

Theme 5

Legal and Practical issues



South Africa's Constitutional Court

Do I hear sighs and see long faces because you now have to study boring law issues? Relax! This is going to be fun. And I promise, no incomprehensible “legalese” rules and regulations. We will focus only on issues that are relevant for your work as an HIV and Aids counsellor, caregiver or educator. In Theme 5, we focus on the following:

- What are the rights of people living with HIV and Aids?
- What are the guidelines on how and when HIV testing should take place?
- What constitutes good practice in the workplace when it comes to employers with HIV infection or Aids?
- Are there any special rights of women and children that should be considered when it comes to HIV and Aids?
- How should the workplace respond to HIV and Aids?

Theme 5 consists of only 2 learning units.

Learning Unit 22: Aids and the law

- Introduction
- The constitutional and legal framework
- The basic rights of people living with HIV and Aids
- National HIV counselling and testing guidelines
- Aids and employment
- Women’s rights

- The rights of children
- Assessment

Learning Unit 23: Aids in the workplace

- Introduction
- The impact of the Aids epidemic on the workplace
- The workplace's response to the Aids epidemic
- Assessment

[\[NEXT\]](#)

Learning Unit 22:

Aids and the law

**BOTH
TRACKS**



Former president Nelson Mandela signs the new South African constitution

[\[TABLE OF CONTENTS\]](#)

Table of Contents

Learning Unit 22: Aids and the law

- [Introduction](#)
- [Basic human rights](#)
- [National policy on Testing for HIV](#)
- [Aids and employment](#)
- [Women's and Children's rights](#)
- [Assessment](#)

Legal matters can often seem like impersonal rules and regulations. So let's start this unit by reading the story of Anna.

Anna's story

The day it became known that I had tested HIV positive everything changed. I was desperate. My husband had died recently and I had two children who I had to look after. So I searched for a job. After struggling for more than two months, often going hungry, I finally found a job in a shoe factory. I was so happy. Now I would be able to buy food and clothes for my children and send them to school.

I had been working in the factory for two months when I started to get ill. I lost a lot of weight and started coughing the whole day. I could barely do my work, but I tried my best. But one day I fainted at work and when I came around the boss told me: "Anna you look ill. You'll need to go to the clinic to test for TB and HIV." "No, I'm okay. I think I just have the flu," I told him.

"You have been coughing for a long time. You need to be tested," he insisted. "I don't want to be tested. I'm too afraid," I told him. "I'm sorry, but if you refuse to be tested I will have to fire you," he told me.

So I went with a heavy heart to our local clinic and ask them to test me. I live in a small rural community and I didn't want to go to the local clinic, but I didn't have the money to go to town. I was so ashamed. Soon everybody started regarding me with suspicion and I knew that they all knew that I have taken an HIV test. I was too afraid to go to work, but I went anyway, because I needed the money.

After two weeks I was still coughing and felt weaker every day. One day during our lunch hour the boss called me to his office. When I came to his office I saw that the nurse from the clinic was also sitting there. They had grave expressions on their faces. I just knew. Before they could say anything, I knew. "Anna," my boss said, "we have some very bad news for you. The nurse told me that you have tested positive for both TB and HIV." I started crying. Was I going to die? What will happen to my children? Is the factory going to fire me? I just didn't know what to do.

As I was crying the nurse came to me and held me. In a soothing voice she said: "Don't cry Anna. We will take care of you. We will treat the TB and put you on ARVs and soon you will feel much better." But I kept on crying, because I knew that everything would change, nonetheless. "Yes, you can keep your job," my boss said, "We will give you a separate room in which you can stitch shoes and you will be able to work happily by yourself without anybody bothering you." "You see, everything will be okay," the nurse said.

When I returned to work after six months from the TB hospital in the city, my boss called everybody in the factory together to welcome me back: "We are glad that Anna is back with us and that her TB has disappeared and the ARVs are working well. From today she will be working in one of the back rooms and I ask you to be kind to her and not bother her with anything." So I sat all by myself in a small dark room at the back of the factory, crying while I stitched my quota of shoes.

After the first week, when I received my payment, I noticed that it was less than usual. Thinking that it was a mistake, I went to ask my boss about it. "I'm sorry Anna," he said, "but surely you didn't expect to be paid the same amount as the other healthy people?"

"But I stitch the same number of shoes as everybody," I protested. When I said that, he became angry and he shouted at me and told me that I could always resign if I wasn't satisfied with my job. So I kept quiet and left his office, clinging to the envelope with my meagre payment, knowing that I would not be able to

afford my house any longer. I would have to build myself a shack on the outskirts of town.

