

HIV/AIDS and the Law in South Africa: The
Legislative Responses to HIV/AIDS in Employment Law
and their impact in the Workplace. A Case Study of the
Durban Metropolitan Unicity Municipality.

By
Renay Krishna

HIV/AIDS and the Law in South Africa: The
Legislative Responses to HIV/AIDS in Employment Law
and their impact in the Workplace. A Case Study of the
Durban Metropolitan Unicity Municipality.

By
Renay Krishna

Submitted in partial fulfilment of the requirements for the degree of
Masters in Social Science in the School of Development Studies,
University of Natal, Durban.

Durban, 2001

DECLARATION

I declare that this dissertation is my own work. It has not been submitted for any other degree or examination at this or any other university.

ABSTRACT

This research focused on the legal response to the HIV/AIDS epidemic in South Africa. The response adopted by the South African legislators embraces the protective model of the law. The philosophy underpinning this legislation is to engender respect for individuals and to promote human rights and in the context of HIV/AIDS, reduce the presence of stigmas and discrimination. Such an approach is commendable however in South Africa given the nature and extent of the crisis a more proactive legal response is required. Such a response is encapsulated within the empowerment model of legislation. The aim of this research was to demonstrate the need for such an approach in a work environment. In order to do so, a study of the Durban Metropolitan Unicity Municipality was undertaken. As a public institution such an entity is obliged to follow all employment laws and guidelines. This characteristic ensures that problems and advantages that arise regarding the implementation of protective legislation can be easily ascertained.

The research was conducted by using a case study approach within a qualitative research methodology. The snowball method of sampling was relied on for obtaining respondents and the data collection technique adopted was interviewing specifically, semi-structured interviewing. Members of the Durban Metropolitan Unicity Municipality were interviewed on the primary aspects of its workplace policy on HIV/AIDS, which is based on the guiding principles of the protective employment laws of South Africa.

The main findings of this research suggest that the protective model of legislation has not achieved a noteworthy level of success in the workplace of the Durban Metropolitan Unicity Municipality. This finding is derived from the low levels of awareness of employment legislation and the workplace policy, high incidence of discrimination prevalent and stigmas still attached to one's HIV/AIDS status, and general dissatisfaction with specific provisions of the workplace policy that are based on the principles of protective employment legislation. An alternative legal response was advocated namely, the empowerment model of legislation which is much more proactive in its application. This model of law focuses on the legal empowerment of people and is conducive to stimulating positive social changes.

To the memory of my Father and for my Husband Nirvaan. Thank you.

ACKNOWLEDGEMENTS

- These words cannot entirely convey my gratitude to my husband, Nirvaan Sookayee. Thank you for everything that you have done for me in making this degree and dissertation achievable. Your advice and wisdom was truly indispensable and your love and care was truly appreciated.
- I thank my mother for her emotional, spiritual and financial contribution that she has given me during all my years of studying at university. Without this, I would not have come so far.
- To my Supervisor, Julian May, I can only marvel at his endless patience, his strong guidance and very insightful comments. I wish to thank him for all that he done to bring about this dissertation.
- I wish to thank all the people at the eThekweni Municipality, who willingly participated in this study and who so generously gave their time and contributions.
- The financial assistance of the National Research Foundation (NRF) towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at, are those of the author and are not necessarily to be attributed to the National Research Foundation.

TABLE OF CONTENTS

<i>Contents</i>	<i>Page No.</i>
Chapter One	
Introduction	1
1.1 HIV/AIDS and the Law	2
1.2 HIV/AIDS and the Law in South Africa	4
1.3 Research Statement	5
1.4 Methodology	8
1.4.1 The Research Site	8
1.4.2 Research Methods	9
1.4.3 Limitations of the Research	10
1.5 Structure of the Research	10
Chapter Two	
Analytical Framework	12
2.1 Introduction	12
2.2 Coercive Model of Legislation	12
2.3 Protective Model of Legislation	16
2.3.1 Human Rights	17
2.4 Stigmas and Discrimination	21
2.5 Empowerment Model of Legislation	23
2.6 Conclusion	29
Chapter Three	
HIV/AIDS Employment Laws in South Africa	30
3.1 Introduction	30
3.2 The Constitution of the Republic of South Africa	30
3.2.1 The Right to Equality	31
3.2.2 The Right to Human Dignity	35
3.2.3 The Right to Privacy	36
3.3 Problems with the Constitution	39
3.4 The Employment Equity Act No. 55 of 1998	40
3.4.1 HIV/AIDS Testing	41
3.5 The Labour Relations Act No. 66 of 1995	44
3.6 Occupational Health and Safety Act No. 85 of 1993	45
3.7 Compensation for Occupation Injuries and Diseases Act No. 130 of 1993	45
3.8 The Medical Schemes Act No. 131 of 1998	46
3.9 The Code of Good Practice on Key Aspects of HIV/AIDS and Employment	46
3.10 Problems with the Protective Model of Legislation	47
3.11 Conclusion	51

Chapter Four

Research Site, Process and Methodology	52
4.1 Introduction	52
4.2 Political Context of HIV/AIDS in South Africa	52
4.3 HIV/AIDS in KwaZulu-Natal	54
4.4 The Unicity's Response to HIV/AIDS in KwaZulu-Natal	57
4.5 Demographic Profile of the Unicity	59
4.6 The Research Process	62
4.6.1 Establishing Contact with the Unicity	62
4.6.2 Total Number of Respondents Interviewed	63
4.7 Methodology	64
4.7.1 Basis for the use of Qualitative Research Methodology	64
4.7.2 The Case Study Approach	65
4.7.3 Sampling Strategy for Qualitative Research: Snowballing	66
4.7.4 Data Collection Technique: Interviewing	67
4.7.5 Semi-Structured Interviews	68
4.7.6 Email Interviews	69
4.7.7 Open Ended Questions	70
4.8 Research Ethics	71
4.9 Conclusion	73

Chapter Five

Analysis of Data	74
5.1 Introduction	74
5.2 The Unicity's HIV/AIDS Workplace Policy	74
5.3 Intervention Programmes	75
5.4 Discussion and Analysis of Data	77
5.4.1 Knowledge of Workplace Discrimination	77
5.4.2 Knowledge of Workplace Policy	79
5.4.3 Knowledge of HIV/AIDS Employment Legislation	81
5.4.4 Accessibility and Comprehension of Legislation	83
5.5 Provisions of the Unicity's Workplace Policy	85
5.5.1 Pre-employment and On-the-job Testing	85
5.5.2 Confidentiality	91
5.5.3 Job Status	93
5.6 Feasibility and Sustainability of Policy	95
5.7 Trade Union Representatives	98
5.8 Conclusion	100

Chapter Six

Conclusions and Recommendations	102
6.1 Introduction	102
6.2 Summary of Chapters	102
6.3 Summary of Research Findings	104
6.4 Recommendations	109
6.4.1 Empowerment	109

6.4.2	The Australian Example	110
6.5	Legal Empowerment	111
6.5.1	Legal Awareness	112
6.5.2	Legal Literacy	112
6.6	Legal Empowerment in the Workplace	113
6.5	Conclusion	114
Bibliography		116
Appendix 'A'		123

ACTS AND CASES

Acts

Code of Good Practice on Key Aspects of HIV/AIDS and Employment
Compensation for Occupational Injuries and Diseases Act No. 130 of 1993
Constitution of the Republic of South Africa, Act No. 108 of 1996
Criminal Procedure Act No. 51 of 1977
Employment Equity Act No. 55 of 1998
Labour Relations Act No. 66 of 1995
Medical Schemes Act No. 131 of 1998
Occupational Health and Safety Act No. 85 of 1993

Cases

A v South African Airways (Pty) Ltd, Case J1916/99; AIDS Law Project
C v Minister of Correctional Services 1996 (4) SA 282 (T)
Hoffmann v South African Airways 2001 (1) SA 1 (CC)
Jansen van Vuuren and another NNO v Kruger 1993 (4) SA 842
National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (6) BCLR
726 (W)
X v Y (1988) 2 ALL ER 648

CHAPTER ONE

Introduction

HIV/AIDS has become more than just a disease and spreading out from its medical effects and the widespread fear they have invoked are social, economic and legal ramifications that pose challenges of their own (Bartlett, 1988). In South Africa the epidemic has given rise to an enormous amount of controversy to the extent of being labelled a 'political disease' (Makhanya, 2000). However, amidst the controversy a significant number of men, women and children are dying each year. The majority of these people are Black and live under conditions of rural and urban poverty. It has been estimated by UNAIDS that in 2000, 19.9% of adults were infected by the epidemic, from 12.9% two years previously. With an estimated total of 4.2 million infected, South Africa is said to have more people living with HIV/AIDS than any other country.

The escalation in the incidence of HIV/AIDS will increasingly affect the demographic profile of South Africa, since the deaths and illnesses of people who are in their reproductive years may reduce fertility rates, which in turn could further alter the structure of the population (Loewenson and Whitside, 1998). Furthermore, the death of economically active adults, which has steadily increased from less than 10% of deaths in 1995/96 to 40% in 2000/01, may have severe economic and social implications at the household level (Dorrington et al, 2001). Since the onset of the epidemic, more than 500 000 South Africans have died of AIDS-related causes. This number is projected to increase by the year 2015 by a factor of 20, to more than 10 million deaths (Arndt and Lewis, 2000). This may have serious implications with regard to development in South Africa defined in terms of economic growth and socio-economic indicators such as longevity, standard of living, infant mortality and the distribution of income (Loewenson and Whitside, 1998).

The debilitating and destabilising effects that HIV/AIDS will have on South African society is frightening given the magnitude of the crisis. Also, given the low probability of discovering an AIDS vaccine in time and making it accessible to infected populations, South Africa's only hope lies in devising more effective

response strategies. Without more effective response strategies and massive behavioural and societal change or an effective vaccine, HIV/AIDS will continue to spread in South Africa reaching staggering levels of infection, death, human suffering, and social disorder. Studies of the social and economic implications of HIV/AIDS show that just as the virus eats away at the immune system of human beings, the pandemic as a whole eats away at the hard won gains in the working and living conditions of communities and ultimately, nations. Such deterioration is particularly grave for developing countries where its impact is aggravated by a weak economic base, high unemployment and pervasive poverty (Hodges-Aeberhard, 1999). In South Africa numerous factors are responsible for the spread of the epidemic. It is well established that socio-economic circumstances heavily influence disease patterns. In this country, HIV/AIDS thrives in environments of poverty, high inequality, rapid urbanisation, violence and destabilisation (May, 1998). The transmission of the epidemic is exacerbated by disparities in resources and patterns of migration from rural to urban areas. Certain groups and women particularly are vulnerable to infection in cultures and economic circumstances where they have little control over their lives. As a consequence, HIV/AIDS presents a unique set of health, social, economic and political challenges. Recently, legal concerns have been brought to the forefront as a possible mechanism to address the affects of HIV/AIDS. The delineation of legal rights and obligations in the HIV/AIDS epidemic has now become a necessary part of the policy debate.

1.1 HIV/AIDS and the Law

The evaluation of the affects of laws on HIV/AIDS is a relatively recent development. Its growing importance is related to changes in the form of legislation. Modern legislation has taken the form of programmes that are targeted to achieve certain goals (Albertyn, 2000). In these circumstances, the proper application of legal norms alone is no longer sufficient. It is also necessary to verify whether the goals pursued are actually attained. For this purpose, the effects of the legislation must be evaluated to draw the necessary conclusions and to proceed to modifications, where necessary. Therefore, the traditional verification of the legality of legislation is gradually being accompanied or combined with the evaluation of the effects of legislation (Albertyn,

2000). Evaluation of legislation therefore means the assessment of the foreseeable or actual impact of laws to clarify the extent to which the actual impact is consistent with the stated objectives, to identify undesirable effects and to assess the coherency of the means used to attain the objectives (Albertyn, 2000).

One of the responses to HIV/AIDS has been an 'epidemic' of laws and policies. In 1991, the World Health Organisation listed 583 laws and regulations concerning HIV infection and AIDS from different countries. To this, more than 170 laws from the United States had to be added. The effectiveness of this legal response has been called in question. In the words of Justice Kirby¹, this 'juridical outburst,' while it may have solved some problems has caused the appearance of 'a new virus, HUL, for highly useless laws' (Kirby, 1988: 304). Cotterrell (1984) notes that law has come to be recognised as an agency of power, an instrument of government. Since government is centralised in the State, laws appear exclusively as the law of the State. This brings into question the nature and role of the State in terms of HIV/AIDS laws.

Virtually every country in the world has introduced laws designed to reduce the spread of the epidemic and to deal with its various social consequences. However, the effectiveness of this legal response is questionable. For example, in the United States it is generally agreed that many of the legal or policy responses to HIV/AIDS are useless and often can be harmful and counterproductive because instead of being based on an understanding of the medical issues, they are driven more by fear and the resulting public demand for action than by medical research and its findings (Hermann, 1991). Generally, a tension is seen to exist between 'responsible legislators and jurists, who continually insist that statutes, regulations, and judicial opinions reflect the best understanding provided by medical and scientific authorities, and those who show a willingness to practice demagoguery by placating or stimulating false and irrational fears through proposed enactments or decisions that ignore established medical evidence' (Hermann, 1991: 277). More recently, many western nations have adopted legislation that provides people who are infected with HIV/AIDS with protective measures. This response has also been called into question, to the extent of being called 'tokenistic' (Pereira, 1996). It has been contended that

¹ Justice Kirby is the President of the Court of Appeal, Supreme Court of New South Wales, Australia.

these laws do not afford affected people substantive protection, instead the mere fact that such laws exists, are viewed as been sufficient in itself (Pereira, 1996).

This research intends to examine these legal responses, so as to determine the accuracy of the above-mentioned observations made by Justice Kirby on the ineffectiveness of the legal responses to HIV/AIDS. Using a case study of the Durban Metropolitan Unicity Municipality (the 'Unicity'), the study questions whether employment legislation that has been enacted thus far in South Africa is effective in terms of it attaining its stated objectives. The link between HIV/AIDS legislation and the continuous spread of HIV/AIDS also need to be explored in all situations. This study however, will be undertaken within a specific context namely, in the workplace. Given the demographic profile of people who are infected, of those most at risk to infection and the increasing rate of unemployment in South Africa, it has become increasingly clear that HIV/AIDS does and will impact directly and indirectly on all aspects of the 'world of work' (Heywood, 2000: 1).

1.2 HIV/AIDS and the Law in South Africa

A review of government's actions shows that in South Africa emphasis has gradually been placed on the rational nature of people and their fundamental rights and where non-coercive measures, such as education, information, voluntary testing, counselling and voluntary behavioural change, accompanied by anti-discrimination legislation, is promoted. This is evident by the importance that has been placed on information and education about HIV/AIDS and on the rights of people infected. As early as 1988, a national AIDS Prevention Programme and an AIDS Advisory Group were established, while a massive education and information campaign was launched and leaflets in nine languages as well as free condoms were distributed (Van Wyk, 2000). In 1990 an inter-departmental AIDS committee was brought into existence which had to finalise a national strategy, while in 1993 a special project committee was set up by the South African Law Commission to investigate the legal aspects of HIV/AIDS with a view to possible law reform (Heywood, 2000).

Government demonstrated its commitment in 1993 by directing that a policy aimed at preventing foreigners and immigrants with HIV/AIDS from entering South Africa be

abandoned. Since 1994, the new government has continued with these efforts by establishing an Inter-Ministerial Committee on HIV/AIDS, the launch of the 'Partnership Against AIDS' in 1998 and the creation of a National AIDS Council (Van Wyk, 2000). This approach is also reflected in for example, the schools policy on HIV/AIDS which was introduced by the Department of Education and which confirms the principle of no unfair discrimination against learners with HIV/AIDS. Numerous laws and policies were also adopted prohibiting the unfair discrimination against people with HIV/AIDS in the employment sector. So far, the legislature has concentrated on how the law can protect individuals or classes of individuals from harmful and undesirable occurrences. Consequently, legal tools such as human rights and anti-discrimination legislation that manifest the protective role of the law have been propounded and adopted as sensible and capable ways in which the law can aid in the fight against the epidemic.

1.3 Research Statement

South Africa's response to the epidemic has predominantly drawn on the protective role of the law, which is premised on the importance of human rights. In the employment context, legislation has been promulgated to ensure that employees' rights and interests are protected, prohibiting certain conduct on the part of employers. The philosophy underpinning this legislation is to engender respect for individuals and to promote human rights. Such legislation also forms the foundation of individual HIV/AIDS workplace policy. Even though this approach is crucial in the fight against the epidemic and is one step ahead of many countries, it is insufficient by itself. This is so because the emphasis on rights individualises problems and mystifies the broader social and economic context in which rights are violated (Albertyn, 2000). In South Africa HIV/AIDS cannot be fought within such a context. Furthermore, despite the emphasis placed by the South African legislators on the protective model of legislation there has been insufficient attention placed on implementing such views in the workplace (Heywood, 2000). In South Africa, given the nature and extent of the crisis a more proactive legal response is required that is conducive towards fostering a workplace environment that encourages employers and employees to be constantly mindful of HIV/AIDS in the workplace. Also, given the social context of the epidemic the legal response need to change underlying values and patterns of social

interaction that give rise to vulnerability to the threat of HIV/AIDS infection. In order to investigate the above statements, the following key questions will be posed to members of the Unicity:

How effective is the protective model of legislation in the workplace?

This can be gleaned by examining the extent of workplace discrimination towards colleagues who have HIV/AIDS and the extent of stigmas in the workplace. The prevalence of discrimination in the work environment is one indication of the success of the protective model of legislation. Furthermore, it would also provide an indication of the work that needs to be done in order to eliminate workplace discrimination. The presence of stigmas discourages openness about one's HIV/AIDS status. Therefore the protective model of law with its focus on human rights ought to encourage openness by eliminating the presence of stigmas in the workplace.

Are members of the Unicity aware of protective employment legislation?

The level and extent of the awareness of legislation among these groups indicate the importance that has been attached to such legislation in the workplace. Awareness of legislation is linked to one's understanding of it. People may be aware of legislation yet may not understand what it conveys. Therefore, it is also important to look at whether people understand protective legislation in terms of its comprehensibility to people for whom it is intended.

Are members of the Unicity aware of the Unicity's HIV/AIDS workplace policy and what it entails?

The Unicity's workplace policy is an internally formulated policy, which is based on the guiding principles of national HIV/AIDS employment legislation. It would appear to be obvious that all of its members would be aware of the policy since internal members undertook the process of formulating it.

Do members of the Unicity agree with the provisions of the Unicity's HIV/AIDS workplace policy?

Since the workplace policy is based on national HIV/AIDS legislation, the opinions and beliefs of members would provide a valuable insight on whether such legislation is accepted and approved. Furthermore, this will also reveal the extent to which the

provisions in the workplace policy is accepted and approved by people who are directly affected by it. Whether the provisions of the workplace policy can be effectively sustained will also be determined.

What are some of the implementation programmes that are pursued at the Unicity and how successful are they?

Successful implementation programmes indicate the commitment given to fighting HIV/AIDS and its effects, as well as the importance that is placed on doing so. Previously, it was noted that insufficient attention has been placed on implementing the protective model of law in South Africa. Whether this applies to the Unicity will be investigated. Members' knowledge of and participation in these programmes as well as their participation in the formulation of them, will also be discerned. The extent to which employees contributed to this process determines their attitude and respect toward the policy and more importantly, towards people with HIV/AIDS. Furthermore, they are much more likely to conform to it.

Do members of the Unicity believe that the protective model of legislation is sustainable in the workplace?

The opinions of the members of the Unicity regarding the approach adopted by the legislature is invaluable in determining whether this approach will be sustainable and feasible. Also, whether the need for an empowering model of legislation has become self-evident, can be gathered from the responses of the members.

It is hoped that such questions would lend themselves to the proper evaluation of the approach adopted by the South African legislators, via a public institution. With the epidemic continuing to spread at alarming rates in many parts of South Africa and in the world, it is important that HIV/AIDS policy in the 21st century is capable of dealing with the challenges facing it.

1.4 Methodology

1.4.1 The research site

This study focuses on a government institution namely, the Durban Metropolitan Unicity Municipality, recently renamed as the eThekweni Municipality. In this research it will be referred to as the 'Unicity', a word used to describe one unified local government authority for Durban. The Unicity is obliged to follow all laws and policies promulgated by the government. Local government in South Africa has undergone a process of transformation in terms of political representation, institutional organisation, and the allocation of powers and duties across different levels of government. The transformation has further led to more than 60 administrative bodies in the Durban area merging into one body that is responsible for the overall planning and management of the Durban area.

The Durban Unicity, among its diverse roles functions as an employer. Consequently, various rights and obligations flow from this role with regard to HIV/AIDS in the workplace. Also, an assumption is made that unlike the private and informal sector, a government institution that employs a large number of employees should and does indeed comply with all the relevant employment laws of South Africa. Therefore, the problems that may result as a consequence of the implementation of HIV/AIDS employment laws can be readily ascertained and the reasons for this can be easily gleaned. Thus, the effectiveness and success of employment legislation on HIV/AIDS may be determined via a government institution that is obliged to obey all employment legislation. A further advantage to be gained by using a government institution which is obliged to implement intervention programmes, is that it allows for such programmes to be assessed in terms of its commitment to fighting HIV/AIDS in the workplace. It may well be that an institution of this size and nature has incorporated all the laws and policies on HIV/AIDS in their individual workplace policy, yet may lack intervention programmes. As a result of this, workplace HIV/AIDS policies become superfluous. A knowledge of non-intervention is essential to determine the effectiveness of the legal responses to HIV/AIDS in the workplace.

1.4.2 Research Methods

This study was conducted by using a case study approach within a qualitative research methodology. The value of using this methodology lies in its usage of a naturalistic approach that seeks to understand phenomena in context-specific settings (Patton, 1990). Given the fact that this study was aimed at discerning the effects of a rights-based approach to HIV/AIDS, in-depth information that would provide for holistic descriptions and explanations of a contemporary phenomenon were sought as opposed to purely objective predictions.

The research method that was adopted in this study is the case study method which approach is widely used in the social sciences (Harber, 1998). This is 'an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident' (Yin, 1984: 13).

A sample of 40 people was interviewed comprising of manager, employees and trade union representatives. Respondents were recruited using a selective snowballing approach. According to Faugier and Sargeant (1997), snowball sampling is particularly useful when the research explores sensitive matters that require knowledge of 'insiders' to locate people. For that reason, the process is best used in situations where the phenomenon being studied itself leads to open and available social networks. It is an approach that comprises making contact with an initial group of interviewees known to the researcher. These informants are asked to connect the researcher with other potential informants in their networks, who are then asked to provide further connections to people who meet the criteria for the research. In this manner, the researcher casts a net into an ever-widening chain of people.

The data collection technique employed was interviewing, defined as a verbal exchange wherein an interviewer attempts to access the opinions or beliefs of an informant (Patton, 1990). This was used as the primary strategy for data collection. Semi-structured interviews were used in all of the interviews that took place, except the email interviews, which required open-ended questions. This type of interview

technique was preferred because it is conducted within a fairly open framework which allow for focused, conversational, two-way communication, consequently they can be used both to give and receive information.

1.4.3 Limitations of the Research

By focusing on the Unicity, the findings of this research cannot be strictly generalized. The nature of qualitative research makes it prohibitively costly and time consuming to involve large numbers of participants. Due to the fact that the number of respondents interviewed did not exceed 40, the results are not representative of all municipal employees. Furthermore, the research was conducted during a six-month period therefore, it provides only a point in time in the functioning of the municipality and its implementation of its workplace policy.

1.5 Structure of the Research

The remaining chapters of this study are structured as follows. Chapter two provides an analytical framework for the study. It distinguishes between the various legal responses to HIV/AIDS, which have been incorporated into three general models of the law. Each of these general models are linked to the nature of the State. Underpinning these responses is the recognition that the law operates on different levels which results in different consequences for people with HIV/AIDS.

