if the company thinks you died of AIDS. Then they will not pay out on the funeral benefit.
- Each policy is different. Some policies pay out for people living with HIV. Some policies only do so if you get diagnosed after taking out the policy. A lot of policies put in a clause that says 6 months after you have filled out the policy you can't fall sick with HIV.
- That someone who has an illness gets discriminated against is wrong. Anybody that takes out a policy does so because there is a risk of dying and whether they die of a car accident, or pneumonia, or a heart attack, the policy should treat it equally.
- There is sometimes a problem with death certificates. The problem is confidentiality.
- Some doctors have two types of death certificates. The first just says that the person died of a natural cause. Then there is a second death certificate which is used by the National Department of Health for statistical purposes on which the doctor records the causes of death.
- The second document you put it in an envelope and you hand it to the family or to the undertaker and it's the responsibility of the undertaker to take the sealed envelope to the Home Affairs Department because it's a confidential document.
- Sometimes the insurance company comes in and they say they want to investigate the folder of the person because they know the person had HIV because they don't want to pay out the policy.
- This is very wrong.

## **Life Insurance Policies**

- If you take out insurance the company will ask you questions about your health. You will need to disclose your status in that application form. If you are HIV positive and you don't disclose your status and you later die and they find that you didn't disclose your status they will not pay out.
- They will repudiate your claim and not pay out on the grounds called a "material non disclosure". You didn't disclose some important information that would have had a bearing on whether or not they would have insured you and at what cost they would have insured you.
- It is very important for people to remember. You must be absolutely honest in the information that you give to the company because otherwise the company will be able to repudiate your claim later.

### **Summary:**

- Being refused a funeral insurance policy based on your HIV status is discriminatory.
- It is discriminatory to be excluded from life insurance policies based on your HIV status.
- Insurance companies cannot disclose your HIV status to anyone; it is confidential.
- You must disclose your HIV status to life insurance companies to get "paid out", just like any other chronic illness.

### **Discussion points:**

- How do funeral services sometimes discriminate against people with HIV?
- Can insurance companies disclose your HIV status?
- Why must you be honest when you give information to a life insurance company?

## **CHAPTER FIVE: WOMAN'S RIGHTS**

### **Rape**

- If you have been raped, the Constitution and a Cabinet statement - made in April 2004 - together ensure that we have a right to receive ARVs for Post Exposure Prophylaxis (PEP) to reduce our risk of contracting HIV.
- There is a policy by government that says that PEP will be provided free to any rape survivor at a government clinic after a particular period of time.
- Currently this does not always happen.

### **Summary:**

- Forced or coerced genital contact or sexual penetration.
- Can be of vagina, anus or mouth.
- Done not only with a penis, but with other body parts or objects.
- Both men and women can be raped.
- The Sexual Offences Bill must be updated.
- Women are less powerful than men, or see themselves as less powerful.
- Only one in nine cases of rape are reported to the police.
- You have the right to confidentiality and respect if you have been raped.
- PEP must be provided free of charge at government clinics to any rape victim to prevent HIV transmission.

### **PMTCT**

- We have the right to choose whether or not we can have children. If we decide we want to have children, we have the right to medicines that reduce our risk of passing on HIV to our children.
- You can take a case to court to say you have the right to health because that's what our Constitution says we can do.

**Summary:**

- Women have the right to autonomy and make decisions regarding their reproductive and sexual health.
- HIV positive women have the right to choose to access medicines that reduce the risk of HIV transmission to their children e.g. Nevirapine and AZT.

**Discussion points:**

- What rights does someone have after they have been raped?
- How many rapes are reported?
- What rights do women have concerning reproduction?
- What rights do we have not to pass HIV to our children?

## **CHAPTER 6: CHILDREN'S RIGHTS**

- Children also have the right to freedom from discrimination at school. The National Policy on HIV/AIDS for learners and educators guarantees this.

### **Right to Education**

- The situation with children is complicated because we have various pieces of legislation that do not match up.
- The Constitution guarantees that everybody has the right to the access of information and that everybody has the right to access to education. We then have certain pieces of legislation that only deals with primary and secondary schools and not for example pre primary schools.
- The Department of Education had a policy for educators and learners around non discrimination. That no child who was living with HIV would be able to be excluded from a school and no child could be refused entry to a school just because of their HIV status.
- The Department of Education issued a policy for educators and learners that talks about precautions. So that means you treat every child as if they are HIV positive so you don't distinguish between children. You make sure that all bleeding wounds are covered, for example, on the sports field and you cannot discriminate. You cannot tell a child "you cannot come to school because you're HIV positive".
- No child should be refused entry to a crèche, a nursery school, a primary school, or a high school. No student should be refused entry to a university, to a Technikon or any other learning centre just because they have HIV.
- That can be challenged using the Constitution.

## **Children's Rights to Education**

- No child may be refused entry to any learning centre or institution based on their HIV status.
- You do not have to disclose your HIV status to your school or institution
- If your school knows your HIV status, it must remain confidential.

## **Access to Social Security**

- The United Nations Convention of Children's Rights (UNCCR) is a legal document that the Government of South Africa has signed. It can help us to both understand the effects of HIV/ AIDS on children's lives and action to protect and provide for them. The government is obliged to provide social security for children who require it.

## **Summary:**

- Children have the right to access social services.
- Many children need to access legal and social services.
- Many children do not have access to their social security grants e.g. foster care grant and care dependency grants.

## **CHAPTER SEVEN: PRISONERS RIGHTS**

- The right to treatment includes those who may be detained or in prison. Our right to treatment cannot be taken away from us.
- Discussions were held with the Department of Correctional Services and the Department of Health about this. Agreements were made between prisoners and government but deadlines were missed and prisoners continue to die because they do not have access to ARVs.

### **Discussion points:**

- What rights do children with HIV have concerning their education?
- Can a school disclose a child's HIV status?
- What legal document protects children's rights to social security?
- Do we have the same rights to HIV treatment and care if we are in prison?

## **CHAPTER EIGHT: THE NATIONAL TREATMENT PLAN**

- We have the right to treatment for HIV- related illness, including antiretrovirals. This right is guaranteed by the Constitution, and was put into effect by the Cabinet announcement of the Comprehensive plan for HIV/ AIDS.

### **Summary:**

- We have the right to access treatment for HIV related illnesses, including ARVs.
- This right is guaranteed by the constitution and was put into effect by the 'Comprehensive Plan for HIV and AIDS Care, Management and Treatment'.
- Government must ensure that ARVs are made available free at all clinics and hospitals across the country.

### **Discussion points:**

- What guarantees our right to HIV treatment and care?
  - What document puts this into effect?
  - What must government make available free?
- We are fortunate to live in a country where we are protected by our Constitution and by many progressive; the Constitution obliges the state to uphold these rights.
  - But we sometimes need to fight to secure these rights.
  - We need to access the law. Sometimes we will need to use other democratic institutions, such as freedom of speech through the press and the freedom to engage in political activism and mobilisation.
  - We need to ensure that people living with HIV/AIDS are not discriminated against. Discrimination makes it hard to disclose ones status and drives the epidemic underground.
  - Our human rights framework is there to protect us. It's up to us to use it and enforce it.