Two weeks later, after I had erected a shack from cardboard and pieces of rusted corrugated iron, the head mistress of the Kindergarten, where my youngest daughter was, called me. “We’re sorry, but we can’t take Miriam any longer,” she told me. “What’s wrong,” I asked, “I paid every month, even while I was away.” “I’m sorry, one of our teachers is going away, so we cannot accommodate her any longer,” she replied. I knew that it wasn’t true, but I also knew that I could say nothing to convince her.

As we walked home, I took Miriam’s small hand and I wondered how I was going to explain to her that she wasn’t going to be able to go to school any longer or see her friends anymore.

Place yourself for a moment in Anna’s shoes. How would you feel if you were treated like this, if you were suddenly treated like a second-rate person? How would you feel with no right to privacy, receiving less payment than other workers and with your child being kicked out of school?

That is why human rights, legal issues and Aids policies are so important. They are to protect people like Anna. Think about Anna, as you read through this learning unit and consider how you, if you had the chance, would defend her rights.

To defend other people’s rights (and your own) you will need a sound knowledge of HIV and Aids policies and laws. In this study unit we will look at people’s rights concerning

- HIV testing
- The workplace
- Women
- Children

Note that this learning unit is based on South African laws and policy. If you are from another country, access the HIV and Aids-related policies in your country, and compare them to South African policies to note similarities and differences. If you have access to the internet, it is very easy to get hold of HIV and Aids policies.

Key questions

Use the following key questions to guide you through this learning unit:

- What are my basic human rights according to the South African Constitution?
- What are the basic rights of people living with HIV and Aids?
- What is the HIV and Aids Charter?
- How do I know that my rights will be respected when I go for HIV testing?
- What are my rights as an HIV-positive employee?
- Are there special legal issues when it comes to the rights of women and children?

[\[NEXT\]](#)

Key concepts

Look out for the following key concepts. Make sure that, after you have completed this learning unit, you know what they refer to and how they are used.

| | |
|--------------------------------------|--|
| Constitution | National Policy on Testing for HIV |
| Bill of Rights | Notifiability |
| HIV and Aids Charter | |

[\[NEXT\]](#)

Basic human rights

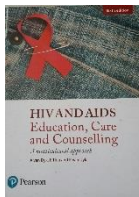
[\[TABLE OF CONTENTS\]](#)

South African legislation and policies are based on basic human rights that apply to all citizens of the country. Learn more about the Constitution and the application of human rights.



Study

Prescribed book: pp. 648-651



Introduction: Read this brief introduction to put HIV and Aids laws and policies into perspective.

Section 22.1: The Constitution and the legal framework. Read about the Bill of Rights as well as the list of basic human rights that apply to all citizens of the country – including those who live with HIV or Aids. You don't have to know names of the laws (Acts) or policies listed in this section. Click on the following link <http://goo.gl/VytDmG> to read the Constitution of South Africa. This link <http://goo.gl/xuT1yz> will tell you more about human rights.

Section 22.2: The basic rights of people living with HIV and Aids. Study the Charter of Rights on Aids and HIV and make sure that you know the rights (but also the responsibilities) of people living with HIV and Aids. Click on the following link <http://goo.gl/dNPYYI> to go to the homepage of the Aids Consortium. Click on the HIV and Aids Charter of Rights and choose from six South African languages.



You have now seen that people living with HIV and Aids have the same basic rights and responsibilities as all other citizens. Under no circumstances may any person, group or organisation discriminate against HIV-positive people. It is against the law.

If you think back to Anna's story, can you list those of her basic human rights which were violated by the clinic, employer and school?

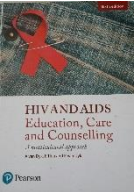

Now that you know what the basic rights of people living with HIV infection and Aids are, let's investigate the National Policy on Testing for HIV.

[\[NEXT\]](#)

National Policy on Testing for HIV

[\[TABLE OF CONTENTS\]](#)

The National Policy on Testing for HIV is a guideline on how and when HIV testing should take place. Read more about it in your prescribed book.

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| <p>Study</p>  | <p>Prescribed book: pp. 652-654</p> <p>Section 22.3: National HIV counselling and testing guidelines. Read through this section and make sure that you will be able to answer the following questions:</p> <ul style="list-style-type: none">• What are the circumstances under which HIV testing may be conducted?• Under which circumstances may HIV testing be conducted without informed consent?• What is meant by proxy consent?• What does the policy say about informed consent, confidentiality and pre- and post-test counselling?• What if a person refuses to receive counselling, or refuses to be tested? <p>Click on this link http://goo.gl/Qs7h3X to read more about the National HIV counselling and testing guidelines.</p> |  |
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Do you feel confident that you will be able to advise a client on their rights in terms of HIV testing?