Chapter three examines the South African legal response in detail. Relevant HIV/AIDS employment laws are described, along with court cases that were decided on the basis of such laws. Most of these cases have established positive precedents in relation to discrimination on the basis of HIV/AIDS. Furthermore, South African HIV/AIDS legislation has progressed beyond most countries in the world in terms of the protection of people with HIV/AIDS. However, the problematic aspects of these laws will also be revealed.

Chapter four describes the prevalence of HIV/AIDS in KwaZulu-Natal. The political context of the epidemic in South Africa will also be discussed. It then goes on to

describe the demographic profile of members of the Unicity and the Unicity itself, as it faces the challenges of HIV/AIDS. Finally, the process that was used to recruit employers, employees and trade union representatives is described.

Chapter five presents the results of the interviews that were undertaken with members of the Unicity. Members comprised of management, employees and trade union representatives. Chapter six reconciles these findings and presents the overall findings and conclusions of the research. Finally, an alternative legal approach that could be adopted in South Africa in response to the HIV/AIDS epidemic is suggested.

CHAPTER TWO

Analytical Framework

2.1 Introduction

It has become prosaic to state that the legal response to HIV/AIDS is important. However, what the legal response should actually be remains contentious. At present several international models exist through which the law can be incorporated into HIV/AIDS policy. These models also reveal the different levels on which the law can operate. Prior to examining these models of legislation it must be borne in mind that before the advent of HIV/AIDS, little attention was paid to the questions raised concerning the relationship of the State to its citizens in the context of epidemic disease, which was seen largely as a thing of the past. Historically, as governments have confronted the challenge of epidemic disease they have tended to rely on policies marked by an authoritarian perspective. The severity of these measures have gradually given way to a culture of human rights and the notion that rights of individuals is a fundamental requirement for justice in society. The next step concerns the empowerment of people who are already infected and those most at risk of infection. These three perspectives have been incorporated into three legislative models of the law, which a country could possibly adopt.

2.2 Coercive Model of Legislation

This model is premised on the fact that despite the global and international changes that have taken place during the last decade, which changes have called into question the sovereignty of the State, the State remains an immensely strong institution (Pierre and Peters, 2000). States retain ultimate sovereignty by virtue of their continuing monopoly of the means of legitimate coercion within their respective territories. According to Albertyn (2000), States in advanced industrial societies generally have expanded the range of their control of the lives of their citizens. In the last quarter century they have extended their reach into areas of private life, such as abortion, the care of children, smoking and domestic violence and have increased powers

concerning the environment, consumer protection, and other spheres. Thus, despite the transformations that have been occurring throughout the world, the State is still a center of considerable political power (Pierre and Peters, 2000).

States have historically exercised direct control in a wide range of sectors of society and the economy. The instruments employed to enforce this control have varied extensively, ranging from deliberative processes of policy making to regulations and tax incentives. According to Linder and Peters (1989), the selection of policy instruments has to a great extent been made in a routine institutionalized fashion than making a careful decision about what instrument is best geared to solve a particular problem. Furthermore adequate debate and discussion that would link the demands of the public directly to policies are not permitted rather, they depend more on one side prevailing over the other. This is witnessed in terms of the State's adoption of coercive policy instruments in the realm of public health. This is explained further by using the coercive model of legislation in relation to HIV/AIDS, which demonstrates a State's regulatory ability in extending its control in the lives of its citizens.

The first model of legislation that will be looked at is that of the traditional proscriptive model that penalises certain forms of conduct. Proscriptive laws entail prohibitions, unlike prescriptive laws which are seen as commands which impose a larger burden on individual freedom and creativity than proscriptive laws. For example, criminal laws are proscriptive norms, that is, they dictate a set of behaviours that are forbidden by society. The laws not only specify the precise nature of the forbidden behaviours but also the penalties that will be imposed if the behaviours occur.

This model evinces the earlier responses to the HIV/AIDS epidemic because of its particular epidemiology in developed countries. Broom (1993) notes that the two groups who were most affected by HIV/AIDS in the west, were homosexual men and injecting drug users, thus people whose sexual or drug using activities constituted a criminal offence. The presence of these criminal sanctions meant that legal concerns were included into the policy debate at the very start. Hence, many countries response to such high-risk activities were framed in the context of legal prohibitions on these activities. It has also been noted that where criminal offences exist in relation to

certain HIV/AIDS risk activities, policies that propose decriminalisation may be 'politically unpalatable' due to public controversy surrounding homosexuality or drug use which may be unrelated to the epidemic (Hamblin, 1991: 2).

This model emphasises coercion and criminalisation and is premised on the fact that the interests of public health require the sacrifice of the rights of those who have contracted HIV/AIDS (Broom, 1993). Furthermore State intervention is witnessed for example, by prescribing compulsory testing for couples to be married or even for the entire population and by demanding quarantine, isolation and criminal sanction, highlighting the individual's responsibilities towards others. It is contended by Van Wyk (2000) that this model probably overestimates the success of State control. This is so because current States have lost most of their direct control. It is contended that State structures have lost considerable leverage over society and this in turn has significantly impaired their overall capacity to act. However, in the context of HIV/AIDS the past decade has witnessed a large number of countries adopting provisions for compulsory reporting of HIV/AIDS, have provided penal sanctions for knowingly spreading the virus, established procedures for mandatory testing and have enacted other proscriptive laws directed particularly at HIV/AIDS (Hamblin, 1991). For example, in Cuba, there exists a mandatory quarantine upon infection despite condemnation by World Health Assembly resolutions (Kirby, 1991). Quarantine was the initial reaction to a public health threat whose scope was unknown, which soon led to semi-isolation for patient's known to be infected. A number of governments have devised coercive measures to criminalise HIV/AIDS transmission. In Zimbabwe, a law has been passed that amends the criminal law to make 'wilful' transmission of HIV a criminal offence (Heywood, 1998). Common features of many Asian and Pacific countries' legislative approaches are actively enforced crimes of prostitution, drug use and vagrancy laws (Kirby, 1991).

According to Hamblin (1991: 2), the coercive nature of such laws, far from encouraging conduct that will reduce the spread of HIV/AIDS 'may actively impede prevention efforts by alienating those people who are at risk of HIV and making it less likely that they will cooperate in prevention measures.' Legislators are urged to be sensitive to not only the direct but the indirect impact of legal sanctions since the specific dimensions of HIV/AIDS infection suggests that proscriptive laws will rarely

be an appropriate policy response if they intend to merely target the conduct of people with HIV/AIDS or activities that give rise to the infection (Hamblin, 1991). This model prescribes the role of law to be negative rather than positive. However, the challenges of HIV/AIDS are such that a capable policy calls for more than a negative prohibition.

According to Williams (1983, cited in Broom, 1993), coercive legislation is particularly applied to criminal conduct, which is described as having two features. First, it must have an element of 'publicness.' It is this element that makes it appropriate for the State to intervene and upon breach act as the complainant. Second, the conduct must involve 'moral wrongdoing.' Expressed at this level of simplicity the definition is fairly uncontroversial. Applied in the context of an infectious disease, the concept of criminalisation must be broadened to coercion, that is, prohibition of certain conduct in the name of public health with a sanction on deprivation of rights for those who contravene it.

Broom (1993) states that the relationship coercion creates is a State with a monopoly on the legitimate exercise of power, controlling those whose actions the State deems warrant control. These people are not only denied any legitimate participation in determining the propriety of their conduct, they are treated as having done something wrong which justifies the deprivation of their rights (Williams, 1983, cited in Broom, 1993). The fact that those acts were often criminal before the advent of the epidemic is purely coincidental however, it contributes to the feeling that those acts must be proscribed and punished immediately (Broom, 1993). Cast in the role of 'villain', given no support or education at a time when they are facing a fatal illness, Broom points out that is not surprising that people infected with HIV/AIDS continue to act in ways that jeopardise the health of others. As has been found in countries in which HIV/AIDS has exploded, criminalisation tends to drive risk activities and the people responsible underground beyond the reach of public health authorities (Kirby, 1996). As a result, it is crucial to remark the dynamic between the State and affected groups which coercive legislation engenders.

Brandt (1998) undertook a study that compared the HIV/AIDS epidemic to earlier epidemics, particularly syphilis in the early twentieth century in the United States.

The common features of HIV/AIDS and syphilis are that both are sexually transmissible, without vaccines, very difficult or impossible to treat and which has severe or fatal consequences. For syphilis, doctors believed that modes of transmission were pens, toothbrushes, towels and beddings and medical procedures (Brandt, 1998). Today, it is known that syphilis is not transmitted by any of those means, yet the belief that such transmission was possible justified massive incursions into the lives of the populous. For example, the United States Navy removed the doorknobs from its battleships during World War I on the grounds that they were a major source of infection of many of its sailors. Brandt argues that theories of casual transmission are indicative of broad social values in the Victorian English-speaking world. Hygiene and purity of body and soul were highly prized. Sexuality was to be expressed only in monogamous relationships sanctified by marriage. Behind these norms were fears about teeming urban masses, the growth of cities and the changing nature of the family. Brandt contends that these norms and fears conditioned the responses to the new perils of syphilis.

2.3 Protective Model of Legislation

The second model uses law in a protective manner and revolves around the importance of rights or human rights within a legal context. Prior to an assessment of this model of legislation, the following discussion briefly looks at the nature of the State as encompassed in this model. Thereafter, the current discourse between human rights and public health policy, particularly on the balancing of the two, will be examined. Public health policy is used since it is in this arena where questions surrounding individual human rights come into sharp focus. Finally, the protective model of law relating to HIV/AIDS will be examined.

In the discussion on the coercive model of legislation the State's powers and abilities are absolute. According to Pierre and Peters (2000: 81), it is much more a matter of 'power over' than 'power to' the people. This means that the State, to a considerable extent could define its own powers. Furthermore, even though the State has extensive exchanges with the surrounding society, it conducts those exchanges largely on its own terms (Pierre and Peters, 2000).

The protective model of legislation is predicated on the assumption that the State is no longer the locus of complete power. Instead, constitutions and other legal frameworks govern State action. The State remains a key role player however, it exercises influence through co-ordination and steering in conjunction with the employment of its resources in various projects (Pierre and Peters, 2000). According to Woodside (1998, in Pierre and Peters, 2000), the emergence of this model has seen the State place less reliance on coercive policy instruments and begins instead to rely on more subtle techniques of imposing or conveying its will on the surrounding society. Posner (1998) attributes this to the massive decentralisation that is taking place throughout most of the western world, which in turn has led to the State having less need to control its populace in detail compared to a decade ago or because it is less able to exercise tight control. In the first coercive model the centrality of the State is taken for granted, whereas this perspective views the State as deliberately relaxing its organisational cohesion so as to enable different segments of the State to develop their own forms of exchange with societal actors, in order to meet the challenges of modern day governance (Pierre and Peters, 2000).

2.3.1 Human Rights

Protective laws are based on the inviolable human rights of people. These rights are derived from a democratic system of government with in most cases, an entrenched constitution. Here, the relationship envisaged between the State and the citizen is not simply a power relationship. Rather than State power the consent of the governed is the defining characteristic of the relationship (De Waal et al, 2000). Constitutionalism is the idea that governments should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution (De Waal et al, 2000). Sejersted (1993) notes that constitutionalism was first and foremost a logical development in the attempt to limit the power of the State vis-à-vis society, while democracy sought to mobilise society to exercise State power. Some of the contradictions that emerge when human rights, derived from a constitutional democracy are confronted against public health policies are examined further down.

A human rights dimension has also been adopted in the field of development studies. In 1998, the United Nations Secretary-General launched a broad human rights

approach to development, which was intended to help governments and development agencies redirect their development thinking. This approach has been defined as one that 'describes situations not simply in terms of human needs, or of development requirements, but in terms of society's obligations to respond to the inalienable rights of individuals. It enables people to demand justice as a right, not as charity, and gives communities a moral basis from which to claim international assistance where needed' (Annan, 1998: 1). The main legal responsibility for national development rests with national government, with the international community aiding with financial and technical assistance to governments and non-governmental organizations while also supporting the development of civil society. This is said to be necessary to enable communities to demand the efficient, effective and equitable use of these resources as a right. Thus, human rights spans the full range of civil, political, economic, social, and cultural rights.

All governmental policies in general and health policies in particular have the potential to burden human rights to a greater or lesser degree, whether by restricting freedoms, discriminating against individuals or population groups or other mechanisms (Bayer, 1992). While the protection of public health may in some cases outweigh concerns relating to human rights burdens, there are many instances where human rights are needlessly infringed. Bayer argues that public health policies are sometimes formulated without careful consideration of the goals of the policy, whether the means adopted will achieve those goals and whether intended health benefits outweigh financial and human rights burdens. In particular, public health policies are seldom drafted with attention to their impact on human rights or the norms of international human rights law (Mann, 1993).

Prior to the HIV/AIDS epidemic the link between health policies and human rights was rarely drawn. Indeed, public health which traditionally has employed measures that can be coercive, compulsory, and restrictive, has often been considered as one of the legitimate grounds for restricting human right (Gruskin, 1998). The HIV/AIDS epidemic heightened the need to explore the nexus between health policies and human rights because of the common initial response to the epidemic, which was very much in the tradition of public health in tackling a communicable disease that is, imposed

coercive measures such as identifying infected individuals who were then labeled as carriers and subjected to isolation and quarantine (Gruskin, 1998).

The disease also quickly became associated with certain population groups such as homosexuals, commercial sex workers, refugees, or migrant workers, who in most cases already are marginalised within society. Blame and fear spurred many of the initial HIV/AIDS policies and interventions (Burris, 1999). Groups that often lacked a voice in the political and policymaking realm became easy targets for coercive and restrictive measures (Broom, 1993). This phenomenon precipitated the mobilisation of human rights groups and activists who questioned the effectiveness of such measures and sought to find alternative means of containing the spread of HIV/AIDS. The early stage of the epidemic was characterised by confrontation between the public health and human rights communities. The relationship between human rights and HIV/AIDS however, has evolved in the last two decades.

The role of law in HIV/AIDS policy focuses upon how it can protect people living with HIV/AIDS from discrimination, breaches of confidentiality and other harmful and undesirable occurrences. As noted above criminal law is used sparingly to effect behavioural changes. This is to be found in the majority of liberal western democratic nations (Bayer, 1992). Hamblin (1991) contends that this approach of the law has been of central importance in the context of the legal responses to HIV/AIDS due to the proliferation of discrimination against people with HIV/AIDS and because of the enlarging recognition, nationally and internationally, of the interplay between the epidemic and human rights. Thus, legal tools such as human rights and anti-discrimination legislation that embody the protective role of the law have been promulgated as practical and effective ways in which the law can aid HIV/AIDS policy. It is also argued that protective laws may help to mobilise the assistance and co-operation of people at risks of HIV/AIDS in intervention strategies. Participation at this basic level would ensure compliance and respect with the stated objective of respecting human rights. In terms of the formulation of legislation, the first 'coercive' model asks what is necessary to ensure the greatest protection of public health, the answer invariably involving the sacrifice of the rights of affected people, the second 'protective' model however looks at what is the minimum encroachment on the rights of those infected to ensure minimum impact on the majority that are uninfected.

While the answer to either of the questions must take into account the scientific data, there has been a shift in onus. Consequently, infected individuals are entitled to all the rights of non-infected individuals unless there is a sound scientifically based reason why the rights of the infected individual should be abridged. For example, preventing infected individuals from donating blood with penalties for doing so knowingly provides a good illustration of a justifiable curtailment of those individuals' rights.

What this means is that laws that protect individual rights and interests must, to be effective, incorporate a proscriptive element that imposes certain penalties for non-compliance however, these laws are essentially non proscriptive in their application. The example used by Hamblin (1991) is that of equal opportunities legislation, which may prohibit certain conduct on the part of the employer that is held to amount to unlawful discrimination however, the underlying philosophical reasoning underpinning the legislation is that of protecting individuals against discrimination. The objective of this legislation is positive rather than negative that is, to generate respect for individuals and to promote human rights rather than merely to impose a proscription on for example, homosexual activity. It may be argued that the distinction is one of emphasis rather than degree but there is nonetheless a vital conceptual shift between regarding the role of law as that of enforcing legal prohibitions and viewing it as a device for promoting and protecting individual rights (Hamblin, 1991).

Such an approach to the law is meant to foster a greater awareness and understanding of the law due to the emphasis that has been placed on it, the widespread attention it has received and the emphasis that it places on the individual. Hamblin (1991) contends that both the proscriptive and protective model for legal intervention involve fundamental value judgements and often value conflicts in relation to what should be protected and what prohibited. Consequently each model functions on two levels namely, by defining specific legal rights and obligations and then by creating or reflecting certain values and rejecting others. These statements of values, which are inherent in the law can influence and shape other policy responses. One of the most important statement derived from this protective approach is the elimination and prohibition of stigmas and discrimination.

2.4 Stigmas and Discrimination

Despite the fact that HIV/AIDS is almost two decades old, the occurrence of stigmas and discrimination in relation to HIV/AIDS are still strongly prevalent and frequent. For example, three years ago in Durban, an HIV/AIDS activist who was a volunteer with National Association of People living with HIV/AIDS was murdered as a direct result of declaring her HIV status. The community horrifically beat her two weeks after commemorating World AIDS Day. Her death was a stark reminder that the issue of stigmas and discrimination is widespread and is yet to be overcome. In the American case of *Support Ministries for Persons with AIDS Inc v Village of Waterford NY*,² the court stated,

‘...to conclude that people living with AIDS are stigmatized is an understatement; they are widely stereotyped as miasmic, untouchable physically and morally polluted. They are shunned socially and are often excluded from public life.’

Goffman (1963 cited in Burris, 1999: 5) defines stigma as a social relation between a stigmatised and a ‘normal’ person based on a shared belief that some part of the stigmatised person’s identity is ‘spoiled.’ Burris (1999) contends that stigmas also constitutes a powerful tool of social control as it can be used to marginalize, exclude and exercise power over individuals who show certain characteristics. While the societal rejection of certain social groups such as homosexuals, injecting drug users and sex workers may predate HIV/AIDS the disease has in many cases reinforced these stigmas. By blaming certain individuals or groups society can excuse itself from the responsibility of caring for and looking after such populations. This is seen not only in the manner in which outsider groups are often blamed for bringing HIV/AIDS into a country, but also in how such groups are denied access to the services and treatment they need (Burris, 1999).

Law has been treated as an important element in the social response to HIV/AIDS particularly in managing the stigmas of the disease and the behaviours related to its spread. A concern for law’s impact on stigmas has also grounded arguments against

legislation that threatened to punish, denigrate, or frighten people with or at risk of HIV/AIDS. As Hamblin (1991: 2) notes, 'an appropriate response to HIV/AIDS will most often have as its desired outcome the absence rather than the presence of applicable law.' According to Bayer (1992: 528), one of the primary justifications for this unprecedented level of protection for people at risk of a communicable disease was practical: stigmas and mistreatment, it was feared, would 'drive people with HIV underground,' alienating them from social support and public health authorities, deterring testing and undermining the effectiveness of HIV/AIDS prevention efforts. Pereira (1996) suggests that the character and cause of stigmas and discrimination is evolving, but its unrelenting presence has kept those most affected largely silent on which issues and obligations governments should prioritise. The fact that every sexually active adult regardless of background is at risk has not helped to destigmatise HIV/AIDS. The consequence of all the above is the decision of most people either not to disclose or discover their HIV/AIDS status. Fear of discovery or disclosure is so great that those affected put at risk loved ones and unborn children (Heywood, 2000). Heywood notes further that non-disclosure and non-discovery or 'secrecy' is a cause of many new infections as well as of the continued invisibility of HIV/AIDS.

Albertyn (2000) states that these examples of legislation evidences the commitment and earnestness of the government in the battle against HIV/AIDS in this context. However, another contention exists that the law has fallen far short of what is required to protect the interests of people with HIV/AIDS. Moreover as Hamblin (1991: 5) suggests, legal protection in theory may not translate into legal protection in practice if the 'legal process is too cumbersome, time-consuming or costly to enable people with HIV/AIDS to exercise their legal rights.' It is further implied that legal remedies that apply in the event of unjustified discrimination or breaches of confidentiality must also be recognised as dealing only with the symptoms of the problem and not with the cause which lies with community prejudice and lack of sensitivity to the rights and needs of people with HIV/AIDS (Hamblin, 1991).

² (1992) 808 F Supp (NDNY) 120, 132

2.5 The Empowerment Model of Legislation

This model is premised on the State acting as a facilitative agent in the empowerment of people so as to bring about social changes. Social changes that help people gain mastery over their lives are viewed as being conducive to the prevention of HIV/AIDS. However, prior to discussing the empowerment model of legislation the role of the State will be looked at and thereafter, the concept of empowerment will be examined.

The role of the State in this model is based on its ability to provide effective 'governance' as opposed to merely governing its citizens. Pierre and Peters (2000) note that the concept of governance has emerged from virtual obscurity to take a central place in the social sciences even though it is often used with different meanings and implications attached to it. A key feature of the term is its capacity to cover the whole range of institutions and relationships involved in the process of governing, linking the political system with its environment (Pierre and Peters, 2000). According to the World Bank (2000: 1), 'Good governance is epitomized by predictable, open and enlightened policy-making, a bureaucracy imbued with a professional ethos acting in furtherance of the public good, the rule of law, transparent processes, and a strong civil society participating in public affairs. Poor governance is characterised by arbitrary policy making, unaccountable bureaucracies, unenforced or unjust legal systems, the abuse of executive power, a civil society unengaged in public life, and widespread corruption.' Thus, the World Bank's focus on governance reflects the worldwide thrust toward political and economic liberalisation. Such a governance approach highlights issues of greater state responsiveness and accountability, and the impact of these factors on political stability and economic development.

As a result, the State remains a key political actor in society and the predominant expression of collective interest. Governance therefore represents new and emerging ways about thinking about government, which is characterised by two general ideas. Firstly, there has been an incremental shift in focus among the political and administrative elite from 'input control toward outcomes and output control.' Secondly, there has been a shift in perspective with regard to State-society

relationships and dependencies. Previously, governments have enjoyed an unrivalled position in society in that it was the locus of political power and authority (Pierre and Peters, 2000: 137). In terms of the governance perspective the State evolves as an actor that remains in control of some unique power bases in society such as executive and legislative powers and the enforcement of public policy. At the same time however, States are becoming increasingly dependent on other societal actors (Pierre, 1997). These new perspectives on government, its changing role in society and its changing capacity to pursue collective interests under severe external and internal constraints are central to governance.

An important assumption underlying governance is that the public can and should have more direct influence over decisions than they can exercise in a representative democracy, which does not allow the average citizen to exert adequate influence over policy decisions. This goes beyond the idea of using groups, networks, and other immediate social structures as mechanisms for governance to focusing on citizens themselves as the principal source of governance. According to Niskanen (1996), these ideas represent a populist challenge to 'big government' and seek to return governance to 'the people,' to participate in the legitimate political community and to make effective decisions about their future through collective action. This would involve the building of more inclusive structures and would require citizens to devote greater time and energy to the processes of collective governance.

According to Pierre and Peters (2000), this is more in line with deliberative democracy with its strong emphasis on the immediate reform of decision-making institutions. Proponents of deliberative democracy argue that citizens feel that they are excluded by the current institutional arrangements used for governing that is, a sense of alienation is experienced in that there is 'the existence of ends with the absence of effective means to achieve those ends' (Pierre and Peters: 2000, 139). Establishing mechanisms for greater direct public involvement in policy making is essential for the revival of democracy. This would also lead to the empowerment of the public, which in turn would enable them to develop more complete and finer understanding of relevant issues. Consequently, successful governance encapsulates the empowerment of people to enable them to meaningfully and directly participate in the process of governance itself.