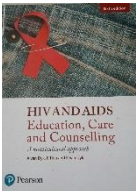

The following section will deal with HIV and Aids and employment. Counsellors and caregivers often work with clients who are disempowered and who do not know their rights in the workplace. This section may help you to give basic assistance to such clients. Note that you do not have to study Section 22.4 – Health Professions Council Ethical Guidelines for Good Practice with regard to HIV. Students who work in the medical field are welcome to read the section for self-enrichment.

[\[NEXT\]](#)

Aids and employment: Code of Good Practice

[\[TABLE OF CONTENTS\]](#)

In this section, we will look at the Code of Good Practice on Key Aspects of HIV and Aids and Employment, which offers guidelines for employers and employees on how to cope with HIV and Aids.

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| <p>Study</p>  | <p>Prescribed book: pp. 661-666</p> <p>Section 22.5: HIV, Aids and employment: Code of Good Practice. Read through this section and make sure that you understand the following:</p> <ul style="list-style-type: none">• What the Code of Good Practice entails.• What the objectives and policy principles of the Code of Good Practice are.• The promotion of a non-discriminatory work environment.• The Code's position on HIV testing, confidentiality and disclosure – how does this relate to Anna's situation?• The Code's position on the promotion of a safe workplace, compensation and employee benefits.• Employers' rights concerning dismissal and grievance procedures when an employee's rights are violated. <p>Click on this link http://goo.gl/l1DoH0 to read more about the South African Labour Guide on HIV and Aids in the workplace. You can also learn more here on the Code of Good Conduct (Practice). The following YouTube video http://goo.gl/lgD0DF is about discrimination in the workplace.</p> |  |
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Do the following activity to test your knowledge on Aids and the law in a practical way.

ACTIVITY 22.1 – CRITICAL EVALUATION OF A WORKPLACE POLICY

Get hold of a workplace policy on HIV and Aids and evaluate the policy in terms of the recognition of basic human rights, the policy on HIV testing, and HIV and Aids-related issues in the workplace. Go to [Activity 22.1](#).

Feedback: Every workplace, big or small, is affected by the HIV and Aids epidemic, and this fact should be reflected in its own workplace policy.

The following section will deal with the rights of women and children – often (but not always!) the most disempowered members of our communities. You do not have to study Section 22.6 – National Policy on HIV and Aids for Learners and Educators. If you are a teacher or educator you are welcome to read this section for self-enrichment.

[\[NEXT\]](#)

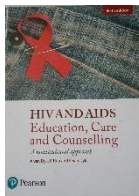
Women's and children's rights

[\[TABLE OF CONTENTS\]](#)

You might wonder why we have a special section for women's and children's rights. Women and children often do not have a voice to fight for their own rights of equality and non-discrimination and, as we know, women are disproportionately affected and infected by HIV. Women's and children's issues are also unique and need separate attention, for example issues such as termination of pregnancy, sterilisation, rape and sex work in the case of women, and the legal age to be tested for HIV or request condoms or termination of pregnancy without parental permission in the case of children, to mention just a few. Go to the prescribed book to learn more.



Study



Prescribed book: pp. 672-678

Section 22.7: Women's rights. Read through this section and make sure that you will be able to advise clients on the following:

- Termination of pregnancy.
- Sterilisation.
- Rape and sexual assault.
- Virginit testing.
- Sex workers.

Read the history about South African women's struggle for women's rights from 1900 to 1994 here <http://goo.gl/t5MNgl>

Section 22.8: The rights of children. Make sure that you understand the following about children's rights:

- HIV-related rights of children.
- Male-circumcision.

Look at this link <http://goo.gl/vwOYmn> for a workshop outline on children's rights in the Aids context.

The following link <http://goo.gl/c7uFrf> will tell you more about children and adoption or foster care: Who must be tested for HIV under which circumstances?

Go to the following website <http://www.youthforhumanrights.org/> to download short videos illustrating 30 human rights with specific reference to children and young people. The videos are very useful in schools to make children aware of their rights.

You will find the Children's Act here: <http://goo.gl/weSsBk>



Workplace policies often do not make special reference to women's or children's issues (and in some cases these might not be relevant). Think very critically about these issues when you do the following activity.