Aithal (1999) states that activists of the Black Panther Movement in the United States first used the term empowerment in the context of political mobilisation in the 1960s. Since then it has entered many fields of theory and practice. It has also become well established throughout the development discourse which is evident by the statement of the World Bank (1994: 1) which states that 'Many basic services ... are best managed at the local level - even the village level - with the central agencies providing only technical advice and specialist inputs. The aims should be to empower ordinary people to take charge of their lives, to make communities more responsible for their development, and to make governments listen to their people. Fostering a more pluralistic structure - including nongovernmental organisations ... - is a means to these ends.'

According to Rappaport (1984), the concept of 'empowerment' has developed in the context of social work and community organisation. It is a concept that has been defined in a variety of ways however common among all the definitions are the following elements:

- Empowerment aims at the improvement of individual and collective skills to regain control over living and working conditions and their impact on well-being;
- Empowerment is the aims and means of community organisation;
- Empowerment refers to a constant process of enabling individuals and groups to take part in collective action (Rappaport, 1984).

Overall, empowerment refers to processes of social interaction of individuals and groups, which aim at enabling people to enhance their collective and individual skills and the scope and range of controlling their lives in a given community. Empowerment happens while people interact in ways of mutual respect, tolerance and social support.

Rappaport further notes that at the core of the concept of empowerment is the idea of power. The possibility of empowerment depends on two things. First, empowerment requires that power can change. If power cannot change, if it is inherent in the State or people, then empowerment is not possible nor is empowerment conceivable in any

meaningful way. In other words, if power can change then empowerment is possible. Second, the concept of empowerment depends upon the idea that power can expand. This second point Rappaport notes, reflects our common experiences of power rather than how we think about power. To clarify these points, it is crucial to understand what is meant by power. Power is often related to our ability to make others do what we want regardless of their own wishes or interests (Weber, 1946). Conceived in these ways power can be viewed as unchanging or unchangeable. Weber (1946) goes beyond this limitation by recognising that power exists within the context of a relationship between people or things. Power does not exist in isolation nor is it inherent in individuals. By implication, since power is created in relationships such as between the individual and the State, power and power relationships can change. Empowerment as a process of change then, becomes a meaningful concept. The empowerment model of legislation is premised on the assumption that power relations can change in favour of the citizen, which in turn enhances the State's ability to govern.

The coercive and protective model of legislation stresses the conduct of individuals or on the adjustment of rights and obligations as between individuals. The empowerment model of legislation on the other hand has been the most controversial. However, it may be the most important as it operates on a broader and more far-reaching level with the law playing a more proactive role 'not merely in mediating rights and obligations as between individuals but also in seeking to change underlying values and patterns of social interaction that create vulnerability to the threat of HIV infection' (Hamblin, 1991: 4). This proactive role extends towards the elimination of stigmas and discrimination within societies as well, by doing more than paying lip service to human rights. To genuinely appreciate the role of law requires an appreciation of the socio-economic patterns of HIV/AIDS infection that has emerged during the 90s. These patterns suggest that one of the most significant risk factors for HIV/AIDS infection relates not to sexual or drug-use activities as such but rather to socio-economic dependency. Increasingly, it has been found that HIV/AIDS does indeed have a racial, gender and income dimension (Albertyn, 2000). This model also demonstrates that the legal and regulatory framework and the prevailing cultural and ethical values and practices in a society interact with economic conditions to

determine the degree of control which people have over their lives and the choices available to them. As a result, the law has an important impact on how the epidemic is experienced and managed in any country.

Due to the fact that HIV/AIDS is preventable, people who have access to information and suitable preventive measures and have the means to implement these measures will be able to protect themselves against infection (Hamblin, 1991). On the other hand the people who remain most vulnerable are those who are denied the means of protecting themselves against infection because of economic need or powerlessness to control the basis upon which their sexual relation takes place (Broom, 1993). Thus, the challenges for HIV/AIDS policy faced today is to distinguish the need to address not only what might be called the 'HIV/AIDS-specific' issues such as education programmes and research into new barrier methods to prevent HIV transmission, but also the underlying social and economic factors that deprive individuals of the power to adequately protect themselves against infection (Hamblin, 1991). This goes beyond the commonly perceived scope of HIV/AIDS policy, indeed some of the changes required transcend the law and the legal system. However, according to Van Wyk (2000), the law can be utilised as an instrument to provoke or reinforce the required changes. Hamblin (1991) warns against making grandiose claims as to the extent to which the law can be used to bring about social and economic change, at the same time however, the potential of law to complement and reinforce other policy initiatives must not be disregarded since legal interventions can address some of the social and economic factors that render certain groups susceptible to HIV/AIDS infection. Consequently, it is possible to conceive of legal interventions that could complement and reinforce the desired objective of most HIV/AIDS policy initiatives.

These interventions would require a creative approach to the law which recognises that the possibility exists to use the law proactively and constructively in response to the epidemic. One form in which these interventions could take is the legal empowerment of people. By enforcing legislation that enable people to become legally empowered, such as by raising their general awareness of the law and the legal system and by encouraging legal literacy, facilitates people's participation and decision-making in their community or work environment. Another form in which

this intervention could take is provided by the example used by Longwe et al (1990, cited in Hamblin, 1991). The authors state that in many developing countries legal regimes exist that entrench the economic dependence of women through land ownership and marital property laws which deny women independent ownership of property or through laws which deny women access to certain forms of paid employment. Legal transformations here could have a direct impact on patterns of economic support in these countries, which in turn could assist in allowing access to health care and in diminishing reliance upon sexual activity as a source of income. For Hamblin (1991), laws can also be enacted which require minimum levels of participation and representation of socially disadvantaged groups in the policy process, either in relation to HIV/AIDS specifically or to more general matters, such as economic assistance and health care. Such a process can help to guarantee access to relevant information about HIV/AIDS and by the mere fact of participation, help to redress the social imbalance.

Reforming the law also has the potential to be highly effective since the law in any form is a vital expression of social and cultural values therefore, law can be used to change these values (Albertyn, 2000). Where laws uphold certain customs or behaviours that give rise to HIV/AIDS transmission risks such as traditional marriage patterns in some cultures, the abolition of these laws can provoke a questioning of the customs and values that underpin them (Longwe et al, 1990 cited in Hamblin, 1991). The active prohibition of certain conduct which may previously have been considered acceptable but which places individuals at risk of HIV/AIDS can also be a powerful force for change. Consequently, a need has arisen to harness the symbolism of the law in all its manifestations - proscriptive, protective or instrumental - and to use it to promote rather than impede the changes necessary to reduce the spread of the epidemic (Hamblin, 1991).

2.6 Conclusion

Traditionally, the shape of public health practice has been dictated by both the nature of the infectious threats and prevailing conceptions of the appropriate relationship between the individual and the State. HIV/AIDS has provided the occasion for a challenge to the traditional approach to public health practice. As both a lethal illness spread in the context of the most intimate relationships and as a public health threat, the epidemic has forced society to confront questions regarding the appropriate role of the State in limiting morbidity and mortality (Bayer, 1992). In so doing, it has required a reconsideration of the ethical limits on State power in the face of a grave social threat. As a disease of the socially vulnerable, HIV/AIDS has also compelled society to face issues involving the role of the State in protecting the weak at moments of social stress. As a disease that has affected large numbers of poor individuals who do not possess adequate medical insurance or who live in nations with limited health care systems, HIV/AIDS has required a reconsideration of what justice demands in terms of the protection of individuals versus the costs associated with illness (Bayer, 1992). Thus, the roles of government in advancing the public health, defending the weak, and ensuring access to health care have all been called into question by the epidemic.

CHAPTER THREE

HIV/AIDS Employment Laws in South Africa

3.1 Introduction

In the previous chapter the legal response to HIV/AIDS encapsulated by three international models of the law was considered. In South Africa, the legislators have adopted the second model of the law, which is centred on the protection of the rights of people with HIV/AIDS. This chapter examines more closely the form that this protection takes in relation to HIV/AIDS specific employment laws, which covers all areas of the employer and employee relationship. Ever since the magnitude of the HIV/AIDS crisis has become known and politicised, a number of laws have been enacted. These laws will be examined and their problematic and positive aspects will be highlighted along the way. Relevant case law will be used where it is able to illustrate problems associated with HIV/AIDS legislation.

3.2 The Constitution of the Republic of South Africa

The Constitution of the Republic of South Africa, Act No. 108 of 1996 (the 'Constitution'), completes South Africa's negotiated revolution. Its effect on the South African legal system can indeed be justifiably described as revolutionary. Basically, the Constitution brought about three fundamental changes. Firstly, for the first time in South Africa's history the franchise and associated political and civil rights were accorded to all citizens without racial qualification. Thus, it brought to an end the racially qualified constitutional order that accompanied three hundred years of colonialism, segregation and apartheid (De Waal et al, 2000). Secondly, the doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy. A Bill of Rights was put in place to safeguard human rights, ending centuries of state-sanctioned abuse. The courts were empowered to declare law and conduct inconsistent with the Bill of Rights and the Constitution, invalid. Finally, the strong central government of the past was replaced by a system of government with

federal elements. Significant powers were devolved to the provinces and local government.

The second of these changes enshrines the principle of constitutional supremacy. This dictates that the rules of the Constitution are binding on all branches of the government and have priority over any other rules made by the government. Any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law (De Waal, 2001). This principle is given expression to in Section 2 of the Constitution. It states that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' Section 8 provides that the Bill of Rights has supremacy over all forms of laws and that the Bill of Rights binds all branches of the State and in certain circumstances private individuals as well. Consequently, legislation of the central, provincial and local government, as well as any form of delegated legislation must comply with the Bill of Rights.

It follows that any form of legislation on HIV/AIDS in the workplace, the provisions of which are inconsistent with the Bill of Rights may be declared invalid. It is contended that the most important provisions in the Bill of Rights that have direct implications for workplace legislation, policies and practices, are the 'Right to equality,' the 'Right to human dignity,' the 'Right to privacy,' the 'Right to fair labor practices' and the 'Right of access to health care services, including reproductive health care.'³ The first two of these rights are examined below. The remaining rights will be looked at in conjunction with the discussion on the various HIV/AIDS employment legislation.

3.2.1 The Right to Equality

According to De Waal et al (2000), equality is a difficult and deeply controversial social ideal. At its most basic and abstract, the idea of equality is a moral idea that people who are similarly situated in relevant ways should be treated similarly. Its logical correlative is the idea that people who are not similarly situated should not be

³³ Section 9, Section 10, Section 14, Section 23 (1) and Section 27 (1) (a) of Act No. 108 of 1996 respectively.

treated alike. This 'social ideal' on which the right to equality is based does not apply well in the case of people with HIV/AIDS in South Africa.

It is not the basic and abstract idea of equality that is so difficult and controversial. Instead, it is the two issues ancillary to the idea of similar treatment for similar people that proves so challenging, particularly when it comes to HIV/AIDS. The first is the issue of what counts as relevant when it comes to determining the similarity of peoples' situation and the second issue is what constitutes similar treatment of people who are similarly situated. The Constitution requires one to grapple with these difficult issues. With the advent of HIV/AIDS litigation and the fact that the majority of people affected by the epidemic are marginalised, these issues will be further confounded. For example, whether the actual social and economic disparities between groups and individuals will be taken into account in relation to HIV/AIDS has not been demonstrated as yet. Nevertheless, the Constitution commits the State to the goal of achieving equality and asserts that the type of society that it wishes to create is based on equality, dignity and freedom. This comprises a guarantee that the law will protect and benefit people equally and prohibit unfair discrimination. Thus equality is an overarching, straddling and underlying constitutional value and a human rights and freedoms concept. It is distinct and at the same time runs in the veins of all other rights and freedoms: civil; political; economic; social; and cultural (Hepple, 2000).

Section 9 of the equality clause contains five subsections. The first provides for the principle of equality before the law and confers the right to equal protection and benefit of the law. The second deals with affirmative action. The third contains a prohibition of unfair discrimination on listed grounds. The fourth extends the prohibition of unfair discrimination to the horizontal level. The final subsection presumes State or private discrimination on the listed grounds to be unfair.⁴ It is the third subsection that is of importance here. This states that, 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.' By referring to 'unfair discrimination' this section implicitly sanctions fair

⁴ Section 9 (1), (2), (3), (4) and (5) respectively

discrimination. Furthermore, HIV/AIDS status is not included therefore discrimination on a ground that is not on the list of presumptively illegitimate grounds of differentiation will constitute discrimination if it can be shown to be analogous to the listed grounds. The Constitutional Court has held that the listed grounds relate to attributes or characteristics that impact on human dignity. Analogous grounds will therefore have a similar relationship and impact. This was illustrated in the case of *Hoffmann v South African Airways*.⁵

Hoffmann v South African Airways concerned a person, Hoffmann, who applied to the Airways (SAA) for the position of cabin attendant. At the end of the selection process Hoffmann was one of 12 selected as suitable candidates for appointment. Although he was on medical examination found to be medically fit a blood test showed him to be HIV positive. His medical report was thereupon altered to read 'HIV positive' and 'unsuitable.' He was informed by SAA that he could not be employed as a cabin attendant because of his HIV positive status. It was SAA's practice to exclude from employment as cabin attendants all persons who were HIV positive, a practice which it justified on safety, medical and operational grounds. Hoffmann challenged the constitutionality of SAA's refusal to employ him in terms of unfair discrimination on the basis of his 'disability' (section 9(3) of the Bill of Rights). He failed in the Witwatersrand Local Division. On appeal to the Constitutional Court it was held (*per* Ngcobo J) that an asymptomatic HIV-positive person, as Hoffmann was could perform the work of a cabin attendant competently and that any hazards to which an immuno-competent cabin attendant might be exposed could be managed by counselling, monitoring, vaccination and the administration of appropriate antibiotic prophylaxis if necessary. The risks to passengers and other third parties were therefore inconsequential and if necessary, well-established universal precautions could be utilised.

After finding that SAA was an 'organ of State' and thus bound by the provisions of the Bill of Rights by virtue of section 8(1),⁶ read with section 239 of the

⁵ 2001 (1) SA 1 (CC)

⁶ This section states that 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the State.'

Constitution, the court held that SAA was thus expressly prohibited by s 9(3) of the equality clause from discriminating unfairly. The Court went on to hold that there was no doubt that SAA had discriminated against Hoffmann because of his HIV/AIDS status and that neither the purpose of the discrimination nor the objective medical evidence justified such discrimination. Its practice judged and treated all persons living with HIV/AIDS as unfit for employment as cabin attendants on the basis of assumptions true only for an identifiable group of HIV-positive persons. SAA's practice of excluding from employment as cabin attendants all HIV/AIDS infected persons meant that persons who were infected would never have the opportunity to have their medical condition evaluated for a determination to be made as to whether they were suitable for employment as cabin attendants. They would be vulnerable to discrimination on the basis of prejudice and unfounded assumptions, precisely the type of injury which the Constitution sought to prevent.

Furthermore the Court held that although legitimate commercial requirements were an important consideration in determining whether or not to employ an individual, to allow stereotyping and prejudice to creep in under the guise of commercial interests had to be guarded against. The greater interests of society required the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination. The need to promote the health and safety of passengers and crew was important as was the fact that if SAA were not perceived to be promoting the health and safety of its passengers and crew, the public's perception of it might be undermined. This notwithstanding, fear and ignorance could never justify the denial to all people who had HIV/AIDS the fundamental right to be judged on their merits and on the basis of reasoned and medically sound judgments. The Court accordingly held that the denial of employment to Hoffmann because he was living with HIV had impaired his dignity and constituted unfair discrimination: it violated his right to equality guaranteed by section 9 of the Constitution. The decision of SAA not to employ Hoffmann was set aside and SAA was ordered to offer employment as a cabin attendant to him provided that should he fail to accept the offer, the order would lapse.

This ruling in *Hoffmann* follows an earlier case against the airline raising the same issue. Early in 2000, SAA settled a case brought before the Labour Court by the AIDS Law Project on behalf of 'A,'⁷ who was found suitable for the position of cabin attendant but denied employment on the basis that he was HIV-positive. On the third day of trial, SAA admitted that it had in the course of a pre-employment medical examination, tested 'A' for HIV/AIDS without his informed consent by failing to provide either pre- or post-test counselling. SAA also admitted failing to properly assess A's fitness for the job and that denying him employment because of his HIV status was 'unjustified.' The case was settled when 'A' accepted SAA's offer of R100 000 in compensation. In an even earlier case, the AIDS Law Project had assisted a woman denied employment as a cabin attendant because she was HIV-positive and pregnant. That case settled for only R5000.

According to Ngwena (1999), there is sufficient evidence to illustrate that HIV/AIDS discrimination is practiced on a significant scale. As the epidemic began to establish itself as a major threat many employers began to institute policies that were aimed at excluding HIV/AIDS employees, with HIV/AIDS testing as an adjunct. This was not limited to the private sector employers. For example in 1990, the Pretoria and Bloemfontein City Councils announced a policy of testing job applicants and excluding those who had HIV/AIDS. Until March 1997, when the government announced a policy to prohibit pre-employment testing in the public sector, the Department of Correctional Services, the South African National Defence Force and the South African Police Services routinely tested job applicants (Ngwena, 1999).

3.2.2 The Right to Human Dignity

The second constitutional right that will be explored is the section 10 right to human dignity. Section 10 states that 'Everyone has inherent dignity and the right to have their dignity respected and protected.' This right occupies a central place in the Constitution. According to section 1 of the Constitution, South Africa is founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms.' De Waal et al (2000) notes that the right to human dignity is therefore one of the core constitutional rights. In liberal moral philosophy,

⁷ *A v South African Airways (Pty) Ltd*, Case J1916/99; AIDS Law Project

human dignity is considered to be what gives a person their intrinsic worth (Hepple, 2000). It is the source of a person's innate rights to freedom and to physical integrity, from which a number of other rights flow. Human dignity accordingly also provides the basis for the right to equality since inasmuch as every person possesses human dignity in equal measure everyone must be treated as equally worthy of respect. The idea of equal respect was the basis of the Constitutional Court's decision in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.⁸ The court held that the common law criminalisation of sodomy was a violation of the right to dignity. It stated further that 'There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society.'

One of the most significant features of the *Hoffmann* judgment was also the reliance on the human dignity argument. The court stated that 'at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against.' The court went on to add that South Africa's new democratic era was characterised by respect for human dignity for all human beings. In this era 'prejudice and stereotyping have no place.' The fact that some people who have HIV/AIDS may under certain circumstances be unsuitable for employment as cabin attendants does not justify the exclusion of all people who are living with HIV/AIDS. Besides the right to human dignity HIV/AIDS has brought another constitutional right to the forefront namely, the right to privacy. This right is discussed below, in conjunction with the rights of people with HIV/AIDS, to keep their status confidential.

3.2.3 The Right to Privacy

The right to have ones HIV/AIDS status remain confidential is based on the constitutional right to privacy found in section 14 of the Bill of Rights. This states that 'Everyone has the right to privacy, which shall include the right not to have: (a) their person or home searched; (b) their property search; (c) their possessions seized; or (d) privacy of their communications infringed.' According to the common law the right to

⁸ 1998 (6) BCLR 726 (W)

privacy is recognised as an independent personality right, which the court considers to be part of the concept of a person's 'dignitas' (De Waal et al, 2000). The rule of confidentiality is as old as the Hippocratic oath and in medical ethics it is regarded as one of the cardinal principles (Hepple, 2000). The constitutional guarantee to a right of privacy assures that the rule of confidentiality has a basis in the South African legal structure as well as in established medical ethics. The essence of this rule is that a health worker should not disclose to a third party information obtained in confidence from a patient, except when valid consent has been obtained. The privacy and confidentiality of infected individuals may be threatened by the following actions: mandatory HIV/AIDS testing of patients, employees, job applicants, applications for insurance policies, applications for mortgages, etc. This also includes the compulsory registration of persons who are thought to have HIV/AIDS or are considered at high risk of becoming infected and the disclosure of test results of an HIV/AIDS infected person to third parties.

The epidemic has introduced a potentially irresolvable conflict between the doctrine of strict confidentiality and the dictates of public interest with serious ramifications for the individual and the family. On the other hand, a guarantee of confidentiality is an indispensable condition of encouraging people to seek treatment and thus reduce the spread of sexually transmitted diseases and HIV infection (Burris, 1999). However, some authorities have argued that in certain circumstances the confidentiality of HIV-infected persons should be waived in the interest of public health, such as when a person with HIV/AIDS persists in unprotected sexual intercourse with his or her partner despite advice and counselling. It has been argued that confidentiality cannot be sustained in such circumstances. In some instances 'shared confidentiality' may be more appropriate than 'strict confidentiality.' Shared confidentiality involves informing sexual partners, or possibly family members and/or caretakers of an individual's HIV/AIDS status. This would be particularly practical in those situations when sexual partners need to make a fully informed decision about behaviour. It would also be useful for relatives or caretakers who require counselling and information concerning care of the patient or when other health professions or social service professionals need to be involved in the patient's care. The basic human rights of privacy and confidentiality are threatened by those who require mandatory testing for HIV infection, compulsory registration or routine screening of persons thought to

be at high risk and unauthorised disclosure to third parties not involved with the medical care of the patient.

According to Kirby (1996), due to the nature of the sensitive questions that can arise in cases involving HIV/AIDS, it will often be the duty of the judge to afford a measure of confidentiality to the persons involved. The court has to try to balance the private interest in protecting confidential information against the public interest that favours disclosure. This was aptly demonstrated in *Jansen van Vuuren and another v NNO v Kruger*.⁹ This case successfully dealt with the doctor-patient privilege and the principles of confidentiality. However, this case was heard before the passing of the interim and final Constitution and so the Appellate Division relied on South African common law and delictual principles of confidentiality. The Appellate Division unanimously upheld a patient's right to the confidentiality of his medical information, being his HIV/AIDS status. In this case, a medical practitioner disclosed a patient's HIV/AIDS status without the informed consent of his patient, to two medical practitioners in the course of a golf game. The court declared that the public interest did not warrant the disclosure because the practitioners were not at risk of any infection and particularly, the patient specifically requested that his confidential medical information should not be disclosed. This decision has established a positive legal precedent with regards to confidentiality in South Africa.

In the case of *X v Y*,¹⁰ the English Court of Appeal also had to consider the public interest exception in relation to the disclosure of information about a person's HIV/AIDS status. An injunction was sought to prevent a newspaper from publishing the names of two doctors infected with the epidemic, who were working in a certain hospital. The newspaper had obtained the information from confidential hospital records. The newspaper argued that there was an overriding public interest in disclosing the information because the public was entitled to know that the doctors had HIV/AIDS. However the court held that the public interest in preserving the confidentiality of hospital records outweighed the public interest in the freedom of the press to publish the information, because people with HIV/AIDS must not be deterred from seeking appropriate testing and treatment. Kirby (1996) notes that this case is

⁹ 1993 (4) S.A. 842

¹⁰ 1988 (2) ALL ER 648

crucial since the judges recognised that the confidentiality in relation to a person's HIV/AIDS status could be vital not only to protect the interest of the infected persons, but also for public health generally against the spread of the epidemic.

The right to privacy in the workplace is twofold. Firstly, an employer may not lawfully coerce a job applicant or employee to be tested. Secondly, the employer may not disclose the HIV/AIDS status of a job applicant or employee without the latter's consent. In the case of *C v Minister of Correctional Services*,¹¹ the court held that informed consent was a prerequisite to testing a prisoner for HIV/AIDS. The doctrine of informed consent dictates that the person whose body is interfered with be furnished with information essential to the promotion of autonomy prior to the test. The employer must at the very least explain the purpose of the test and the implications of a positive result prior to obtaining consent. To ensure that such consent is real, an employer must also provide counseling before the test is carried out. At any stage in the procedure, the employee or applicant must be free to withdraw their consent. Ngwena (1999) notes that the actual practice of employers however, suggests frequent infractions of the doctrine of informed consent.