ACTIVITY 22.2 – CRITICAL EVALUATION OF A WORKPLACE POLICY ON WOMEN'S AND CHILDREN'S RIGHTS

Critically evaluate the workplace policy that you used for Activity 22.1 on women's and children's rights. Keep Anna's story in mind when you read the policy. Go to [Activity 22.2](#).

Feedback: The school where Anna's daughter was clearly did not have a proper workplace policy to protect HIV positive children.

You are now finished with this learning unit. Click on [Assessment](#) to do some self-assessment questions.

Study reflection

After completing Learning Unit 22 (Aids and the law), you should have acquired the following knowledge and understanding and be able to:

- Advise a client or patient about their rights in the following circumstances:
 - when they go for HIV testing
 - in the workplace
 - in their dealings with health care institutions
- Advise women on their rights about the termination of pregnancy.
- Assist children and their caregivers to understand children's rights.
- Assist your workplace in developing or evaluating a workplace policy.

Self-Assessment 22



Now is the time to pause briefly and assess whether you have acquired the necessary knowledge and skills. Click on the link [Self-Assessment 22](#) to do a few questions on this learning unit.

You are now finished with the assessment. Go to Learning Unit 23.

Appendices

- Activities
- Assessment
- Glossary

ACTIVITY 22.1 -GET HOLD OF A WORKPLACE HIV AND AIDS POLICY

Get hold of your own workplace's HIV and Aids policy, or Google the words "HIV and Aids policy" on the internet to search for workplace policies. To help you a bit, here is one example of a workplace policy: Pfizer: <http://goo.gl/QSn3bZ>

Print the policies and keep it at hand to answer the following questions:

1. Read through your workplace policy and give special attention to the recognition of basic human rights in this policy. Make notes and indicate to what extent the workplace policy takes the human rights of its employees or students into account.
2. To what extent does the policy honour the principles of the National Policy on Testing for HIV? Think back on Anna's story. Could her employer insist that she be tested? What were her rights? Could he have fired her if she refused to be tested?
3. All workplace policies must deal with HIV testing in the workplace. To what extent does your policy comply with the National Policy on Testing for HIV? Find out by doing the following:
 - a. Take a pencil and underline all the sections in your workplace policy that have to do with HIV testing.
 - b. Go to your prescribed book and make a summary of all the main points in the National Policy on Testing for HIV.
 - c. Go back to your policy and critically evaluate how well it complies with the National Policy.
 - d. Make notes of possible shortcomings in your workplace policy. (For example, does the policy state whether the company offers HCT (HIV counselling and testing)? If it does, does it make provision for referrals and treatment?)
 - e. Would your workplace policy have protected Anna's rights and what difference would it have made?
4. It is now time to evaluate your workplace policy further to see to what extent it takes the Code of Good Practice into account.
 - a. Does the policy recognise the impact of HIV and Aids on the workplace? How?
 - b. Does it promote a non-discriminatory work environment? If yes, exactly what does it say?
 - c. Is HIV testing addressed in the policy? What does it say about testing?
 - d. Does the policy explicitly say that nobody can be asked to undergo an HIV test?
 - e. What does the policy say about informed consent, confidentiality and disclosure?
 - f. Does the policy include guidelines on the promotion and maintenance of a safe working environment?
 - g. Does the policy have guidelines for compensation for occupationally acquired HIV?
 - h. Does the policy have a non-discriminatory attitude in terms of employee benefits?
 - i. What is the policy on dismissal of employees with Aids?
 - j. How could this policy have made a difference to Anna's situation?

FEEDBACK ACTIVITY 22.1

It is important to be very critical when you read a workplace policy. Don't just assume that the policymakers took all the important aspects into consideration.

Could you find any omissions in the policy you evaluated? If so, was it merely an oversight that can be easily corrected, or do you think that there was ill intent based on prejudiced attitudes? How old is the policy? Does it take important developments in the field (like availability of ARVs in the public sector) into account? Does it also make provision for the loved ones of HIV-infected employees? If you found omissions, how can they be corrected in the policy?

[\[BACK\]](#)

ACTIVITY 22.2 - CRITICAL EVALUATION OF THE WORKPLACE POLICY ON WOMEN'S AND CHILDREN'S RIGHTS

Critically evaluate your workplace policy (see Activity 22.1) to see if it makes any reference to women's and children's rights. Does it, for example, refer to issues such as the following?

- Sexual harassment in the workplace.
- Rape in the workplace.
- Provision for HIV testing and post-exposure prophylaxis.
- Prevention of mother-to-child transmission of HIV.
- Discrimination against women in the workplace.
- Proper care for children of women employees.