3.3 Problems with the Constitution

The Constitution is founded upon the fundamental principle that the justice system is accessible to all persons. Equal justice for all is a cornerstone of the South African democratic system and must extend to all people including vulnerable and poor people who are unable, without help, to assert, protect or defend their civil legal rights. To these categories people with HIV/AIDS must be added, the majority of which are poor, vulnerable and unable to assert their legal rights. Burris (1999) notes that the pattern of legal protection of people with HIV/AIDS reflects and reinforces class differences. Furthermore, much of the 'protection' is of value primarily to those within the economy, having jobs, seeking professional services and getting medical care. Studies in the United States on testing behavior variously find that gay men, the more affluent and the better educated are much more concerned about the privacy of their tests than are drug users, prostitutes and people of lower socio-economic status (Hong and Berger, 1994 cited in Burris, 1999).

In South Africa many people with HIV/AIDS live marginal lives in which serious social vulnerability emerges in ways that the Constitution does not effectively address, such as the loss of support of a spouse or partner or domestic violence. In fact for many people with HIV/AIDS, the law may be less a source of protection than itself a source of social risks. Consequently, substantive legal protection requires the development of a fully integrated system to meet the equal justice needs of low income and vulnerable people who are highly susceptible to HIV/AIDS. This might ensure that low income individuals and families affected by the epidemic have timely and meaningful access to legal information and services necessary to allow them to assert, defend and enforce important personal legal rights and prerogatives.

3.4 The Employment Equity Act No. 55 of 1998

The protective model of law in relation to HIV/AIDS is primarily encapsulated in the Employment Equity Act of 1998 (the 'EEA'). Also, to determine suitability for employment is now governed by the EEA. According to section 2 of the Act, its purpose is to 'achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels in the workplace.'

Chapter 2 of the EEA, which prohibits unfair discrimination on a number of grounds including HIV/AIDS, came into effect in August 1999. It states that, 'No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds including race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age disability, religion, *HIV status*, conscience, belief, political opinion, culture, language and birth.' The chapter applies to all employees with the exception of the South African National Defence Force, the National Intelligence Agency of South Africa and the Security Services. It also includes job applicants as demonstrated by Constitutional Court cases involving SAA, which dealt with pre-employment testing.

¹¹ 1996(4) SA 282 (T)

Notably the exclusion of the word positive from the phrase 'HIV status' means that, by implication, discrimination on the grounds of an employee's perceived HIV/AIDS status is also prohibited. That is, it is not a prerequisite that an employee be HIV positive before they can succeed with a claim of unfair discrimination on the grounds of their HIV/AIDS status. This would refer to cases where employees who are not living with HIV/AIDS are perceived to be HIV positive by employers on the grounds that they refuse to undergo HIV/AIDS testing or alternatively if the employee falls into a so-called 'risk group' known to be associated with HIV/AIDS infection (Heywood and Hassan, 1998).

3.4.1 HIV/AIDS Testing

According to section 7(2) of the EEA 'testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court.' Heywood and Hassan (1998) point out that in terms of the EEA, the exception to the prohibitions on HIV/AIDS testing is much narrower than the exceptions to non-HIV medical testing. Medical testing is prohibited unless: legislator permits it; it is justifiable on a number of grounds (medical facts, employment conditions, social policy, fair distribution of employee benefits, inherent requirements of the job). On the other hand, HIV/AIDS testing is prohibited unless: an employer obtains authorisation from the Labour Court. When requested to allow HIV/AIDS testing by an employer, it remains to be seen whether the Labour Court will take into consideration the criteria set out under medical testing. Provisions of the Labour Relations Act (No. 66 of 1995) and other provisions of the EEA provide that discrimination will be deemed fair if it is based on the inherent requirement of the job. Surprisingly, Heywood and Hassan note that this requirement was not used as the only ground on which medical testing and HIV/AIDS testing would be authorised by the Labour Court. However, since medical and HIV/AIDS testing in the workplace may occur for various other reasons which are not necessarily linked to the inherent requirements of the job, the legislators have widened the criteria or grounds on which both medical and HIV/AIDS testing can take place.

Consequently, one finds that the legislators have provided room for employers to seek authorisation to conduct medical and HIV/AIDS testing for benefit related purposes,

such as medical aid, where such testing is at the instance of the employer and not the request or informed consent of the employee. Thus, a total and blank prohibition on HIV/AIDS testing does not exist. This may result in employers abusing these provisions by testing individual employers for HIV/AIDS on the pretext that this is related to workplace benefits. Furthermore, HIV/AIDS testing has a great deal of stigmas attached to it and the continuance of this practice in the workplace is not compatible with the protective model of law.

Thus, the EEA does not make it a criminal offence for an employer to conduct a test in violation of section 7(2). However, an employee who alleges that his or her right not to be tested has been violated may refer a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), for conciliation, and if this does not resolve the dispute, to the Labour Court for determination. Heywood and Hassan (1998) contend that voluntary testing at the request of employees is acceptable but it is advisable to refer employees outside the organisation for counselling and testing so as to maintain confidentiality. Anonymous, unlinked surveillance or epidemiological HIV/AIDS testing in the workplace may occur provided it is undertaken in accordance with ethical and legal principles regarding such research. Where this is done the information obtained may not be used to discriminate against individuals or groups of persons. Testing will not be considered anonymous if there is a reasonable possibility that a person's HIV/AIDS status can be deduced from the results.

A recent decision by the Labour Court was to have 'made history,' by granting the director of Ndebele Mining Company permission to test their workers (Sunday Times, 2000). According to the director, the turnover of staff at the mine was relatively low and that the management and staff had a good relationship of trust and respect. Of the 57 staff, 51 had asked to be tested. The director conveyed that all the members had received detailed pre-test counselling and they were also informed about the voluntary nature of testing and furthermore, they were reassured that no negative conclusions would be drawn about anyone who declined to be tested. The tests would be kept confidential and the names of those who tested positive would be withheld from the rest of the workforce and management unless the workers concerned gave written consent for its disclosure. However, staff would be encouraged to disclose

positive results so that they can be appropriately assisted. It was also pointed out by the director that most of the staff were illiterate and had no access to medical advice and treatment. Heywood (2000) contends that even though the court order was 'one of its kind' in South Africa, it was not necessary for employers to obtain court permission before starting a programme of voluntary testing. All employers should be educating their workforce, encouraging voluntary testing, counselling and making reasonable accommodation for alternate work when necessary. He also stated that the fact that the Labour Court granted the order has indicated to employers that they should not be reluctant to get involved in such programmes out of fear that the courts would **not** give permission.

Issues **raised** by the testing for antibodies to HTV/AIDS have been dealt with in depth during **the** past decade. In a study by Enel et al (1992: 5), opinion about HIV antibody testing **is** widely varied. The authors state that 'there are those who recommend screening for all: their arguments are irrational and are not based on scientific fact. Others **show** interest in screening targeted groups: the problem then lies in the choice of the **groups** and in the motives of that choice, which are subjective as well as objective. Last, we found those who recommend voluntary screening: they defend both human rights and scientific inquiry.' To compulsorily test the entire population for antibodies is not a feasible option however, Werdel (1990) suggests that testing should be required among prisoners, arrested prostitutes and drug users and those who attend sexually transmitted disease and drug abuse clinics. For Werdel 'these groups are not only at a high risk of infection but they also pose a serious risk to the health of the community' and 'are likely to transmit the disease to innocent, healthy members of society' (1990: 131). However, authors such as Gostin and Curran (1988) and Kirby (2000) oppose mandatory testing whether of the entire population or specific groups claiming that it is unlikely to lead to changes in the behavior necessary to impede the spread of the epidemic and because of the potential for the invasion of privacy and the proliferation of discrimination.

According to World Health Organisation (1991: 2), 'mandatory testing without informed consent has no place in an AIDS prevention and control programme.' The following reasons were submitted. Due to stigmas and discrimination aimed at infected individuals, these individuals who believe they might be infected tend to go

‘underground’ to escape mandatory testing. Testing without informed consent damages the credibility of health services and may dissuade those in need of services from obtaining them. Mandatory testing might also create a **false** sense of security particularly among people who are outside its scope and who use it as an excuse for not adhering to more effective measures for protecting themselves and others from infection. Mandatory testing programmes are also expensive and divert resources from successful prevention measures. Field (1990) argues that funds can be used more effectively and efficiently in education programmes and universal precautions to prohibit the further spread of HIV/AIDS than in mandatory testing programmes. Fields (1990) also points out that proposals for mandatory testing generally are political proposals, not health policy proposals and that they are often motivated by anti-gay or anti-drug user feelings and are rarely animated by legitimate public health objectives.

According to Ngwena (1999), the EEA is merely spelling out what is already implicit in the Constitution, except that the complainant need not prove discrimination. There is a presumption that HIV/AIDS discrimination is unfair by the mention of HIV/AIDS status in the lists of grounds. The onus is on the employer to justify discrimination. Ngwena contends that the provision has a symbolic value in that ‘it signifies society’s disapprobation of HIV-related discrimination and has the potential to sensitise employers and the broader society about respecting the rights of people living with HIV/AIDS’ (Ngwena, 1999: 520).

3.5 The Labour Relations Act No. 66 of 1995

The objectives of the Labour Relations Act (LRA) is widely defined so as to change the law governing labour relations in South Africa by giving effect to section 27 of the Constitution on the right to fair labour practice. The LRA also possesses provisions dealing with unfair discrimination. It prohibits unfair discrimination and protects employees against arbitrary dismissals. In outlawing discrimination the LRA states that it is an unfair labour practice if an employer unfairly discriminates against an employee on a number of grounds if they act unfairly in promoting, demoting, providing training opportunities or supplying benefits to the employee, if discipline is arbitrary or if they fail or refuse to reinstate or re-employ in terms of an agreement.

This Act therefore protects employees from being dismissed simply because they have HIV/AIDS and from being discriminated against with regard to employee benefits, staff training and other work-related opportunities. However where there are valid reasons related to their capacity to continue working and fair procedures have been followed, their services may be terminated in accordance with the relevant provisions.¹² Finally, the LRA provides job applicants and employees with relatively much more 'accessible and specialist machinery for realising their rights' (Ngwena, 1999: 531). In addition to the Labour Court, the LRA has created the Commission for Conciliation, Mediation and Arbitration, described by Ngwena as being the 'epitome of a people's court' (Ngwena, 1999: 531).

3.6 The Occupational Health and Safety Act No. 85 of 1993

This Act requires employers as far as it is reasonably practicable, to create a safe working environment. In an HIV/AIDS context, this can be interpreted to mean that employers must ensure that universal precautions are used when responding to an occupational accident. Furthermore, employers should ensure that proper equipment needed to protect staff against possible infection and appropriate training in the use of universal precautions is provided.

3.7 The Compensation for Occupational Injuries and Diseases Act No. 130 of 1993

This Act provides compensation for employees who are injured in the 'course and scope' of their employment. Should there exist a possibility that an employee has been exposed to HIV during an occupational accident then: an accident report should be completed and forwarded to the Workman's Compensation Commissioner; the employee should be tested for HIV to determine their baseline status; any other person who has been involved in the accident should be tested with their informed consent; the employee, if HIV-negative at the time of the accident should be re-tested at three and six months after the accident; if they sero-convert during this period, an application for compensation may be made.

¹² Section 188 (a)(i) of the LRA

3.8 The Medical Schemes Act No. 131 of 1998

Medical aid as a type of insurance characterises an extremely vital employee benefit in the workplace (Heywood, 1998). Previously, most medical schemes refused to cover illnesses that were related to HIV/AIDS. Recently the Act has been amended to prohibit discrimination on the grounds of 'state of health,' which includes persons living with HIV/AIDS. As a result medical schemes cannot refuse to cover reasonable care that could prolong the lives of people who are infected. The minimum benefits to be incorporated for HIV related illnesses include hospital and admission as well as necessary medical treatment. Such treatment also continues until death.

3.9 The Code of Good Practice on Key Aspects of HIV/AIDS and Employment

The intention of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment (the 'Code'), is to create a national standard on the most effective way to handle HIV/AIDS in the workplace. It aims to guide employers, employees and government towards the most economically suitable and humane ways to respond to the epidemic in the workplace. The workplace can be seen as one important front for preventing new infection and promoting non-discrimination towards infected individuals.

The Code in its introduction, takes cognisance of the following facts. HIV/AIDS constitutes a serious public health problem which has socio-economic, employment and human rights implications, which will have the following effects in the workplace: 'prolonged staff illness; absenteeism and death impacting on productivity; employee benefits; occupational health and safety; production costs and workplace morale.' It is put forth that despite the epidemic having been publicised so widely, it is still surrounded by ignorance, prejudice, discrimination and stigmas. For example, discriminatory practices such as pre-employment testing for HIV/AIDS, dismissal for having HIV/AIDS and the denial of employee benefits comprise just some of the practices that are perpetuated in the workplaces of South Africa. It is suggested further that one method of reducing and managing the impact of HIV/AIDS in the

workplace is through the implementation of an HIV/AIDS policy and programme. By addressing aspects of HIV/AIDS in the workplace, employers, trade unions and government will be able to aptly and actively aid in the local, national and international efforts to prevent and control HIV/AIDS. In light of the above the Code has been developed as a guide to employers, trade unions and employees.

The Code also attempts to assist with the achievement of the broader goals of eliminating unfair discrimination in the workplace based on HIV/AIDS status; promoting a non-discriminatory workplace in which people living with HIV/AIDS are able to be open about their HIV/AIDS status without fear of stigma or rejection; promoting appropriate and effective ways of managing HIV/AIDS in the workplace; creating a balance between the rights and responsibilities of all parties; and giving effect to the regional obligations of the Republic as a member of the Southern African Development Community.

3.10 Problems with the Protective Model of Legislation

South Africa has had progressive legislation protecting the rights of people living with HIV/AIDS for some time however the number of people infected with HIV/AIDS is continuing to increase. The question that needs to be addressed given the nature of all the above Acts, is whether HIV/AIDS employment legislation with its strong emphasis on protection, can provide substantive protection for people with HIV/AIDS. These issues are considered below along with some of the most problematic aspects of our HIV/AIDS law.

All of the above Acts confer rights to people who are infected with HIV/AIDS. However according to Albertyn (2000: 9), the problem with rights relates to the way in which 'rights can individualise problems and mystify the broader social and economic context in which rights are violated.' The author states that the particular danger to people with HIV/AIDS is that a focus on the rights of individuals with HIV/AIDS 'can feed into a public understanding of people with HIV/AIDS as different or of being the ones to blame for HIV/AIDS' (2000: 9). Consequently, the way in which rights and the message that accompanies them are framed is vital. For example, Albertyn (2000) argues that it may be preferable to link HIV/AIDS to social

issues of inequality and poverty rather than to individual discrimination. However, the most effective method will also depend on the particular national context. Furthermore, Albertyn (2000) states that rights can be narrowly interpreted both politically and legally. For example in Canada, in the first few years after the entrenchment of rights in the constitution, women found that these rights were used to reverse political and legal gains made by women in the legislative arena. It took further political mobilisation and engagement to reverse this trend. Thus, rights can work against progressive causes. The author notes that it has become 'extremely important to ensure that rights are given a political and legal content that is informed by those who are disadvantaged and vulnerable' (Albertyn, 2000: 10). This raises the questions of for example, the need for research and mobilising strategies.

Pereira (1996) notes that although describing anti-discrimination legislation as tokenistic has become something of a cliché, 'tokenism' does nevertheless most aptly encapsulate its essence. According to the AIDS Law Project (2000), in its daily work it receives several complaints against doctors and nurses who have tested people for HIV/AIDS without their knowledge or informed consent. This occurs for the most part in the context of applications for employment and life insurance. Many of these complaints have been referred to the Health Professionals Council.¹³ However, despite these complaints and the mechanisms that have been put in place for individuals to seek redress, relatively few complaints of HIV/AIDS discrimination have been lodged with the Labour courts. *Hoffmann v South African Airways* was South Africa's first Constitutional Court case that dealt with HIV/AIDS and employment. Considering that HIV/AIDS related discrimination is both extensive and pervasive in the workplace, the number of complaints received does not accurately represent the extent of discrimination experienced. This low level of complaints is suggestive that given the high incidence of discrimination, anti-discriminatory legislation are not very effective tools for protecting the rights of employees and marginalized groups in society.

In South Africa, anti-discriminatory legislation against people with HIV/AIDS in the workplace and in general has a relatively weak enforcement structure. Also, many

¹³ The previous South African Medical and Dental Council

people discriminated against do not bring proceedings under the relevant legislation because of the delays involved and the limited range of remedies available (Pereira, 1996). Delays occur allocating complaints to investigating officers and there are often extended delays at the assessment and investigation phases. If a complaint is not settled, there are considerable delays associated with referral and a formal hearing. Yet the need for speedy and effective administrative remedies is especially important in the context of HIV/AIDS because the complainant may be ill or dying and as such will be deterred by possible delays from pursuing legal action (Pereira, 1996).

Further factors limiting anti-discrimination legislation are the relatively modest remedies that are provided. For example, in *Hoffmann v South Africa Airways*, Hoffmann received in compensation only R100 000, however, this was much more favourable than the case of *'A' v South African Airways*, where the complainant only received R5000. In another case, a temporary worker at a chemical company who applied for permanent employment was told he would have to undergo an HIV/AIDS test. When he tested HIV positive, he was refused any further employment. The case went to the industrial court where it was argued that such testing clearly constituted an unfair labour practice. The company settled out of court and paid the individual R20 000 (Heywood, 2000). Accordingly, many potential complainants will not pursue relief as they do not see it as worth the trouble given the limited range of remedies available under anti-discrimination legislation.

It is contended that the 'paying-off' of employees do not send a positive message to other employers who discriminate against workers. These decisions of the Courts suggest that employers who are discriminating against their HIV/AIDS employees, should they be taken to court, would merely have to financially compensate the complainants. Employers should be penalised in ways other than by only financially compensating employees.

The artificiality of legal reasoning can be demonstrated using the testing policies of De Beers, the South African diamond mining company. According to Pile (2000), the company is taking steps to combat the disease by encouraging their workers to take HIV saliva tests known as sero-prevalence surveys. The test requires workers to spit into a laboratory container, which is then tested for HIV specific antibodies.

Theoretically, such tests in South Africa would be considered a breach of the Employment Equity Act, which prohibits HIV testing, unless the Labour Court sanctions it. However, repercussions against an organisation which carries out voluntary, anonymous HIV/AIDS testing are unlikely unless the employer uses the results against an employee or discloses them without consent.

Pile (2000) states that the company decided to do mass voluntary and anonymous testing to establish the feasibility of making anti-retrovirals available to infected employees, either by setting up a trust fund or by an in-house medical aid. The company stated that the drive to encourage voluntary testing was very successful since over 75% of the employees chose to participate in the research. The good turnout is attributed to the fact that the company has run an effective, formalised policy to combat HIV/AIDS on its mines since the late 1980s, so workers are highly sensitised to the issue. However, Pile (2000) attributes this turnout to the company's more contentious decision to introduce HIV/AIDS testing for bursary and scholarship applicants from the year 2000. The company claims that vast amounts of money will be spent on this scholarship programme that is aimed at training people to replace employees who have AIDS related illnesses. While the company is in effect discriminating against HIV/AIDS infected applicants, the Employment Equity Act does not cover bursary applicants since they are not employees. Thus, the company has in effect found a way to work around the definition, thereby enabling it to circumvent the Employment Equity Act. The Company noted that this did not constitute pre-employment testing, rather, they viewed it as pre-investment testing.

The issue that needs to be considered is whether the protective model of law can be deployed to address the problem of HIV/AIDS related discrimination and accordingly whether it has any role in achieving the goals of public health strategies in relation to HIV/AIDS. Pereira (1996) suggests that considering the fact that societal discrimination amplifies the risk of HIV/AIDS infections for marginalised groups and intensifies the impact of infection for those affected, then such a question is intimately related to whether the law can be used as an instrument of social change.

In a modern secular democratic society the norms and values are to a large extent embodied in the legal system (Cotterrell, 1984). Thus, the assumption that the law

reflects the consensus in society is important not in its actual sense but in terms of its ideological value. The point is that legal representation carries with it a legitimating of ideas in a way in which other institutions such as the media, do not, as it claims to speak as one of the primary voices of the modern liberal State. Hence, the law by espousing norms of non-discrimination in the form of anti-discrimination legislation is significant and imperative as they can contribute to establishing the legitimacy of non-discrimination in society. This in turn may foster a social climate more supportive of people living with HIV/AIDS and those most at risk of contracting it.

3.11 Conclusion

According to Pereira (1996: 7), it can be safely asserted that using the protective model of law to eradicate discrimination in society has definite limits since 'you can't legislate for what people think.' Furthermore, in the context of HIV/AIDS the reality is that many people affected by HIV/AIDS who suffer discrimination will be resistant and unlikely to use the law as a means of possible redress, due to the public nature of the law and the consequent fear of further reprisal and discrimination. Many persons living with HIV/AIDS may not want the burden of a legal battle in what may be the final months or years of their lives. Hence, it is apparent that there are enduring limitations on the ability of the law to prevent HIV/AIDS related discrimination.

CHAPTER FOUR

Research Site, Methodology and Process

4.1 Introduction

In this chapter the prevalence of HIV/AIDS in KwaZulu-Natal will be described, along with the Unicity's response. The spread of the disease has been rapid yet efforts to seriously challenge this have been curtailed, given the politicisation of the epidemic. Therefore, it is necessary to examine the South African government's response and the general political and social environment that has shaped the development of HIV/AIDS policy in South Africa. This is followed by a description of the epidemic in KwaZulu-Natal and some major reasons for it flourishing in the province. Thereafter, the research site will be considered and the overall process of carrying out the research is described.

4.2 Political Context of HIV/AIDS in South Africa

HIV/AIDS emerged in major cities in South Africa in 1985 (Smith, 2000). In 1990, the first series of annual national surveys in antenatal clinic attendees found an HIV/AIDS prevalence of 0.8%. By 1991 this had doubled to 1.5%. At this stage it became abundantly clear that South Africa was in the early stages of a rapidly growing HIV/AIDS epidemic (Schneider and Stein, 1998). In 1991, discussions between the African National Congress (the 'ANC') and the then Health Department began on HIV/AIDS. Having just returned from exile, the ANC had witnessed at close range the effects of the epidemic in other parts of Africa and understood the epidemic's potential to undermine national development (Schneider and Stein, 1998). In 1992, the National AIDS Committee of South Africa was formed demonstrating 'an unusual show of national unity at a time of complex and sensitive political negotiations' (Schneider and Stein, 1998: 5). The AIDS Plan assigned a central role to government as leading and implementing a comprehensive response to HIV/AIDS as well as providing the necessary funding. The plan foresaw a strongly shared vision of mobilisation to focus all of the country's resources on fighting the disease. However,

soon thereafter the problems of implementing the HIV/AIDS policy began to materialise and controversies around HIV/AIDS started to emerge.

The first dissent began in 1995 when a ministerial decision was made to commission *Sarafina II*, a musical about HIV/AIDS. A contract of R14 million was assigned to the South African playwright of *Sarafina*. Several months later when the sum of the money involved became known this produced an outcry from a range of stakeholders, inside and outside of government. Investigations uncovered extensive confusion around administrative and tendering procedures adopted within government and raised questions on the approval of such a large sum of money for a play. The second controversy emerged in 1997 when a Cabinet release announced the development of a treatment for HIV/AIDS, developed in South Africa. According to Schneider and Stein (1998), researchers from a local university had approached the Minister of Health for the funding of their treatment drug known as Virodene and had been given an audience with Cabinet. The drug had been tried in the form of skin patches on a few volunteers with HIV/AIDS and had shown some success. However, subsequent investigations by an independent panel had shown that it had not passed the most basic biological and animal experiments. Another controversy in 1997 emerged when the Minister of Health unexpectedly announced that HIV/AIDS was to be made notifiable. This was strongly opposed by internal and external stakeholders who then proposed more efficient and less problematic methods of tracking the epidemic (Schneider and Stein, 1998).

These actions represent the responses of politicians to a serious problem affecting everyone in South Africa. Schneider states that 'Although well intentioned, these quick fix initiatives have precipitated individual and institutional fall-out which is doing little to further AIDS prevention or care in the country (Schneider and Stein, 1998: 10). However, two further major controversies have resulted in the commitment of government to challenge HIV/AIDS being seriously questioned.

The President, Thabo Mbeki, has come under severe criticism for his stance on HIV/AIDS claiming that the HIV virus does not cause AIDS. This is in conflict with the official viewpoint established within South African governmental health agencies. The President has yet never unequivocally conceded that viral infection is a

necessary condition for the disease. He has also never clearly stated that drugs can improve the life expectancy and quality of life of infected people. In myriad indirect ways he has communicated his dissidence to the public and his government. HIV/AIDS statistics are challenged and the ravages of the epidemic de-emphasised. The virological explanation is treated as an unproved hypothesis. According to Schneider and Stein (1998), because of his enormous influence in government and the ruling party, Mbeki's views cannot be brushed off as a harmless foible. In a country where it is estimated that one in four deaths is related to HIV/AIDS, the government is actively undermining a sense of national urgency. Furthermore, it shows no sign of allocating the kind of anti-retroviral provision that could make a difference.

A further controversy has been the government's decision not to provide AZT which President Mbeki deemed 'toxic' to pregnant, HIV/AIDS mothers in public clinics. The Health Minister stated that the decision was based on AZT's high costs and unproven safety, rejecting several reports by the Medicines Control Council in favor of AZT. International medical consensus is that the benefits of AZT outweigh its risks. An offer by a pharmaceutical company to provide AIDS medication for pregnant infected women at a 75% price reduction was rejected by the government. Various decisions and actions surrounding the provision of HIV/AIDS drugs to infected people, on the part of government, has resulted in it being sued by the Treatment Action Campaign in 2001, which has been a further embarrassment for the South African government.

These developments have been said to exacerbate the long-standing conflict between the South African government and frontline HIV/AIDS doctors, scientists and activist and further undermined the credibility of government. Government is accused of neglecting its duty to combat the rapidly spreading epidemic, which has accentuated the failure of its national policies on HIV/AIDS. It is within this context that the Durban Unicity's workplace HIV/AIDS policy was formulated

4.3 HIV/AIDS in KwaZulu-Natal

HIV/AIDS is now a pandemic in South Africa and KwaZulu-Natal including Durban, is ahead of the rest of the country in terms of the progression of the pandemic

(Dorrington et al, 2000). It is estimated that 700 000 people in KwaZulu-Natal will be infected with HIV/AIDS by 2020. The population of KwaZulu-Natal according to the national census is 8.4 million making it the most populated province in the country. Females comprise 53.15% and males 46.85% of the population. The National HIV survey of women attending antenatal clinics at public health facilities show an increase of HIV prevalence from 0.7% in 1990 to 22% in 1999. KwaZulu-Natal has the highest prevalence at 32.5% (Smith, 2000). The prevalence is generally higher among women, with women aged 15-19 showing a prevalence of 43.3% compared to males of the same age who show a prevalence of 17.3%. Female prevalence peaks in the 25-29 year old age group whereas male prevalence peaks in the 35-39 year old age group (Smith, 2000). The number of HIV positive people is expected to continue to rise for the next few years, with the prevalence leveling off at over 30% of 15-49 year olds. As the epidemic progresses the number of people sick from HIV/AIDS will increase with an adverse effect on the KwaZulu-Natal and national economy. It is further predicted that the number of people sick from the epidemic will peak around 2008/9 (Dorrington et al, 2000). In 2000, deaths resulting from HIV/AIDS represented half of all deaths in the province. In the next few years deaths from HIV/AIDS is expected to exceed all other causes of death combined. The impact is amplified by the concentration of them in the productive age group (Whiteside and Sunter, 2000).

Research undertaken by the Health Economics and HIV/AIDS Research Division (HEARD), state that the reasons attributed to the high incidence of HIV/AIDS in KwaZulu-Natal than anywhere else in the country, is the presence of a combination of all the following factors involved in the transmission of the epidemic.

Political violence in certain areas of the province has resulted in the displacement of people to squatter camps, where living conditions are not conducive to healthy and safe lifestyles. Also prevalent is the high rates of sexual violence towards women. This has been shown to reduce women's ability to negotiate condom use where the use of condoms is regarded as an insult to manhood (Jewkes and Mvo, 1997). The province has extensive truck routes and two large ports in the province namely, Richards Bay and Durban. Cross-border traffic with Mozambique and Swaziland,

countries with high prevalence rates as well,¹⁴ is also present. A study by Whiteside (1998, cited in Smith, 2000) cites a survey of 213 truck drivers in KwaZulu-Natal. The study found that 35% had more than one sex partner in the week immediately preceding the survey. The study states that although most of those surveyed had heard of HIV/AIDS and knew how to protect themselves, it was not clear whether they were doing so.

The population of KwaZulu-Natal represents 20.7% of the total population of South Africa but only 7.6% of the land area (Smith, 2000). This high density is accompanied by population demographics that show a very high proportion of young people, where 64.6% of the population is less than 25 years of age. Despite the high population density of the province, industry has never developed commensurate with the population (Smith, 2000). Many working men join the ranks of migrant labour and work most of the year in Gauteng province. These men, away from home for long periods of time have their sexual needs assuaged on a commercial basis with the eventual transmission of HIV/AIDS to their partners at home. The absence of the male parent for long periods from home adds to the risk of a dysfunctional family. Smith (2000: 3) notes that 'stresses occasioned during his absence due to the mother having to cope with family discord are compounded on his return when she tries to maintain harmony.' The high levels of unemployment and marginalisation among youth, has also led to young people putting short-term survival over long-term well being. Short-term survival strategies include exchanging sex for schooling, employment, money, food or shelter.

Tuberculosis research in Hlabisa in KwaZulu-Natal found that the proportion of TB cases attributable to HIV/AIDS infection was at least 44% in 1995 (Wilkinson and Davies, 1997). The authors note that between 1994 and 1995, KwaZulu-Natal was one of the provinces with the highest HIV/AIDS prevalence rates and during this period the province also recorded increases in registered TB deaths. TB deaths among younger females have increased particularly rapidly in the province and Wilkinson and Davies (1997) contend that some of the increases in TB mortality are likely due to misreporting of cause of deaths of HIV/AIDS patients

¹⁴ 14.17% and 18.50% respectively

4.4 The Unicity's Response to HIV/AIDS in KwaZulu-Natal

Given the spread of HIV/AIDS in KwaZulu-Natal, the importance of local authority level responses to the epidemic has been amplified. The province has experienced multiple impacts such as economic, social, and medical. Thomas and Crew (2000) note that the effect of this is seen in increasing poverty within the city, increased strain on resources such as hospitals, clinics, a diminishing rate payers' base to generate wealth to build infrastructure, an increasing orphan population with low levels of education, lack of social stability and nurturing and increasing numbers of street children.

The Unicity's response has been the following:

Support from the Unicity has taken the form of accommodating the AIDS Training, Information and Counseling Centre (ATICC) as a start and providing it with infrastructure, management and resources. More recently this has been expanded to include advocacy for funding for the ATICC and also acknowledgement of the importance of HIV/AIDS activities in the Unicity area and support of initiatives to involve other stakeholders in the Unicity area (Thomas and Crewe, 2000).

Previously, since 1989 services were provided through ATICC, which was housed within the then City Health Department. Thomas and Crewe (2000) note that the focus of service delivery was:

- Provision of HIV/AIDS counselling and testing, training of counsellors and counsellor trainers, AIDS awareness programmes and a publicly accessible HIV/AIDS resource centre;
- ATICC also participated in a number of crucial initiatives that have shaped the direction of HIV/AIDS responses and programmes. These included active participation in the National AIDS Convention of South Africa (NACOSA) and the development of the NACOSA Plan, the Regional AIDS Advisory Committee and various other national, provincial and local policy and programme development forums;

- Only those who could call in at the centre accessed services, whilst open to all.

Thomas and Crew (2000) state that this approach was developed in the early stages of the epidemic in South Africa, when there was very limited visibility of the epidemic stigmas were particularly widespread and little was known about the HIV/AIDS field in other sectors. In addition, this approach promoted access to important resources in a confidential and private setting and made good sense overall. It allowed for the delivery of an excellent and thorough clinical and counselling service to the relatively small numbers of people who were primarily from the gay community. The weaknesses of the approach was that it was too centralised, the provision of high-quality, intensive services were limited, this 'luxury service' could not be sustained as the demands of the epidemic grew and finally, because the ATICC was designated to deal specifically with HIV/AIDS, other organisations, departments, sections, etc. did not regard it as priority for themselves (Thomas and Crewe, 2000).

Over time these services were not sustained. At this point in time, Thomas and Crewe (2000) note that shifts in the strategic emphasis chosen by ATICC took place. Priorities became capacity building, provision of technical support and resources, and contributing to the continuum of care through facilitating the establishment of referral systems. In essence this involved reducing the amount of direct service provision for example, counselling and concentrating on increasing the capacity of other organisations to develop their programmes and assisting them to acquire the skills to do so. Other sections within the Health Department were encouraged to incorporate HIV/AIDS activities into their work. For example, many nursing staff in the clinics were trained as counsellors; family planning advisors added HIV/AIDS counselling to their work; health educators became increasingly involved in the provision of HIV/AIDS awareness programmes in schools and industry and also in life skills programmes; and community social workers initiated and participated in outreach programmes, policy initiatives and the training of community peer educators (Thomas and Crewe, 2000).

Key challenges for the future have been identified as:

- Co-ordination of service provision;

- Shared vision and planning about what needs to be done and the most efficient and effective way of achieving this;
- Teamwork - playing complementary roles and avoiding duplication;
- Ensuring sufficient allocation of resources and skills development to provide appropriate responses;
- Promoting a broad understanding of the impact of HIV/AIDS and an understanding of all the micro and macro factors that contribute to its spread. By doing this, service providers can then identify where it is that services fit into the prevention or management of the impact of HIV/AIDS, without them necessarily being specific HIV/AIDS programmes.

According to O'Loughlin (2001), Durban is slowly being swamped by its dead. The author states that according to one cemetery official, the projected death rate for the next 10 years will require enough graves to fill 241 hectares - equivalent to one-fifth of the area of the old city of Durban. O'Loughlin quotes the director of cemeteries and crematoria as saying that '...availability of land is a serious problem. At present we have 24 cemeteries in the city centre and 16 are already full to capacity. We estimate that if the death rate continues to go up at the present rate the operational cemeteries will be full within five years' (2001:1). The director goes on to state that in 1995 between 5000 and 6000 people were buried within his jurisdiction but by last year this had risen to 13 500. This provides a very clear and frightening indication of the challenges facing the Unicity.

4.5 Demographic Profile of the Unicity

The Unicity employs a total number of 17729 people. This is comprised of 2234 Whites (1500 Males and 734 Females); 5466 Indians (4506 Males and 960 Females); 498 Coloureds (316 Males and 182 Females) and 9531 Blacks (8127 Males and 1404 Females). The total number of Males employed is 14 449 and Females is 3280.

Six Occupational levels exist. This consists of 3 levels of management that include top management, such as chief executive officers, executive officers and directors. Senior management is made up of the assistant city treasurer and assistant town clerk.

Middle management includes engineers/technologist, accountants and the forensic auditor. After management follows the technical specialist which comprises artisans, technicians and librarians. Below this is general staff which includes clerical and secretarial staff and finally, basic skills staff which include general workers.

Table 4.5 (a): Total number of Management

Occupational Levels	Total	White		Indian		Coloured		Black	
		male	female	male	female	male	female	male	female
Top Management	105	64	5	17	3	0	2	13	1
Senior Management	135	67	10	36	4	2	0	11	5
Middle Management	688	268	60	178	41	20	4	84	33
Total	928	399	75	231	48	22	6	108	39

The number of people belonging to the top management level is 105. This total is made up of 64 White males, 17 Indian males and 13 Black males. There are no Coloured males employed at this level. There are also very few females in proportion to males. Females' account for only 11 of the 105 top management (5 Whites, 3 Indians, 2 Coloureds and 1 Black). This pattern is repeated in relation to senior and middle management with White males constituting the majority of senior and middle management followed by Indian males and Black males. Coloured males are under represented at these levels of management. The management level that employs the largest number of women is middle management with a total of 138 females. The groups most represented at these levels of management are White males (399), followed by Indian males (231) and Black males (108). White females are also in the majority (75), followed by Indian females (48) and Black females (39). Coloured males and females are the least represented at all levels of management.

Table 4.5 (b): Total number of Non-managerial staff

Occupational Level	Total	White		Indian		Coloured		Black	
		male	female	male	female	male	female	male	female
Technical/ Specialist	3452	824	231	915	254	142	36	758	292
General Staff	6845	268	425	1720	565	114	132	2944	677
Basic Skills Staff	6504	9	3	1640	93	38	6	4317	398
Total	16801	1101	669	4275	912	294	174	8019	1367

The total number of non-managerial staff employed is 16 801. The majority of technical specialists are Indian males (915) followed by White males (824) and Black males (758). There are only 142 Coloured male technical specialists. The majority of female technical specialist employed are Black, with a total of 292 females. This is followed by Indian females (254), White females (231) and Coloured females (36). Coloured male and female technical specialists are the least represented in this category. The occupational level that employs the majority of staff is at the level of Basic Staff with a total of 6845 employees. Most of these are Black males (2944), followed by Indian males (1720). Black females are also in the majority at this level (677), followed by Indian females (565). The next occupational level that employs a large number of employees is at the level of Basic Skills Staff. Black males are the most represented at this level (4317), followed by Indian males (1640) and Black females (396). The least represented group at this level comprise of White females (3), Coloured females (6) and White males (9). In non-managerial positions, Black males (8019), Indian males (4275) and Black females (1367) are the most represented group. Once again, Coloured males and females are the least represented group employed at the Unicity. Overall, the top levels of the Unicity's employment structure is comprised primarily of White males, the middle ranks by Indian males and the lower ranks are occupied by Black males.

HIV/AIDS infection rates for the Unicity members are currently unknown. The Human Resources Department was approached by this researcher to determine the

HIV/AIDS infection rate of Unicity members. The respondent from this department stated that there was no certain way to determine the rate of HIV/AIDS infection among Unicity members since testing of employees and management was prohibited. The only vague estimation of this could be gathered from an examination of the history of sick leave in all of the departments. This data indicated a sharp increase in the average number of sick leave taken in all of the departments. Figures for the Department of Transport indicated the highest number of productive days lost, followed by the Department of Electricity and Emergency Services. However, this did not provide an accurate assessment of the prevalent HIV/AIDS infection rate.

4.6 The Research Process

4.6.1 Establishing Contact with the Unicity

Establishing the initial contact with the Durban Unicity was not difficult to achieve. The Unicity possesses an easily assessable web site, which contained the description of the various departments' management along with their telephone numbers. In this research there were no key individuals to contact. However, the person who occupied the most senior position in the department was contacted first. Since respondents were to be primarily selected using snowball sampling, it was decided to establish initial contact with two separate departments and thereby create two separate links in the chain. This was undertaken early in September 2001. The first department in which contact was initiated was the Corporate Human Resources Division and thereafter the Economic Development Corporate Services. Once the interview was concluded, respondents were then asked to refer the researcher to another member belonging to another department. Most of the Unicity's departments are not housed in a central location instead they are geographically spread around Durban's central business district. Thus, interviews were scheduled on different days, at the respondent's convenience, so as to allow the researcher sufficient time to locate the various departments.

4.6.2 Total Number of Respondents Interviewed

Table 4.6.2: Sample size and composition

Occupational Levels	Total	White		Indian		Coloured		Black	
		male	female	male	female	Male	female	male	female
Top Management	3	1	1	1	0	0	0	0	0
Senior Management	5	3	0	2	0	0	0	0	0
Middle Management	14	4	3	4	1	0	0	2	0
Technical/ Specialist	2	0	0	1	0	0	0	1	0
General Staff	6	0	1	2	1	0	2	0	0
Basic Skills Staff	7	0	0	2	1	0	0	2	2
Total	37	8	5	12	3	0	2	5	2

A total sample of 40 people was interviewed. This comprised of 22 managerial staff (3 top management, 5 senior management and 14 middle management). The remainder consisted of 2 technical specialists, 6 general staff and 7 basic skills staff. The remaining 3 respondents were trade union representatives from the South African Municipal Workers Union. Most of the respondents represented middle management, followed by basic skills staff and general staff. The group most represented were Indian males (12), White males (8), Black males (5) and White females (5). Coloured male and females were the least represented in the sample.

According to Patton (1990), the particular design of a qualitative study depends on the purpose of the inquiry, what information will be most useful and what information will have the most credibility thus there are no strict criteria for sample size. Van Meter (1990) also contends that the ideal number of links in snowball sampling will vary depending on the purpose of the study. This study was limited in its scope, primarily due to time constraints. Therefore the number of links or referrals was not so substantial so as to counteract the effects of selection bias. The researcher also attended an HIV/AIDS workshop held by the municipality in November 2001. This opportunity enabled the researcher to establish contact with employees other than management, whom the researcher would not have met using the selective snowballing approach for the purpose of recruiting.

4.7 Methodology

Qualitative research broadly defined, means 'any kind of research that produces findings not arrived at by means of statistical procedures or other means of quantification (Strauss and Corbin, 1990: 17). Patton (1990) notes that where quantitative researchers seek causal determination, prediction, and generalisation of findings, qualitative researchers seek instead illumination, understanding, and extrapolation to similar situations. Qualitative research uses unreconstructed logic to get at what is really real, the quality, meaning, context, or image of reality in what people actually do and not what they say they do. Unreconstructed logic means that there are no step-by-step rules, that researchers ought not to use prefabricated methods or reconstructed rules, terms, and procedures that try to make their research look clean and neat (Patton, 1990). Qualitative analysis also results in a different type of knowledge than does quantitative inquiry. Eisner (1991) however, points out that all knowledge, including that gained through quantitative research is referenced in qualities and that there are many ways to represent our understanding of the world.

4.7.1 Basis for the Use of a Qualitative Research Methodology

In the decision to adopt a qualitative research methodology, several considerations where taken into account. Strauss and Corbin (1990) claim that qualitative methods can be used to better understand any phenomenon about which little is yet known. They can also be used to gain new perspectives on things about which much is already known or to gain more in-depth information that may be difficult to convey quantitatively. Thus, qualitative methods are appropriate in situations where one needs to first identify the variables that might later be tested quantitatively or where the researcher has determined that quantitative measures cannot adequately describe or interpret a situation. The ability of qualitative data to more fully describe a phenomenon is an important consideration not only from the researcher's perspective, but from the reader's perspective as well.

The primary limitation is that unlike quantitative research, the findings are not statistically projectable to the population under study. This limitation is created by

two facts namely, recruiting is rarely completely representative and the very nature of qualitative research necessitates small sample sizes.

4.7.2 The Case Study Approach

Under qualitative research methodology there are various qualitative research methods. According to Yin (1984), a research method is a strategy of inquiry which moves from the underlying philosophical assumptions to research design and data collection. The choice of research method influences the way in which the researcher collects data. Specific research methods also imply different skills, assumptions and research practices (Yin, 1984). The research method that was adopted in this study is the case study approach which is widely used in the social sciences (Harber, 1998).

According to Yin ‘a case study is an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident’ (Yin, 1984: 13). Case studies can use a combination of both qualitative and quantitative research methods however, according to Mark (1996), is particularly well suited to qualitative research that seeks to understand complex social phenomena.

The case study method was adopted for various reasons. These reasons also constitute some of the advantages of using this method. Firstly, Merriam (1998: 13) contends that the case study approach enables research to preserve the ‘holistic and meaningful characteristics of real-life events.’ It also ought to be adopted when the researcher does not have a lot of control over events and when the focus is on a contemporary phenomenon within some real-life context, which is what this research was focused on. The phenomena, being the implementation of employment legislation, were also entirely outside the researcher’s control. Secondly, the case study approach is valuable in that it provides the researcher with a detailed set of information from which specific theoretical nuances can be examined and explored (Mark, 1996). Thirdly, the method is useful in that it does allow for multiple theoretical approaches to be tested against the same set of events using multiple data sets of the same phenomena and is therefore valuable in the evaluation and comparison of competing theories (Mark, 1996). For Yin (1984: 33) case studies have been very advantageous

for informing policy because ‘processes, problems and programs can be examined to bring about understanding that can affect and even improve practice.’

There are a number of problems and potential limitations of using a case study approach. The key limitation of the approach results from the limited number of cases that can reasonably be undertaken by the researcher, which is a general problem related to qualitative research overall. This problem has a key effect in that the value of the case study’s insights are restricted to the case itself because of the specificity of the study’s scope and limited use of wide-scale quantitative data collection (Yin, 1984). Thus, while theoretical developments can be gained from the case it is not possible for the researcher to generalise beyond the case either longitudinally, over time or latitudinally, between different cases, with a high degree of confidence (Yin, 1984). Yin also argues that it is situation and time bound often requiring a lot of time for appropriate data collection and it can also be an unfounded intrusion into the lives of others.

4.7.3 Sampling Strategy for Qualitative Research: Snowballing

According to Patton (1990), in qualitative research there is a tendency to rely on the snowball method of sampling for obtaining informants or respondents. Snowball sampling is particularly useful when the research explores sensitive matters that require knowledge of ‘insiders’ to locate people. Thus the process is best used in situations where the phenomenon being studied itself leads to open and available social networks.

It is an approach that comprises making contact with an initial group of interviewees known to the researcher to meet the criteria for the research. These informants are asked to connect the researcher with other potential informants in their networks who are then asked to provide further connections to people who meet the criteria for the research. In this manner, the researcher casts a net into an ever-widening chain of people. Spreen (1992) notes that snowball sampling can be placed within a wider set of link-tracing methodologies that seek to take advantage of the social networks of identified respondents to provide a researcher with an ever-expanding set of potential contacts. This process is based on the assumption that a ‘bond’ or ‘link’ exists

between the initial sample and others in the same target population, allowing a series of referrals to be made within a circle of acquaintance (Berg, 1988).

A range of advantages has been claimed for snowball sampling. Firstly, it has enabled access to previously hidden populations. Often members of such populations may be involved in activities that are considered deviant, such as drug taking, or they may be vulnerable, such as the stigmatised in society making them reluctant to take part in more formalised studies using traditional research methods. Trust may be developed as referrals are made by acquaintances or peers rather than other more formal methods of identification. It may also be used to examine changes over time. Snowball sampling can also produce in-depth results and can produce these relatively quickly (Van Meter, 1990).

Snowball samples however, also have a number of deficiencies. Firstly, there exist problems of representiveness and selection bias, which limits the validity of the sample and the quality of the data (Van Meter, 1990). Griffiths et al (1993) note that because elements are not randomly drawn but are dependent on the subjective choices of the respondents first accessed, most snowball samples are biased and do not therefore allow researchers to make claims to generality from a particular sample. Secondly, snowball samples will be biased towards the inclusion of individuals with inter-relationships and therefore will over-emphasise cohesiveness in social network and will miss 'isolates' who are not connected to any network that the researcher has tapped into (Van Meter, 1990).

4.7.4 Data Collection Technique: Interviewing

In this research, interviewing was the primary tool by which data were collected. Formally defined, an interview is 'a verbal exchange wherein an interviewer attempts to access the opinions or beliefs of an informant' (Patton, 1990: 25). Patton further notes that interviewing can provide the researcher with flexibility in data gathering, it can be adjusted to meet the researcher's and or their respondent's needs and to probe areas of interest during the discussion. The type of interview that was adopted was the semi-structured interview.