How could the policy be changed, if necessary, to have made sure that Anna would not have been discriminated against in the workplace? For example, does it explicitly prohibit any separation measures? Does it deal with any violations of privacy?

[\[FEEDBACK\]](#)

FEEDBACK ACTIVITY 22.2

Many workplace policies do not specifically make provision for the rights of women and, although we are all humans, women have certain challenges and needs and provision for these gender-specific needs must be made. Do organisations that look after children have a policy to protect these children in their care?

[\[BACK\]](#)

SELF-ASSESSMENT 22

Question 1

Before Mabel was diagnosed as HIV positive she worked as a cashier at the local grocery store. After her HIV positive test result, she was legally obliged to:

1. keep her HIV status unknown to the customers of the shop.
2. immediately inform her employer about her HIV status.
3. take basic hygienic precautions to prevent infecting her co-workers, for example, by properly disposing of menstrual pads and any clothing containing blood.
4. keep quiet about her HIV status to protect her family and children.

Question 2

After a while Mabel decided to inform her employer about her HIV positive status. In terms of the South African law her employer could:

1. discontinue her service as long as he paid her proper compensation – for example, three months' salary.
2. not fire her as long as she could do her work, or continue with other work in the shop if she could no longer do her current job as cashier.
3. immediately transfer her to another part of the shop and offer her a lower salary.
4. fire her if her co-workers refused to work with her because she is HIV positive.

Question 3

When Nwabisa first started to feel sick, she decided to have an HIV test done at her local clinic. On the wall of the clinic was a written notice stating that it would be accepted that all patients coming for treatment had given their consent for an HIV test. According to the law this is:

1. illegal, because not all people can read.
2. legal, because it is the responsibility of all patients to ensure that they take notice of all notices and forms that they sign.
3. illegal, because although the hospital ensured Nwabisa's informed consent through the notice, they did not ask her to sign a consent form.
4. legal, because the patients are formally informed about the tests.

Question 4

What does Section 12 of the Children's Act say about virginity testing? Do you think the law is general knowledge and that people abide by it?

Question 5

Complete the following sentence: A child may consent to his or her own medical treatment if the child is over the age of And if the child is of sufficient and has the This means that this child may consent to,, and

FEEDBACK 22

Feedback Question 1

The correct answer is 3. Mabel has no legal obligations to tell anyone that she is HIV positive. As a cashier, there is no possibility that she will infect someone in the course of her work. What the law does require from her is to take basic hygienic precautions to prevent infecting her co-workers, for example, by properly disposing of menstrual pads and any clothing containing blood (if such a situation should ever arise).

Feedback Question 2

The correct answer is 2. The boss could not fire her as long as she could do her work, or continue with other work in the shop if she could no longer do her current job as cashier. All the other alternatives constitute unlawful behaviour.

Feedback Question 3

The correct answer is 1. It is not enough for hospitals or clinics to put a notice on the wall and to assume that all people will read it, or can read it.

Feedback Question 4

A child who is older than 16 years of age must give written and signed consent to undergo a virginity test. The consent form must also be signed by the person conducting the virginity test and official proof of the child's age must be attached to this form.

Feedback Question 5

The paragraph should read:

A child may consent to his or her own medical or surgical treatment if the child is over the age of **12 years** and if the child is of sufficient **maturity** and has the **mental capacity to understand the benefits, risks, social implications and other implications of the treatment or surgical procedure.** This means that this child may consent to **HIV testing, ARV treatment, treatment for STIs** and **may ask for condoms or other forms of contraception.**

[\[BACK\]](#)

Constitution

The South African Constitution is the supreme law of the country and all other laws must comply with its provisions.

[\[BACK\]](#)

Bill of Rights

The Constitution includes a Bill of Rights which lists the basic human rights that apply to all citizens.

[\[BACK\]](#)

HIV and Aids Charter

The HIV and Aids Charter sets out basic human rights which should be enjoyed by all people and should not be denied to persons infected with and affected by HIV and Aids.

[\[BACK\]](#)

National Policy on Testing for HIV

The National HIV counselling and testing policy provides guidelines on how and when HIV testing should take place. It gives guidelines on the duties of healthcare workers and the rights of people considering HIV testing.

[\[BACK\]](#)

Notifiability

A notifiable disease is a highly contagious disease with a short incubation period that should be reported to the Department of Health so that further spread of the disease can be prevented (e.g. cholera and ebola). HIV-infection is NOT a notifiable disease.

[\[BACK\]](#)