While interviewing provides a number of advantages to the researcher, the method also has many limitations. Firstly, Bogdan and Biklen (1982) note that it is time consuming and expensive. As it is a skill it also requires training and practice to develop. The researcher must physically face their subject and ask questions that can be personal, redundant, and sometimes, impertinent. The researcher must act as a filter, cross checking various responses on the same issue to establish what will be later presented as 'fact.' Therefore, because the interviewer becomes the instrument of the research, the method precludes the codification of a subjects responses in a manner directly comparable to that of other interviewees, which can be done using positivist research. Finally, it is based on personal memory and interpretation and is possibly subject to missing data errors, mistakes, and misrepresentation that must be countered through cross verification of responses (Bogdan and Biklen, 1982).

4.7.5 Semi-Structured Interviews

Semi-structured interviews were used in all of the interviews that took place, except the email interviews, which required open-ended questions. This type of interview technique was preferred because, as noted by Berg (1998), semi-structured interviews are conducted with a fairly open framework which allow for focused, conversational, two-way communication, therefore they can be used both to give and receive information. Semi structured interviewing starts with more general questions or topics. Relevant topics are initially identified and the possible relationship between these topics and the issues such as implementation, effectiveness, etc. become the basis for more specific questions that do not need to be prepared in advance (Berg, 1998). In this research not all questions were designed and phrased ahead of the interview. Instead, these interviews were partially structured by a written interview guide. The flexible guide ensured that the interview stayed focused on the issue at hand. The majority of questions were created during the interview allowing both the researcher and the respondents the flexibility to probe for details or discuss issues.

Prior to conducting the interviews, inquiries were made about the time respondents were prepared to allocate to the interview. Most of the respondents interviewed by the researcher did not impose any time constraints and were often prepared to spend their lunch breaks talking to the researcher. The respondents therefore set the pace of the interviews. Each interview lasted between one and two hours and in some instances, three hours. This allowed for detailed note taking. Tape recorders were not used even though they are recommended by some writers such as Yin (1984). However, Merriam (1988) argues that this comes down to a matter of personal preference. In this research, written notes were preferred on the basis that persons occupying positions in a public institution are unlikely to speak frankly to researchers with tape recorders (Harber, 1998). This was a partly incorrect assumption since respondents were forthright in their responses regarding HIV/AIDS in the workplace. However, it is contended that respondents would not have been very candid had a tape recorder been present. Also, it was not necessary to obtain a totally verbatim recording of interviews since the research dealt with policy matters as opposed to individual issues (Harber, 1998).

4.7.6 Email Interviews

A relatively new form of interviewing was also utilised, namely, email interviews. Email interviews were conducted with 9 respondents. According to Selwyn and Robson (1998), email interviews are relatively straightforward applications of electronic mail and their use predates the development of World Wide Web. These were used in cases where the respondents that were referred to by previous respondents, were unable to meet with the researcher. Given the type of information that needed to be extracted from the respondents, interviewing over the telephone would have been expensive and not feasible. However, respondents or their personal assistants were initially telephoned to determine their email addresses and to inform them about the future email. Emails were then sent to the respondents containing an introduction to the researcher, the research and an explanation on how their details were discovered. Thereafter, a list of open-ended questions were included. Respondents were free to answer the questions at their own pace as no time constraints were imposed. All the respondents who were communicated to via email,

sent reply emails to the researcher. Further clarifications and explanations were done also via email.

This approach was valuable in that rather than interviewing a respondent face-to-face or via the telephone, open-ended questions were typed out and sent to the respondent for consideration and reply. The process can be brief or detailed, depending on the needs of the researcher and the willingness of the respondent. In this research many of the respondents were willing to correspond using email, and in fact preferred this technique to the conventional one-on-one interviews. However, the disadvantage was that this approach was staggered by the turn-around time of the email system, either because of technological speed or the regularity of access of the respondent to the computer or email account. Overall, the approach lacked the immediacy of the interview method on which it is based but can nevertheless facilitate detailed communication between the researcher and respondent where other methods cannot be applied (Selwyn and Robson, 1998). In this study, the data that was obtained via the use of e-mail interviews did not substantively differ from data that was collected during the face-to-face interviews with respondents. Responses that were received using the former method were equally rich in detail to the data collected using the latter approach.

4.7.7 Open Ended Questions

Open-ended questions were sent to respondents who could not attend the interview via email. This did not consist of a standard set of questions instead, questions were framed keeping in mind the position held by the respondents. For example, questions posed to the Occupational Health Physician differed from those sent to the respondent from the Department of Welfare. Thus, respondents had the opportunity to express themselves in a 'language' that was natural to them and the respondents subjective experiences were gleaned. Overall, questions were formulated with the intent of determining the success of the protective model of law that has been adopted in response to the HIV/AIDS epidemic.

4.8 Research Ethics

Harber (1998) notes that ethical issues permeate all aspects of qualitative research. Ethics in research entails conforming to accepted professional practices (Berg, 1998). There are numerous ethical considerations when carrying out research, however the most significant issues that affected this research will be examined. Initially, one has to gain permission to carry out the research. In this research no key individual or department was responsible for granting permission. This research however was not based on private and confidential practices or information of the Umicity. Instead, the research was focussed on the open and transparent implementation of the municipality's HIV/AIDS workplace policy. Therefore, the Corporate Human Resource department was approached as one of the first links in the snowball sample chain and here, the informed consent of the individual respondent was attained. In this way the consent of every respondent was gained prior to the scheduling of appointments.

Bailey (1978) notes that public institutions should not prevent research into their general activities. The legitimate interest of citizens in the functioning of social institutions is a reason for giving researchers freer access to matters relating to the public administration and political bodies than in the case of private organisations. Public archives should be made accessible to research. Furthermore, Bailey (1978) adds that restrictions can be imposed on access out of regard for personal protection or for reasons of over-riding national interests or national security. However, classified material should be declassified at the earliest justifiable opportunity. In this research the use of classified material was limited.

The next ethical issue that this researcher had to deal with concerned being open and frank about the purpose of the research. Informed consent, for Berg (1998) essentially entails making the subjects fully aware of the purpose of the study, its possible dangers and the credentials of the researcher. These are basic elements of information that are contained in the introductory statement. This was explained to all the respondents who participated in the interviews and in all of the emails. Most of the respondents showed an avid interest in the research and were interested to know about the findings. Respondents who expressly stated that they wished to be informed on the

overall findings of the research, were asked to provide a contact number such as an e-mail address, where the results could be mailed to them. Finally, establishing trustworthiness was the next ethical consideration. Berg (1998) contends that often trust can only be built up slowly as the purposes of the study and the consequences for respondents of taking part become clearer as the study develops. In both an ethical and a practical sense, respondents need to be reassured of the protection of the information they provide and this assurance of confidentiality can only be demonstrated over time. These points suggest that the initial respondents may act as invaluable assistants in obtaining the confidence of further respondents.

Confidentiality has become extremely crucial when researching issues related to HIV/AIDS. Berg (1998) notes that while not necessarily involving a legal requirement, promises to preserve confidentiality do carry a moral obligation. Persons who are made the subjects of research are entitled to confidential treatment of all information they give. The researcher must prevent the use and transmission of information that may harm the individual on whom the research is being carried out. This research concentrated on the Unicity's HIV/AIDS workplace policy, as opposed to the actual number of employees infected by the virus even though this question was raised during the course of some interviews. Consequently, respondents were willing to discuss the workplace policy without sensitive issues straining the interview. However, respondents were reassured that their feedback would be kept confidential and that their identity would remain anonymous if they so desired. However, no such requests were made by any of the respondents. In fact, all the respondents readily agreed to have their input used but the publication of certain internal documents were prohibited unless permission was granted by the author thereof prior to it being published.

4.9 Conclusion

In this chapter, controversies surrounding HIV/AIDS and the South African government that have emerged over the years were briefly discussed. The President's personal opinions have particularly been of serious concern and have been said to undermine the seriousness of the crisis in South Africa. The rate of infection in KwaZulu-Natal is the highest among the provinces and this has been

attributed to the particular social, demographic and economic dynamics at play in the province. The Unicity's response to the epidemic was also described. This has varied over the years, yet it nevertheless still faces great challenges as the affects of the epidemic are becoming more visible. Thereafter, the demographic profile of the Unicity was illustrated followed by a description of how contact was initiated with members of the Unicity in order to carry out the research. Finally, the research methodology that was adopted in this study, which was primarily qualitative in nature was explained.

CHAPTER FIVE

Analysis of Data

5.1 Introduction

This chapter focuses on the analysis and interpretation of data. In this study the nature of the data that was collected was exclusively qualitative. Therefore, the method of analysis that one adopts is less structured than with quantitative analysis. The findings of the interviews with management and general employees are presented respectively, in relation to particular themes. Immediately thereafter each component of the interviews with the two groups is analysed. Interviews conducted with the three trade union representatives are separately discussed at a later stage. Prior to this, it is necessary to examine more closely the Unicity's HIV/AIDS workplace policy which will be referred to as 'the workplace policy.' Immediately thereafter, intervention programmes that have originated as a result of the workplace policy will also be considered.

5.2 The Unicity's HIV/AIDS Workplace Policy

The structural and political amalgamation of the previous six metropolitan councils into one Unicity, meant that a new HIV/AIDS workplace policy was required. Previously, each of the six metropolitan structures had their own HIV/AIDS workplace policy however, with very few intervention programmes in place. As a result a single Unicity required a single policy. An HIV/AIDS steering committee was formed to consolidate the policies into one document. This process took seven months. In August 2001, the 'Durban Metropolitan Unicity Municipality HIV/AIDS Workplace Policy' or 'the Unicity policy' (Annexure A) was approved by the Executive Committee of the Unicity. The basis of the Unicity policy is derived from the Occupational Health and Safety Act and the Code of Good Practice on Key Aspects of HIV/AIDS and Employment. The policy's primary objective is in setting out guidelines for employers and trade unions to implement so as to prohibit the

unfair discrimination of employees with HIV/AIDS. It addresses the issues of: HIV testing, confidentiality and disclosure; the protection of employee benefits; dismissals; grievance procedures; the creation of a non-discriminatory work environment; and the provision of a Wellness Centre. The secondary objective of the policy is to provide guidelines for employers, employees and trade unions on how to address and confront HIV/AIDS within the workplace. A holistic approach is encouraged which includes: the creation of a safe working environment; the development of procedures to manage workplace injuries and claims for compensation; devising strategies to prevent HIV/AIDS; developing strategies to reduce the impact of HIV/AIDS in the workplace; supporting infected employees; the provision of assistance for voluntary HIV/AIDS testing.

5.3 Intervention Programmes

It has been contended (Hamblin, 1991), that protective laws help to mobilise the assistance and co-operation of people at risks of HIV/AIDS in intervention strategies. Participation at this basic level ensures compliance and respect with the stated objective of respecting human rights. Also, through workplace participation employees develop new beliefs in their ability to influence their personal and social spheres (King, 2000). Accordingly, the purpose of examining intervention programmes was directed at determining the level of participation among respondents in the formulation of these programmes and at these programmes' direct effectiveness. According to the Unicity's workplace policy, intervention programmes are to be dealt with by management, employees and their representatives at the Bargaining Council (Provision 4). One of the major disadvantages of the Unicity's response to the epidemic was that it did not establish a central HIV/AIDS co-ordinating structure that would exist on its own as opposed to being located in any one department. Such a structure would have been able to give impetus to and ensure co-ordination of a metropolitan-wide HIV/AIDS programme. At present various ad hoc initiatives exist that are carried out by different departments.

The Unicity has advocated various intervention programmes. These include information, education and communication activities, education and training on HIV/AIDS, peer education and peer counsellor training, condom distribution,

counselling for infected Unicity members, treatment of sexually transmitted diseases for infected Unicity members and wellness management programmes. Even though many intervention activities are advocated, not all of these programmes have been implemented and those that have been implemented have not been done so consistently. Interviews conducted with the employee group found that none of the respondents had participated in the formulation of these programmes in their workplaces. The majority of the management group interviewed, particularly middle management was also unaware of these intervention programmes as well as how they had come about. The trade union representatives however, were aware of these programmes since they were part of the Bargaining Council involved in the formulation of these policies. The success of the intervention programmes was determined by examining the two most popular programmes that are implemented in workplaces throughout South Africa namely, education and awareness programmes and condom distribution programmes.

Awareness and education programmes are based on the recognition that education has an invaluable role to play in the struggle to reduce the spread of HIV/AIDS. This takes the form of comprehensive HIV/AIDS education and health education. Peer education programmes were initiated at the Unicity, which either went to the departments or conducted voluntary workshops open to all management and employees. Here, very basic legal education regarding one's legal rights was provided. The most important provisions of the Employment Equity Act, the Occupational Health and Safety Act and the Labour Relations Act, are explained. According to the Unicity's HIV/AIDS workplace policy every employee of the Unicity is required to attend at least one HIV/AIDS education programme on a yearly basis or should the need arise, more frequently (Provision 3.1.2). The previous six metro councils' HIV/AIDS policies included a similar provision. Respondents were asked if this initiative, which predates the Unicity workplace policy, was monitored to the extent that should an employee not attend any education programmes it would become known. The majority of general employees stated this was not enforced at all furthermore, one employee admitted to having attended such a programme four and a half years ago. Some employees stated that they had postponed their attendance till another date yet never got down to attend it because of work. The response from the management group was similar. Here, senior and middle management admitted to not

having the time to do so and in the words of one respondent from middle management, 'I am tired of hearing about AIDS.'

With regard to the condom distribution programme, condoms were distributed via dispensers located in toilets but the condoms always ran out before the end of the month. Initially, these were replaced but over time this initiative was abandoned. Respondents stated that one usually discovered condoms in the toilets on an intermittent basis. It has been stated that condom distribution programmes will fail dismally if raising awareness and using education to change attitudes towards existing sexual practices do not accompany it (Burris, 1999). In the case of the Unicity, the opposite situation now exists. According to 1 respondent from the management group, the development of many programmes and services has been hampered by the lack of resources - financial and human - and the absence of a common policy and strategy. The transformation of the Unicity provided a unique opportunity to develop programmes which would effectively and holistically target HIV/AIDS among Unicity members. Instead, the situation now exists in the Unicity where, despite the emphasis placed on the importance of workplace programmes in conveying the general aims of the protective model of law, such initiatives are not earnestly carried out.

5.4 Discussion and Analysis of Data

In chapter one it was stated that the legal response to HIV/AIDS that embody the protective role of the law is insufficient per se, to contain the epidemic and the effects of it in South Africa. The questions that were put to respondents, attempted to discover the accuracy of the above statement in relation to HIV/AIDS in the workplace.

5.4.1 Knowledge of Workplace Discrimination

Management and Employees were initially asked if they had any knowledge of discrimination against any Unicity member, management or employee, based on their HIV/AIDS status or perceived HIV/AIDS status. The responses were as follows.

a) Management

Of the 22 respondents in the management group, 8 respondents claimed that they knew of people in the Unicity who had experienced various forms of workplace discrimination because they were suspected of being infected. Most of the discrimination encountered can be classified as subtle forms thereof, such as rude language and isolation in their workplaces. So far no blatant discriminatory practices had occurred however one respondent claimed that even if these practices did occur most of the people subject to such treatment would not want to come forward, as they felt that they would be subject to more stigmas and discrimination. Another respondent stated that lodging a complaint would also be regarded as an even greater breach of privacy.

b) Employees

Of the 15 respondents in the employee group, 12 respondents stated that they had come across discrimination and some respondents even felt that fellow employees suspected them of having HIV/AIDS. One respondent stated that the signs that people look for include excessive weight loss and continuous coughing. Another respondent stated that the many number of days that people are absent from work are also seen as a sign of infection. Should one exhibit these signs then it is said that one has HIV/AIDS and such a person is then stigmatised as a diseased person, to be avoided. These respondents stated that discrimination by workers against co-workers suspected of HIV/AIDS is very high because people feel that they will become infected if they associate with an infected person. Four of the 12 respondents stated that they know of fellow employees who are infected and whom co-workers have discriminated against. This has also taken the form of rude and insensitive remarks about their state of health and avoidance of any form of contact with the infected worker.

These responses clearly indicate the presence of workplace discrimination and the prevalence of widespread stigmas, more palpably among employees at all levels of employment. A total of 20 respondents claimed having come across these practices in the workplace however, since the identity of those to whom such discrimination is directed is unknown, the number of people this has occurred to and the number of times such practices have occurred cannot be confirmed. These practices in the

workplace have confirmed the need for greater protection to be conferred to employees with HIV/AIDS and for intervention programmes to be designed around the elimination of discrimination.

5.4.2 Knowledge of Workplace Policy

Respondents were asked about their awareness of the workplace policy. The level and extent of the awareness of legislation among these groups indicate the importance that has been attached to such legislation in the workplace. According to Burris (1999), this information constitutes essential baseline data for any analysis on the effectiveness of law.

a) Management

All of the 22 respondents were asked if they had read the Unicity's HIV/AIDS workplace policy. Ten respondents from middle management (3 White males, 2 White female, 2 Indian males, 1 Indian female and 2 Black males), albeit aware of the policy had not read it. One respondent from middle management (Indian male) stated that he was not aware of the policy and another respondent from middle management (Indian male) stated that the policy was only a draft therefore only once it became a final document, would it be read. However, at the time of the interviews the policy had been approved by the Unicity's Executive Council. Five respondents, 3 from upper management (1 White male and female and 1 Indian male) and 2 from senior management (White males) had read the policy and had a good knowledge of the provisions. The remaining 5 respondents comprising 3 from senior management (1 White male and 2 Indian males) and 2 from middle management (1 White male and female) stated that they had not read the policy in detail but knew of the most contentious provisions.

This low level of awareness among the management group, particularly middle management was surprising. The results show that top and senior managers, consisting primarily of White males have read the policy whereas middle management, consisting of White, Indian and Black males have not read the workplace policy albeit aware of it. One respondent from middle management bluntly attributed this to the fact that the workplace policy exists only because the

Unicity, as a public institution is obliged to have one. Therefore it is not very meaningful because its importance has not been emphasised. The policy was formulated at workshops and invitations to attend were sent to Councillors, Coordinators, Directors, Managers or whomsoever they chose to appoint. Of the 22 respondents interviewed, only 6 had attended these workshops. The remaining 16 respondents either could not attend at the time or did not know about it. Another respondent from middle management stated that most of the Unicity employees, including management would not know of the policy because the process of formulating it was relatively closed, in that all Unicity members were not asked for their contributions. A respondent from senior management viewed the overall participation of management as being very ad hoc, chaotic and ineffective.

b) Employees

Employees were then asked about their knowledge of the Unicity's HIV/AIDS workplace policy. Only 4 respondents comprising 2 technical specialist (1 Indian male and Black male) and 2 general staff (1 White female and Indian male) were aware of some of the provisions in the policy. For the remaining 11 respondents the policy was a vague or unknown document that was largely not very relevant to them. One of the respondents indicated that he did not know the importance of having such a policy instead, it was felt that a piece of paper would not make a difference in the workplace. None of the respondents decisively knew how to get hold of the policy or how it came to be in the first place. Invitations to attend the workshops where the policy was discussed for formulation was not extended to any of the employees. Instead, communication to the general Unicity employees regarding the policy occurred via publications within the Unicity, each department's shop steward and the media.

The lack of awareness among employees can partly be explained by their non-participation in the formulation of the workplace policy. However, given the fact that various other methods of communicating the workplace policy were used, their lack of knowledge is disquieting. The lack of awareness among the management group however, cannot be easily justified. Organisers of the workshops that were held to discuss the formulation of the policy stated that invitations were sent to all Unicity workplaces inviting all management personnel to attend. This low level of

participation can only be attributed a lack of interest in the matter and a sense that HIV/AIDS is someone else's problem to deal with. It further indicates that communication between the various levels of management in the Unicity is lacking

One of the findings of a recent survey noted that a lack of consultation by employers was to blame for the poor awareness among workers of the aims of employment equity legislation (Temkin, 2001). The survey further revealed that just under half of the respondents claimed to have heard of affirmative action, which indicated that the consultative processes in the workplace were not as transparent and open as expected.

5.4.3 Knowledge of HIV/AIDS Employment legislation

The workplace policy is based on the principles of the protective HIV/AIDS employment legislation. Respondents were asked to state how familiar they were with these protective laws and the rights attached to them.

a) Management

When asked about the actual legislation on which this policy was based, only 4 out of 22 respondents, 3 from top management (1 White male and female and Indian male) and 1 from senior management (White male) were well aware of employment legislation such as the Employment Equity Act, The Code of Good Practice on Aspects of the Law relating to HIV/AIDS in the Workplace and the Constitution. They were aware of the actual provisions on which the policy was based. Their awareness stemmed from the fact that during the course of their employment and due to the inherent nature of their employment, these respondents had come into contact with the various legislation. Five of the respondents, 3 from senior management (2 White males and 1 Indian male) and 2 from middle management (2 White males), knew of some of the HIV/AIDS employment laws. This was attributed to having read internal memorandums circulated by the Unicity's Legal Department on the changes in the law and which memorandums only contained the relevant amendments. Voluntary peer education programmes that provide Unicity employees with basic education on legal and ethical issues supplemented this information. The remaining 13 (1 senior management and 12 middle management) were not personally

aware of any HIV/AIDS legislation. Most of the 13 respondents revealed a general awareness of controversial HIV/AIDS legislation that they had read about mostly in newspapers. Of the 22 respondents, only 1 (White male from senior management) had received formal legal training, which explained the respondent's highly technical knowledge of the law. A similar pattern emerges here where top management, consisting mainly of White males seem to have a deeper knowledge of employment legislation, whereas the lower levels of management are only aware of the most contentious employment laws although not personally aware of the provisions.

b) Employees

Employees were asked if they were aware of the employment laws relating to HIV/AIDS. All of the 15 respondents displayed a general and some vague idea on HIV/AIDS laws. When asked if they knew what the main importance of the EEA or the Code of Good Practice was and what rights they convey, various responses were received primarily by the 4 respondents from the general staff (1 White female, 1 Indian male and female and 1 Coloured female) who had attended the peer education programmes. The remaining 11 respondents volunteered their own explanations. These ranged from 'they protect workers with AIDS' to 'it's for better treatment of employees who have AIDS.'

The respondents were asked if they had received any legal education at their workplaces on HIV/AIDS issues. Only 4 of the 15 respondents had participated in the peer education programmes held at their respective workplaces, which covered very basic legal and ethical issues. This constituted the only legal education they received which introduced them to the rights of people with HIV/AIDS under the various legislation and the Unicity's workplace policy. All 4 respondents stated that such education was valuable. The remaining 11 respondents had received no training on the legal aspects of HIV/AIDS. For various reasons, they were unable to attend the peer education programmes or were not aware of them. Of the 11 respondents, 2 technical specialists (1 Indian male and Black male), 2 general staff (1 Indian male and 1 Coloured female) and 3 basic skills staff (2 Indian male and 1 female) were familiar with some of the rights such as those on confidentiality and employment testing that people with HIV/AIDS have. This familiarity was derived from having

read pamphlets or newspaper articles. The remaining 4 respondents comprising of basic skills staff (2 Black males and 2 females) did not have any knowledge on the legal aspects of HIV/AIDS. They were unaware of many crucial aspects of the law on HIV/AIDS. For example, one of the 4 respondent's (Black male) was unaware that consent was required prior to an employee undergoing an HIV/AIDS test. Another respondent, a basic skills staff (Black male) stated that it was not necessary to know the laws on HIV/AIDS since they did not affect him personally and further stated that the law can not do anything to help people. Overall, most of the basic skills staff consisting of Black males and females were unaware of general employment legislation on HIV/AIDS. Technical specialists and general staff on the other hand were only familiar with provisions that had received the most attention.

These results point to a lack of open and transparent consultative processes in the workplace. Management and employees, particularly the latter group exhibited a very low level of awareness of employment specific HIV/AIDS legislation and the workplace HIV/AIDS policy. While it may not be expected of both groups to have an in depth knowledge of workplace legislation, one would expect a fair amount of awareness of the workplace policy. It would also be expected of management to exhibit a higher degree of awareness than employees however, their knowledge of legislation and policy was equally poor. Once again, given the nature of the institution that is given the task of foreseeing that HIV/AIDS is effectively dealt with in KwaZulu Natal, this is unexpected.

5.4.4 Accessibility and Comprehension of legislation

a) Management

Respondents were asked to consider what they would do if they had a legal query on HIV/AIDS. Only half the respondents said that they would contact the Legal Department. From the remaining respondents a variety of responses emerged which included contacting their immediate superior and a lawyer. Most of these respondents however, did not know what they would do. Inquiries were also made relating to management's access to employment legislation and workplace policy. It was discovered that if any of the respondents needed to check up on any aspect of HIV/AIDS legislation or workplace policy they would have to contact the Legal

Department. The majority of the respondents revealed that they did not have direct access to workplace legislation and policy. One respondent from senior management (White male) stated that advice on HIV/AIDS workplace legislation was only a phone call away therefore it did not matter whether workplaces kept the relevant statutes or policy. Another respondent from middle management (White male) stated that even if the most important HIV/AIDS related legislation were housed in their workplaces, people in need of advice would still contact the Legal Department since such legislation was not easy to understand. The implications of this are that the Unicity needs to ensure that members have easy access to legislation and more importantly, the workplace policy. The State also needs to ensure that its laws are available in an understandable fashion to lay people. Furthermore, the Unicity's intervention programmes need to consider incorporating legal literacy as a component of its education and awareness raising programmes.

When asked to consider the comprehensibility of legislation and policy, the 4 respondents, 3 from top management (1 White male and female and 1 Indian male) and 1 from senior management (White male) who were familiar with both policy and legislation agreed that the workplace policy was worded more clearly than legislation emanating from government. All 4 respondents agreed that such legislation ought to have been more clearly drafted. It was also suggested by the one respondent from senior management that the writing style used that is, by stating restrictions and qualifications first and then the main point made it difficult to read particularly if one does not encounter legal prose on a daily basis. Furthermore, many respondents indicated in their own way that legislation is not people friendly and can be quite intimidating for lay people to read.

b) Employees

In order to determine the accessibility of the workplace policy and HIV/AIDS legislation, respondents were asked what they would do if they had a legal problem that related to HIV/AIDS. The majority of the respondents did not know what they would do or where to even start. Only two respondents from general staff (1 White female and Indian female) who had attended the peer education classes stated that they would telephone the Legal Department and ask someone for advice. Three respondents, 2 basic skills staff (2 Black females) and 1 general staff (1 Coloured

female), stated that they would approach their 'boss' who would be able to advise them. The remaining respondents simply did not know what they would do.

Asking the respondents about the comprehensibility of policy or legislation proved to be fruitless since none of the employees had come into direct contact with either the workplace policy or employment legislation. The 4 respondents who had attended the peer education programmes stated that the provisions were explained to them and that they did not have to read it themselves.

5.5 Provisions of the Unicity's Workplace Policy

Management and employees were asked to consider the most important provisions of the workplace policy. These provisions are directly based on national HIV/AIDS employment legislation. Concurrence with the provisions in the Unicity's workplace policy would also indicate the acceptance of legislation. Also, since the policy is based on the protective model of law this would denote the extent to which both groups accept such an approach.

5.5.1 Pre-employment and On-the-job Testing

The Unicity's policy does not include specific provisions regarding the pre-employment testing of potential applicants. The policy only makes direct provisions for workplace testing, stating that compulsory workplace testing for HIV/AIDS is prohibited (Provision 3.3.1). In a separate provision it states that no compulsory HIV/AIDS testing for training is required (Provision 3.5). This is construed as training that would be given to potential employees which, it is contended constitutes pre-employment testing. For the respondents who were unaware of the provisions and what they entailed the researcher explained these to them.

a) Management

Respondents were initially asked about their perspectives on the pre-employment testing of potential Unicity employees. Of the 22 respondents, only 2 top management (White female and 1 Indian male) believed that pre-employment testing was unimportant and improper to the extent that a person's productivity does not depend on his or her serostatus. The remaining 20 respondents believed that pre-employment

testing should be allowed without the interference of the Labour Court. Respondents differed on whether such testing should be mandatory or voluntary and various reasons were given for their choices. Thereafter, respondents were asked about the testing of existing employees or on-the-job testing. Not surprisingly, those in favor of pre-employment testing were also in favor of employment testing. The 2 respondents who opposed pre-employment testing said that they opposed any form of testing in the workforce.

Of the 20 respondents in favor of testing, 16 respondents comprising of 1 respondent from top management (White male), 5 senior management (3 White males and 2 Indian males) and 10 middle management (3 White males and 2 females, 3 Indian males and female and 1 Black males), suggested that workplace testing should be allowed provided that they are voluntary, the results remain confidential and appropriate counseling is made available. The Labour Court also insists that should permission be granted to test employees who have volunteered to undergo testing, then adequate counseling must be provided for. The outstanding 4 respondents from middle management (1 White male and female, 1 Indian male and 1 Black male) clearly indicated that mandatory testing of all Unicity employees, including management should be tested. One respondent (Indian male) adamantly stated that given the magnitude of the epidemic and its impact on KwaZulu-Natal, employees in all workplaces must be tested to ensure that society maintains a semblance of stability. However, all 4 respondents believed that the results of HIV/AIDS testing should be kept confidential. Overall, all of the female respondents, except 1 not in favor of any testing, approved of on-the-job and pre-employment testing. This approval was also evident amongst senior and middle management of both sexes and all race groups that were interviewed.

The reasons that were given by the management group who were in favour of pre-employment and on-the-job testing are summarised as follows. A private company can separate its employees from the public to a larger extent than a public institution. A public institution such as the Unicity's Department of Health, Emergency and Rescue Services and the Durban Metro Police employ for example, nurses, fire fighters, marine safety officers and police officers. This means that employees occupying such positions are in constant contact with members of the public in

situations where the transmission of HIV/AIDS is conceivable. For example, an HIV/AIDS infected nurse working at one of the Unicity's local clinics could infect a patient via a needle stick injury or could become infected themselves. Fire fighters, in carrying out rescues often have to haul and carry victims out of wrecks and are often cut when carrying out the rescues. The victim may also be cut which is most likely in disaster situations. Police officers may also come into contact with HIV/AIDS infected criminals, who may be very dangerous. Having to carry out arrest procedures forcefully may result in violence.

The interchange of blood in all of these situations is seen as being highly probable. These members cannot be completely protected nor can members of the public. Respondents felt that it is justifiable for persons whose blood risks being transmitted to the public to be tested on a regular basis with or without the consent of the employee. Most of the respondents in favour of pre-employment and employment testing viewed protective devices such as rubber gloves, protective aprons and goggles as being inadequate and not full proof. The chances of accidental infection of employees to the public and vice versa and from employees to fellow employees are seen to be high. Thus, testing of existing workers would enable the Unicity to place infected employees in positions where they would not pose a threat to fellow employees and the public. A record of infected employees would also enable the Unicity to monitor the course of HIV/AIDS in the workplace.

One respondent from senior management (White male) felt that the employment laws on HIV/AIDS testing discriminated against employers. Other respondents expressed these sentiments as well. It was held that many jobs require on the job training which may take a number of years. Should an HIV positive individual be employed ahead of an HIV negative individual, whose status is unknown to the employer, considerable resources and time is wasted on training the HIV positive individual. This is because such a person may die within five to seven years of being employed. Had the HIV negative individual received the job, an employer could conceivably have expected thirty years of service out of that individual. Another respondent from senior management (Indian male) stated that without HIV/AIDS testing in relation to training programmes, money would be wasted thereby prejudicing the employer and members of the public whose interest the Unicity has pledged to protect.

The same respondent from senior management mentioned that the distribution of employee benefits must also be considered. The imposition of welfare burdens on medical aid schemes and on pension funds imposed by prohibiting pre-employment testing must be kept in mind. Once a person is a member of a pension scheme or a medical aids scheme such an individual is entitled to the benefits of the scheme, the most crucial of which is the protection from disease and death. The rampant unemployment experienced by the country as well as the scarcity of capital, was also mentioned by a respondent from top management (White male). It was contended that no advantages exist by employing an HIV positive employee at the expense of an HIV negative person who remains unemployed. Should valuable resources of the country be used in training an HIV positive person, leaving the uninfected person untrained then the long-term development of the country is severely prejudiced. Consequently, pre-employment testing dictates the most effective employment of capital.

For the 2 respondents from top management (1 White female and Indian male), who were not in favour of any type of workplace testing for HIV/AIDS, such practices were viewed as being unnecessarily discriminatory, stigmatising prospective employees and violating their human rights by excluding them from productive employment for reason only of their health status. One respondent (Indian male) stated that a prospective employee is under no moral or legal obligation to inform the employer of their serostatus. The employer similarly has no moral or legal right to know the serostatus of the prospective employee except in very rare and exceptional circumstances where the nature of the employment might expose co-workers and others to a demonstrable risk of infection. It was felt that the chances of nurses, fire fighters or the police of contracting the epidemic or passing it on are slim. The respondents stated that thus far no reports of such occurrences have been made. The medical facts are that HIV/AIDS can only be transmitted in limited circumstances and one needs to analyse the medical facts in relation to the employment conditions and the inherent requirements of a particular job.

b) Employees

Excluding the 4 respondents from general staff (1 White female, 1 Indian male and female and 1 Coloured female), who had attended the peer education programmes, the technical provisions of the workplace policy and general employment laws on HIV/AIDS testing had to be explained to the respondents. Respondents were initially asked if they thought that prospective employees should undergo an HIV/AIDS test. Of the 15 respondents 11 felt that this was, to quote one respondent 'not a bad thing to do.' The 11 respondents comprised of 2 technical specialists (1 Indian male and Black male), 3 general staff (1 Indian male and female and 1 Coloured female) and almost all basic skills staff (2 Indian males and 1 female and 2 Black males and 1 female). A general consensus emerged among these respondents that infected people should not be employed since they constituted a source of risk to other workers. Furthermore, 1 respondent, a basic skills staff (Black male) stated that there are many people who are unemployed and who should be given the job ahead of someone who has HIV/AIDS. The dissenting 4 employees comprising 3 general staff (1 White female, Indian female and 1 Coloured female) and 1 basic skills staff (Black female) generally did not think this was necessary. Of these 4 only 1 respondent (Coloured female) had attended the peer education programmes.

With regard to the testing of existing employees the responses were similar. The 11 respondents in favour of pre-employment testing also considered on-the-job testing to be crucial. One of the respondents, a basic skills staff (Black female) stated that if a few were infected this would affect the rest of the workforce. This respondent stated that if a worker with HIV/AIDS coughs on you their germs will get into your body leading to HIV/AIDS, therefore it is safer not to have infected people work in the same workplace environment. Most of the respondents indicated in various ways that people who have HIV/AIDS have contracted it because of their promiscuity. Most of them who are infected are not aware of it therefore, they pose a risk to other workers who they may have a relationship with. Consequently, employees should be tested and furthermore respondents indicated that the rest of the workforce should know the results. All of the 11 respondents vehemently agreed that one's HIV/AIDS status should be made known so that uninfected workers might protect themselves. The remaining 4 respondents were also not in favour of on-the-job testing. One respondent from general staff (Indian female) claimed that this would only result in

workplaces becoming fragmented on the basis of the infected and the uninfected that would give the employer more power over workers. Another respondent from general staff (White female) stated that testing for HIV/AIDS will not solve the problem of HIV/AIDS but will make the situation even worse by increasing the presence of suspicion that already prevails in the workplace. Overall, most of the respondents who were not in favour of pre-employment testing were also not in favour of on-the-job testing. This pattern also emerged with the respondents from the management group who were not in favour of both forms of testing. The respondents in the employee group were all females from each of the race groups.

With regard to the consent of individuals prior to testing this was not attributed much importance by the majority of respondents. Of the 4 respondents not in favour of any form of HIV/AIDS testing, 3 respondents from general staff (1 White female, Indian female and 1 Coloured female) stated that the consent of the person to be tested was required before such testing is allowed. One of these respondent's (White female), stated that HIV/AIDS testing must first be explained before someone agrees to it. Another respondent from the general staff (Indian female), stated that even if an individual consents testing must not be allowed because if a person is found to have HIV/AIDS then they will be fired. The remaining 11 respondents indicated that permission to test a person should not be necessary. The main reason that emerged was that people who know that they are infected would simply not agree to being tested.

While stigmas may also inform the views of management, they are consistent with the findings of an ING Barings study (1999), which found that employers' production costs will increase. This is attributed to poor labour turnover and high employee benefits. It was also noted that the total costs of benefits in South Africa would increase from 7 percent of salaries in 1995 to 19 percent by 2005 due to HIV/AIDS. The ING Barings study also found that some companies in South Africa are already hiring two employees for every one skilled job because of the likelihood that one will die from HIV/AIDS. The costs of training new employees or retraining existing employees to fill vacancies also affect productivity and profits. The study found that HIV/AIDS disrupts production due to absenteeism and illness of the employees and compels employees to be away attending funerals or to sick relatives. Increases in

production costs associated with labour turnover and employee benefits, is becoming increasingly discernible. This creates stress at the work place for the reduced number of employees. A survey conducted by Old Mutual in 1999 revealed that 30% of companies are lowering the benefits they pay to their employees as a result of the increasing number of claims related to HIV/AIDS. The research indicated that without these adjustments, the proportion of the wage bill paid out in death benefits by an average company in some provinces would rise by two-thirds between 1997 and 2002 (UNAIDS, 1999).

Under the common law, the employer has a duty to take all reasonable steps to provide a safe working environment (Ngwena, 1999). Moreover legislation such as the Occupational Health and Safety Act requires the employer to provide and maintain as far as reasonably practicable a safe working environment. However, Ngwena states that employer's compliance with health and safety obligations must also be approached with 'considerations of legitimacy, rationality and proportionality' (Ngwena, 1999: 523). Unless one's HIV/AIDS status endangers health and safety in the workplace then the discrimination is unfair. But even where there is a significant risks of endangering health and safety, the employer must in addition establish absence of a real alternative to discrimination. The employer is required to choose an option that is least restrictive on the freedoms guaranteed to the job applicant or employee prior to effecting more drastic measures such as exclusion or dismissal.

5.5.2 Confidentiality

Provision 3.3 of the Unicity's HIV/AIDS policy relates to confidentiality. It states that an infected individual has the legal right to confidentiality about their HIV/AIDS status in all aspects of their employment. Consequently, an employee is not obliged to notify management of his or her status. Furthermore, information pertaining to the HIV/AIDS status of an employee shall not be disclosed without the employee's written consent. These provisions are based on the Employment Equity Act and the Constitutional right to privacy.

a) Management

Although the respondents strongly dissented on the testing of potential and existing employees, the majority of respondents agreed that confidentiality must be maintained. It was generally agreed that in the absence of confidentiality effective treatment of HIV/AIDS in the workplace would be impaired. Most of the respondents in their own way, acknowledged the continuous presence of stigmas and discrimination and the impact this has on affected individuals and communities. Infected individuals would refrain from speaking freely and candidly about their status after being informed that such disclosure could result in a breach of confidentiality and the resulting increased opportunity for discrimination.

The findings on HIV/AIDS testing showed that 20 respondents were in favor of conducting such tests and that 16 of the 20 respondents from the management group indicated that it is important to keep the results confidential. However, the 4 respondents in favor of mandatory testing of all employees in the workforce, indicated in various ways that the results should only be kept private if their activities do not affect the health of others. For example, if an individual who is employed as a nurse by the Unicity's Department of Health is aware that they have HIV/AIDS yet continues to work with the knowledge that they present a possible risk to the health of another, such an employee's right to confidentiality should be compromised. In this situation a breach of confidentiality would seem to be ethically warranted. One respondent from senior management (White male) remarked that the Unicity has an interest in protecting public health and this outweighed individual liberties.

b) Employees

Confidentiality among the majority of employees was also not considered to be of great consequence. Nine of the respondents comprising 1 technical specialists (Black male), 3 general staff (1 Indian male and female and 1 Coloured female) and 4 basic skills staff (2 Black males and 2 females) stated that if a person has HIV/AIDS, this should be revealed. One respondent, a basic skills staff (Black male) stated that he would want to know whether someone who he works with is infected. The respondent stated that his life as well as that of his family was at risk. Other reasons that were given by respondents were that they would know who to avoid having contact with, it would prevent someone who is infected from deliberately infecting another person

and people might change their behaviour if they knew that they will be tested and their results made known. Overall, the majority of male and female Black employees were not in favour of keeping one's status confidential.

The majority of management group recognized that by upholding the confidentiality of an infected person's status, the wider public health goals are served without the use of coercion. The majority of employees on the other hand believed that one's status should be revealed primarily so that infected people could be avoided. In such a situation employees would be loath to come forward for fear of being discriminated against. Farquhar (1999) on the other hand, notes that government itself has argued that over-concern for confidentiality has stymied HIV/AIDS prevention efforts in South Africa, claiming that the greatest progress has been made in fighting the disease in African countries where confidentiality is less protected than it is in South Africa. However, one may argue that in these countries there is less stigmas around the disease and thus violent backlashes are not as likely.

5.5.3 Job Status

The Unicity's HIV/AIDS policy states that the HIV/AIDS status of an employee shall not be a factor in job status, promotion or transfer (Provision 3.4). This provision is based on the Code of Good Practice on Key Aspects of HIV/AIDS and Employment. This Code makes it illegal to use a person's HIV/AIDS status as a factor in that individual's job status, promotion or transfer. It states that any changes in job status should be based on the existing criteria of equality of opportunity, merit and capacity to perform the work to a satisfactory standard.

a) Management

Respondents were asked of their views pertaining to the above provision. More than half of the 22 respondents in the management group agreed that this was a fair provision. The most common reason given by respondents was that employees with HIV/AIDS should be allowed to work as long as they can perform their jobs. However, if they cannot continue with normal employment due to their ill health, then efforts should be made to offer them alternative employment. Seven respondents comprising 1 top management (White male), 3 senior management (2 White males

and 1 Indian male) and 3 middle management (2 White males and 1 Indian male), dissented in relation to the provision of alternative employment. The reasons that were given are as follows.

- If an employee is no longer able to work then such an employee's services must be terminated. The Unicity's fiscal constraints mean that such a benevolent attitude is not feasible.
- If alternate employment is sought for one HIV/AIDS infected employee, this would set a workplace precedent that would require the Unicity to seek alternate employment for all employees who insist on staying on. Whereas one employee may still have the reserves to continue, another may not.
- The retaining of these employees may also disrupt the productivity of the workplace in that absenteeism and sick leave would become more frequent at this stage of the illness.

Consequently in certain situations, an employee's HIV/AIDS status should be a factor with regards to job status.

b) Employees

With regard to the question on whether an employee's HIV/AIDS status should be taken into account as a factor in that individual's job status, promotion or transfer, an overwhelming 13 respondents agreed that this should be so. Their reasons are summarised as follows. A person who has HIV/AIDS cannot perform the job they are given properly because they are always ill and have to be away on sick leave. A person who has HIV/AIDS will die before someone who is not infected therefore the uninfected person should be promoted before an infected person. The majority of these respondents did not consider the provision of alternate employment as a viable option. The general consensus appeared to be to identify and then get rid of everybody who is infected.

The views of the employee group regarding job status are much more harsher than management, where the majority were in favor of providing alternative employment to infected individuals. This was the general trend with the employee group with regard to the previous provisions. However it is disturbing to note that 7 respondents from the management group were not in favor of this provision fearing that valuable resources would be squandered. Furthermore, of these 7 respondents, 1 respondent

belongs to top management and 3 from senior management. Most of these respondents consisted of White males. The views of both management and employees are once again based on the stigmas associated with people with HIV/AIDS. HIV/AIDS for management is synonymous with the waste of financial resources and for employees, HIV/AIDS is synonymous with lack of capacity to work and of posing a risk to other workers. According to Ngwena (1999), the crucial consideration is not whether the job applicant or employee has HIV/AIDS but whether on account of AIDS-related illness he or she can perform the job according to the legitimate expectations of the employer. Consequently, the views of the respondents regarding the job status of HIV/AIDS infected management and employees cannot be justified on the grounds that once an individual is infected, he or she is incapable of working.

5.6 Feasibility and Sustainability of Policy

a) Management

After having discussed the most relevant provisions of the policy respondents were asked to comment on its feasibility and sustainability. Not surprisingly, most of the respondents commented that the policy was not very feasible and as the impact of the epidemic begins to be felt many provisions will have to be changed. The reasons given are summarised as follows.

The 20 respondents who said they were in favor of pre-employment and employment testing, indicated that the prohibition to do so constituted a major disadvantage to employers. According to the EEA, permission to conduct such testing is still a prerequisite even if all employees in a workplace give their informed consent. One-off permission to test the existing workforce may be granted by the Labour Court however, such permission cannot be granted in relation to applicants for employment. Thus, every time the Unicity received an application for employment, in order to test that applicant given his or her permission to do so, would require an application to be made to the Labour Court. This may lead to countless applications to the Labour Court since each application for pre-employment testing is determined individually. Respondents stated that this was an unnecessary waste of resources.

All the respondents, even those not in favour of HIV/AIDS testing agreed that it would be valuable to have an idea on the number of employees infected. The reasons offered for this was that it would be crucial in being able to anticipate the future loss of workers due to HIV/AIDS. In this way the economic impact in the workplace could also be predicted. One respondent stated that the EEA, by preventing the tracking of the epidemic in the workplace was also preventing them from pursuing a coherent and effective anti-AIDS campaign in the workplace. It was also the view of respondents that the EEA should be amended to allow for situations where the informed consent of the employee has been given and the results were to remain confidential. Permission to the Labour Court would then be unnecessary. When asked by the researcher if steps to approach the Labour Court for permission were being taken, 1 respondent from senior management (White male) stated that no such moves were in progress since there existed a lack of political courage on the part of management. A special hearing would have to be convened with all the relevant interest groups present. However, it was felt by respondents that something has to be done soon given the fact that the epidemic has spiralled out of control and because the Unicity employs a number of high risks groups. Consequently, provisions on HIV/AIDS testing were considered to be both unfeasible and unsustainable in the Unicity.

Two respondents from senior management (2 White males) indicated that the laws' over-concern for confidentiality might in fact stymie HIV/AIDS prevention efforts in the workplace. However, the rest of the respondents did not consider confidentiality laws to be unfeasible or unsustainable. The 7 respondents who were not in favour of providing alternate forms of employment for HIV/AIDS infected employees, indicated that the existing labour legislation does not adequately protect the employer in having to retain the services of those who become too sick to undertake the tasks for which they were originally employed. This was regarded as being unsustainable. In the memorable words of one respondent from senior management (White male), the above laws were attempting to turn HIV positive employees into HIV negative employees. Such a situation was seen to be highly inequitable towards uninfected employees and employers who bear a large part of the costs. Thus, these protective laws were viewed as primarily protecting individual rights at the expense of community or public rights. For the Unicity, emphasis has to be placed on the latter.

Consequently, respondents indicated that these laws were sometimes frustrating to work with. Another respondent from senior management (Indian male) stated that if HIV/AIDS is to receive such protection from the legislature so too should other contagious diseases. The strong emphasis on HIV/AIDS protection constituted indirect discrimination against those with other fatal and contagious diseases.

b) Employees

This could not be asked of all employees since many respondents were not aware of the workplace policy. Prior to the interviews the most important provisions of the workplace policy, such as those on HIV/AIDS testing, confidentiality and job status, were explained to respondents. Thereafter, it was left to respondents to decide on their sustainability. From the above findings it would not be premature to conclude that the majority of the respondents were not in favor of any of the provisions that were used as a basis for discussing the appropriateness of the policy and hence, legislation.

From the respondents who were able to confidently discuss the workplace policy, a general feeling of disapproval emerged. These respondents were from general staff (1 White female, 1 Indian male and female and 1 Coloured female) and basic skills staff (1 Indian male and 2 Black males and females.) These respondents stated that their greatest fear was to become infected and they felt that by working with people with HIV/AIDS their chances of infection were increased. The prohibition on the testing of employees and employers was regarded overall as being foolish. More interestingly, the provision of protection of people with HIV/AIDS was incomprehensible to this group. One respondent from basic skills staff (Black male) stated that the law should not show sympathy towards someone with HIV/AIDS because such people deserved to be punished for their behaviour. Most of these reasons were based on stigmas and a real sense of fear, rather than actual experiences. The reasons that were received from the management group on why they believed the provisions to be ineffective and unsustainable, was once again largely based on economic concerns, particularly the financial capacity of the Unicity to afford such a benevolent attitude. Yet this financial concern is derived more from the stigmas attached to HIV/AIDS in the workplace than from legitimate concerns. As part of the intervention programmes, employees and management should receive more education and information on all aspects of the epidemic in an attempt to dispel misconceptions

and stigmas attached to the epidemic. Educational programmes in the workplace informing employees and management of the facts of HIV/AIDS and its transmission need to encourage the appropriate attitude in this regard.

5.7 Trade Union Representatives

Each department of the Unicity has 1 trade union representative. In this study, 3 trade union representatives (Black males) were interviewed from different departments. All 3 represented the South African Municipal Workers Union (SAMWU). Due to the small number of respondents interviewed specific sections are not used to report on their responses. Instead, their responses will be summarized into one discussion. Representatives were also asked about their level of awareness of the employment laws and whether they considered the Unicity's policy, based on those laws, to be feasible and sustainable.

The representatives stated that they were familiar with HIV/AIDS employment legislation. This knowledge was derived from having attended HIV/AIDS education workshops, which provided explanations on the relevant provisions and their implications in the workplace. The 3 representatives had also participated in the workshops that were held on the formulation of the Unicity's workplace policy. One representative stated that he has been approached by employees for an explanation of certain provisions of EEA in a language that they were familiar with. The representative further stated that Unicity departments, such as the Durban Solid Waste employed many employees in low skilled jobs who did not have the capacity to understand some of the legal provisions. Thus, language also provided a barrier towards their effective understanding of the laws. Even though employment legislation has been translated into the Zulu language, the representative stated that many employees still encountered problems understanding the Acts.

All three representatives were very aware of and content with the provisions of the workplace policy. One representative claimed that from his experience all employers found reasons to discriminate against employees. The advent of HIV/AIDS has given them even more reason to so do. Therefore, the law has to adopt a protective stance to protect those workers who do not have the capacity and power to protect their own

rights. The law is viewed as an important instrument that can impede discrimination. Issues such as pre-employment testing, employment testing and confidentiality, regulated in the Unicity's policy were not considered to be unfeasible and unsustainable by all 3 representatives. One representative claimed that employers need to recognize the tremendous negative impact of pre-employment and on-the-job testing. Testing the existing workforce was seen as being not only unethical but also as leading to great hostility and as being incompatible with effective HIV/AIDS prevention and care programmes at the workplace. Employers need to understand that respect for workers' rights is a powerful prevention tool conducive to creating a climate for workplace prevention programmes. Finally, prevention was viewed as being much more cost-effective than HIV/AIDS testing in the long term. Overall, the protection that was offered by the relevant workplace legislation was seen to be sufficient.

This huge difference in opinion between employees and their representatives may be attributed to the two groups understanding of the epidemic. Where the views of the employee group are clearly misinformed and are largely based on stigmas attached to people living with HIV/AIDS, the views of the trade union representatives are generally well informed about the epidemic. For example, some employees were misinformed about the ways in which the epidemic is transmitted, believing that transmission could occur if an infected employee coughs on them. A possible explanation for these beliefs is that trade union representatives have attended numerous workshops on HIV/AIDS whereas most of the respondents in the employee group have not. Thus, the benefits of programmes such as the peer group programmes are clearly evident. The Unicity therefore needs to make the attendance of such programmes compulsory for employees and management. Furthermore, it is also evident that communication between trade union representatives and employees need to be enhanced. Trade union representatives are essentially vehicles through which the opinions and contributions of employees are conveyed. It is also crucial then for these union representatives to encourage employees to attend peer-based programmes and to ensure that the attitudes and opinion of employees are conveyed.

Representatives also stated that their organisation is aware of the impact of HIV/AIDS and have been developing activities, particularly in the fields of awareness raising and

representation of the interests of their members. At the Unicity level, dialogues were not often initiated on HIV/AIDS between employers and employees and as a result employees and management have not actively participated in the development and implementation of workplace prevention programmes. Some of the specific issues taken up by SAMWU include the fight against stigmatization and discrimination against people living with HIV/AIDS and their families, the relationship between low salaries, bad working conditions and HIV/AIDS infection, the danger of HIV/AIDS infection in situations of conflict and the provision of treatment to persons with HIV/AIDS, for whom the availability of affordable medication is essential. One respondent stated that they did require assistance in terms of capacity building, advocacy and political support.

These findings suggest that the importance of the role played by worker organizations in addressing HIV/AIDS in the world of work cannot be overemphasized. This is partly because they are in a very good position to bring the issue out into the open and help overcome the culture of denial that still persists and partly because it is difficult for employees to fight for their rights and interests on their own. Overall, worker organizations act as a bridge in communicating policies to their support base.

5.8 Conclusion

In this chapter the results of the interviews with management, employees and trade union representatives were described. The interviews essentially attempted to determine the participation of management and employees in the formulation of the workplace policy and intervention programmes, and their views on certain provisions of HIV/AIDS employment legislation that are also incorporated in the workplace policy. Overall, the interviews attempted to discern the appropriateness and success of the protective model of law. Management and employees supported most of the provisions, such as those on on-the-job testing and pre-employment testing. However, the results revealed that most of the beliefs and opinions of the management group were motivated largely by economic concerns and most of the employee group's motivations were directly based on stigmas related to the transmission of the virus. According to Burris (1999) the first step in removing stigmas is by creating a positive supportive environment to encourage people living with HIV/AIDS to be open about

their status without shame. The protective model of law is premised on being able to do the very same however, stigmas remains widespread. In the workplace the marginalisation of employees removes some of the support from their natural network. This leads to social isolation and diminished social support for all individuals living with HIV/AIDS. With regard to certain employee's fears about the deliberate transmission of HIV/AIDS in the workplace, prominent reports of incidences of the deliberate transmission of the epidemic have resulted in public calls for this to be made the subject of criminal sanction. It has been stated that just as other individuals in society are held responsible for behaviour outside the criminal law's established parameters of acceptable behaviour, persons with HIV/AIDS who knowingly or recklessly conduct themselves in ways that harm others must be held accountable (Van Wyk, 2000).

Overall, the benefits of having awareness programmes were visible, particularly since many of the respondents came into contact with HIV/AIDS laws for the first time at these workshops. However, the monitoring structures of some departments were either very weak or in some cases, non-existent. The work environment provides one of the most important and effective channels for addressing the disastrous effects of HIV/AIDS (Heywood, 2000). The individual workplaces of the Unicity have not made the maximum use of such facilities that could be used for the group discussions that are ideal for education campaigns. The long-term nature of the HIV/AIDS epidemic calls for a strong commitment by employers and employees for the development of a determined education and prevention campaign.

CHAPTER SIX

Conclusions and Recommendations

6.1 Introduction

This chapter attempts to reconcile the findings in chapter five and in so doing, suggests alternative ways in which a public institution such as the Unicity can use the law to encourage substantive changes in the workplace that are conducive to the reduction of HIV/AIDS. Prior to this, a brief recapitulation of the previous chapters is undertaken.

6.2 Summary of Chapters

The previous chapters have focused on the legal response to the HIV/AIDS epidemic in South Africa. The response espoused by the South African legislators embraces the protective model of the law. The idea behind this legislation is to inspire respect for individuals and to promote human rights and in the context of HIV/AIDS, reduce the presence of stigmas and discrimination. In chapter one, it was stated that such an approach is commendable however in South Africa, given the nature and extent of the crisis, a more proactive legal response is required. This is confirmed by the research that was undertaken on the Durban Metropolitan Unicity Municipality.

In chapter two, three models of legal intervention were described which illustrate the range of different ways in which the law can play a role in response to the HIV/AIDS epidemic. At one end of the spectrum, the role of law follows an essentially proscriptive model whereby certain forms of conduct are prohibited and made subject to criminal sanctions (Hamblin, 1991). In the middle, the role of law in HIV/AIDS policy focus upon how the law can protect individuals from harmful and undesirable consequences such as discrimination against people with HIV/AIDS. At the other end of the spectrum, the empowerment model envisages a legal response to HIV/AIDS

that will operate on a wider and more comprehensive level. This model suggests that the law can play a proactive role not merely in reconciling rights and obligations as between individuals but also in seeking to change fundamental and causal patterns and social interaction that create vulnerability to the threat of HIV/AIDS infection (Hamblin, 1991).

In chapter three, a description of HIV/AIDS specific employment laws in South Africa was provided with case law illustrating the emphasis that has been placed on the protective model of legislation. This model is predicated on the assumption that the State is no longer the locus of complete power instead State action is governed by for example, constitutions. The protective model and the ensuing laws reflect the nature of the South African State today, which has placed less reliance on coercive policy instruments and has begun to rely on more subtle techniques of imposing its will on the surrounding society.

Chapter four outlined the political context in which the epidemic has flourished and which has shaped the development of HIV/AIDS policy. The South African government's commitment to fighting HIV/AIDS has been severely questioned and the notion of 'inadequate political will,' has been generally advanced as an explanation for its lack of progress. The epidemic has had a far-reaching impact on the province, whose demographic, social and economic profile has exacerbated the problems experienced by its population. The strategies implemented by the Unicity to control the impact and spread of HIV/AIDS was then described, followed by the demographic profile of the Unicity. Finally the research methodology and methods that were adopted to carry out this study was explained.

Chapter five reported and analysed the results of the interviews carried out on the management, employees and trade union representatives of the Unicity. The overall findings suggest that there is indeed an urgent need to review the legal response to HIV/AIDS in South Africa. The protective model of legislation has not made much of an impact in the workplace of the Unicity, which constitutes the main component of local government. This finding is derived from the following issues that were focused on during the interviews.

6.3 Summary of Research Findings

Firstly, the implementation programmes that are pursued by the Unicity were examined to determine their rate of success. The Unicity has a range of implementation programmes but the two that were concentrated on were the peer education and condom distribution programmes. Overall, the benefits of having awareness programmes were visible, particularly since many of the respondents came into contact with HIV/AIDS laws for the first time at these workshops. However, the monitoring structures of some departments were either very weak or in some cases, non-existent. The work environment provides one of the most important and effective channels for addressing the disastrous effects of HIV/AIDS (Heywood, 2000). The individual workplaces of the Unicity have not made the maximum use of such facilities. It was also discovered that condoms distribution programmes were not implemented constantly with respondents stating that one infrequently discovered condoms in the toilets.

Consequently, these intervention programmes will not be effective if implemented only in isolation. Their effectiveness lies in the integration of individual aspects into one. Given that successful implementation programmes indicate the commitment given to fighting HIV/AIDS and its effects, as well as the importance that is placed on doing so, it would appear that the Unicity is not totally dedicated to dealing with the impact of HIV/AIDS in the workplace. It must be realised that HIV/AIDS implementation is a continuing process and not a one-time event.

It may be asserted that as a service provider the Unicity has an obligation first to provide equitable services among all its citizens and not preferentially to target its employees for any programmes. However, the Unicity as an employer has a distinct and independent responsibility towards its employees that is circumscribed by various employment codes and the Constitution. Furthermore, it can achieve far more by setting an example for other employers in the region than by striving to service all its citizens.

The extent of workplace discrimination towards colleagues who have HIV/AIDS was initially explored. This was premised on the assumption that given the fact that South Africa has had protective employment legislation for many years, the extent of workplace discrimination would be minimal. In this research it was found that out of a sample of 37 respondents, 20 respondents knew of the presence of discrimination against people living with HIV/AIDS or perceived to have HIV/AIDS. According to Kirby (2000), discrimination is one of the biggest challenges because it leads to fear, denial, apathy and isolation. Discrimination deters the participation of people who are infected and affected, impeding public health prevention and care efforts. Kirby (2000) contends that the State is responsible for enacting and enforcing appropriate laws and also reducing fear, ignorance and discrimination by funding education campaigns such as peer based education.

Related to discrimination, is the issue of stigmas. The extent of stigmas in the workplace was also probed. Burris (1999) observes that the presence of stigmas discourages openness about one's HIV/AIDS status. The consequence of this is the decision of most people either not to disclose or discover their HIV/AIDS status because of the shame that is invoked. The protective model of law, with its focus on the inviolability of human rights ought to encourage openness about one's status simultaneously discouraging the presence of stigmas in the workplace. However, this study has shown that stigmas still prevail in the workplace. The views of employees were largely based on the stigmas attached to people living with HIV/AIDS. Management's views were also based on stigmas however this was motivated by economic concerns. In the Unicity there is the need for a thorough understanding of the virus and its transmission vectors. This suggests that a greater effort must be made on the part of Unicity to educate its members and encourage an environment of compassion and understanding.

Whether employees and management were aware of protective employment legislation was explored next. This was based on the assertion that the level and extent of the awareness of legislation among these groups indicate the importance that has been attached to such legislation generally, in the workplace. This study revealed that a low level of awareness generally existed in the Unicity. While upper levels of management were aware of such protective legislation, middle management

and employees demonstrated no such knowledge. According to Hodges- Aeberhard (1999), greater awareness on the part of both management and employees could influence the legislative framework and employees could assume a more assertive role in negotiating realistic conditions with employers for sectoral and enterprise HIV/AIDS agreements. However, this would demand greater leadership and awareness on their part of the issues involved.

Employees and management's understanding of protective employment legislation was examined next. The purpose of this was to glean whether employment legislation is easily comprehensible to people for whom it is intended. A general consensus emerged mostly from those respondents who had a good knowledge of legislation that employment laws should be made more comprehensible. Therefore, it is crucial that workplace intervention programmes incorporate legal awareness and legal literacy programmes. This generally entails increasing the knowledge of legal rights among employees and management. According to Friedland (1975), the State has a duty to guarantee that its laws are available in an understandable fashion to lay people. The author notes that good citizenship requires that access to a country's statutes and laws be made readily available. An increasing number of statutory and other provisions place positive obligations on employees and management but they cannot be expected to fulfil these obligations unless they are aware of them. Friedland (1975) notes that a lack of legal knowledge and perception of legal rights and issues naturally gives rise to many social ills and woes. By increasing employees and management's social and legal awareness and knowledge in the workplace, this would enable both groups to make demands for positive changes in all issues of concern to them.

It is contended that fundamentals of law should also be taught in workplaces in order to enhance the awareness of management and employees. Employees should be taught to recognise everyday situations involving law and knowing of resources available to supply specific legal information. The following means of communications should be used: video films; radio; television; print media; seminars; workshop; meetings. The majority of employees and almost half of the management group had no idea where to start should a problem arise that required knowledge of the law and legal system. Friedland (1975) contends that the existing delivery of legal information should be improved by reducing the problems facing employees in handling legal questions and

by improving the quality of the information dispensed. The capability of citizens to learn how to appreciate and use the rule of law, to be advocates, to influence policy change and to make their government work for them, should be developed. Consequently, programmes should be implemented by the Unicity that would enable employees and management to understand the law, the legal system and gaining access to justice through collective actions. Furthermore, employees need to gain control over their lives and working conditions, which this would enable them to do in order to be able to develop lifestyles conducive to reducing the spread of HIV/AIDS.

The extent to which employees participated and contributed towards the formulation of the HIV/AIDS workplace policy was thereafter investigated. The importance of this was based on the assumption that the extent to which employees contributed to this process determines their attitude and respect toward the policy and more importantly, towards people with HIV/AIDS. Participation is also seen to generally enhance workplace democracy. Furthermore, many would argue that employees are much more likely to conform to the policy, having contributed to it.

None of the employees interviewed had participated in the formulation of such programmes. Also, more than half of the respondents from the management group had not participated in this process as well. As a result, employees generally did not consider the workplace policy to be an important source of their rights. The workplace policy was an unknown document that could not solve the problem of HIV/AIDS. For the majority of middle management, the workplace policy was also regarded as being meaningless. Thus, the Unicity has to make changes in the way in which policies that directly affect all members, are formulated and implemented. It also has to ensure that communication between the various levels of management and between employees and trade union representatives is existent and effective.

Finally, the study attempted to discern whether employees and management agreed with the provisions of the HIV/AIDS workplace policy, which was based on national employment legislation. Three of the most contentious and important provisions were discussed namely, the prohibition of on-the-job and pre-employment testing, the right to privacy and the right not to have ones HIV/AIDS status taken into account in

relation to one's job status. Importantly, the majority of employees did not agree with all of the 3 provisions that were discussed.

The results of the study suggests that the presence of protective laws and the rights that emanate from them has led to a general feeling of passivity in the Unicity, where rights per se are being relied upon and nothing more concrete and tangible has been done to encourage positive changes in the workplace. The Unicity has been entrusted with the task of ensuring that appropriate responses are developed at the local level, to prevent the further spread of HIV/AIDS and to address the basic needs of people infected and vulnerable to the disease. Whether the Unicity can successfully achieve these wide goals is questionable in view of the widespread stigmas that still prevails in the workplace. The stigmas attached to people with HIV/AIDS has the potential to stymie all efforts made by the Unicity to prohibit discrimination. In most countries of the world an ineffective legal response means that people with HIV/AIDS are not sufficiently protected against discrimination in all of its manifestations. In South Africa, it is contended that despite all of the valuable protection given to people with HIV/AIDS, this response is inadequate as is demonstrated by these findings. The Unicity's workplace policy also offers little in the way of stimulating actual behavioural changes and changes in one's attitudes towards the epidemic itself and towards people living with HIV/AIDS. Overall, the workplace policy needs to become more practical and ought to adopt a more hands-on approach in order to encourage behavioural and attitudinal changes in the workplace.

According to Whiteside and Woods (2000), another concern that has arisen of late is that some people and institutions have become hardened to HIV/AIDS. Furthermore, the authors quote the editor of the Natal Witness (31 October 1996) as having stated '...how sad it is that people can become inured to even the most terrible things if they are exposed to them constantly' and that 'Information about the depredations of the virus may now be among the news that no longer arouses an appropriate response.' The authors go on to state that 'This danger is a reality for decision-makers, who are inundated with bad news, impending social and economic gloom, and varying demands on their limited resources. Aids workers too are vulnerable to burnout and becoming slaves to the epidemic. This form of reactive immobilisation is a phenomenon that is ever-present in stressful environments, and is something to be

actively and creatively opposed' (Whiteside and Wood, 2000: 2). This progression is used as a rough explanation of community response as a whole as well as the response within various sectors. Whether this explains the response or lack of response from the Unicity, remains to be investigated.

6.4 Recommendations

6.4.1 Empowerment model of Law

The protective model of law does not appear to be a workable model to be adopted as a response to the epidemic. An alternative approach that could be adopted is the empowerment model of law. This model requires the State to act as a facilitative agent in the empowerment of people so as to bring about social changes. Social changes that help people gain mastery over their lives are viewed as being conducive to the prevention of HIV/AIDS. This model operates on a broader and more far-reaching level with the law playing a more proactive role 'not merely in mediating rights and obligations as between individuals but also in seeking to change underlying values and patterns of social interaction that create vulnerability to the threat of HIV infection' (Hamblin, 1991: 4). This model uses legislation to legally empower employees and facilitate employee participation and decision-making in the world of work. Such legislation however, must include an obligation on employers to negotiate substantial changes doing more than relying on legislation and the rights that they convey in relation to HIV/AIDS.

6.4.2 The Australian Example

The empowerment model of law is aptly demonstrated in the case of Australia, which uses the concept of participation to stimulate the empowerment of people with HIV/AIDS. Unlike many western nations, a large amount of Australian epidemic legislation has gone beyond the coercive and protective model of the law. According to Broom (1993), the difference in legislation and its role in the epidemic hinges on a difference in the political history of the epidemic. The first feature of this history is the early participation at all levels of decision making of the community most affected. In Australia, this comprised the gay community. Many other countries

excluded gay participation and its inclusion in Australia was due to a unique alliance between the government and community-based organisations. The gay community existed as a community before the epidemic (Broom, 1993). It was therefore used to asserting its claims to legitimacy in the face of stigmatisation. The AIDS Action Committee in Sydney with the majority of gay membership, formed in response to the quickly evident political nature of the AIDS issue. This was to be the nucleus of the AIDS Council of New South Wales and was soon followed by the formation of the Victorian AIDS Action Committee. Broom (1993) contends that these community-based organisations naturally adopted the style of politics, which the gay community had developed in the years of campaigning for gay rights.

The government's attitude was similarly proactive. While the epidemic started earlier in the United States and South Africa than Australia, it took the Reagan Administration until 1986 to allocate substantial funds and even to mention the word 'AIDS' publicly (Broom, 1993). HIV/AIDS was first seen in South Africa in the early 1980s (Schneider and Stein, 1998). However, the first signs of tackling the disease seriously, emerged at the launch of the National AIDS Committee of South Africa (NACOSA), in 1992, which was an umbrella body whose purpose was to co-ordinate the HIV/AIDS response in South Africa. In Australia the Federal Minister for Health, in contrast, made HIV/AIDS a health priority in 1985. The Minister unequivocally recognised HIV/AIDS as 'potentially the most serious and expensive public health problem to face Australia since Federation' (Wran, 1988, cited in Broom, 1993: 6).

The history of epidemic legislation and the stigmatised status of affected people have led to a presumption of encroachment on affected peoples' rights. Under this presumption the best strategy for people living with HIV/AIDS is to demand minimum encroachment on their rights that is, non-criminalisation. In Australia however, the politics of HIV/AIDS has produced a legislative approach that has gone further than this minimum claim. Here, the strength of the gay community and the leadership demonstrated by the government made criminalisation far less likely. In this political context, non-criminalisation through protection of affected individuals' rights left space for the participation of affected groups in formulating codes of risk-avoiding behaviour. If affected groups participate in and consent to these codes of behaviour, they are much more likely to conform to them. Alternatively, prescribing

codes of behaviour from above is unlikely to win consent and in matters so intimate and impossible to enforce. To go beyond coercion and mere protection requires the articulation of an equal relationship between affected groups and empowered institutions, such as government and even the medical establishment. This in turn has required that people living with HIV/AIDS become empowered. Australia has shown us that the fight against HIV/AIDS is synonymous with the empowerment of those affected by it and this is a radical development in the management of illness within our society (Broom, 1993).

6.5 Legal Empowerment

Legal empowerment essentially entails the discovery of legal measures that can empower people. Issues such as legal awareness and legal literacy constitute measures that contribute towards a sense of empowerment. These concepts are briefly discussed below. According to Fox (1991), the law can be viewed as being autonomous and must be understood wholly on its own terms, independent of a social context. In another view, law and society are homogeneous, they correspond in origin and structure and cannot be understood independently of each other (Fox, 1991). However, there exists a third basic perspective on the relation between law and society. In this view law and society are best thought of in interactive terms. This view recognises that law and society each have some unique and independent dimensions but that they also interact on many levels with reciprocal influences. The underlying assumptions of legal empowerment are premised on the third perspective. That is, that law can be used to effect positive social changes through the legal empowerment of people which in turn would stimulate positive legal reform.

6.5.1 Legal Awareness

Legal awareness entails increasing the knowledge of legal rights among the general public. However, in most societies certain groups such as women, children and people with HIV/AIDS, some of the most vulnerable groups in society are unaware of their legal rights and obligations (Burris, 1996). An increasing number of statutory

and other provisions place positive obligations on members of the public but citizens cannot be expected to fulfill these obligations unless they are aware of them. For example, a basic assumption in our legal system is that a citizen knows the law, for example the Criminal Procedure Act No. 51 of 1977, provides that ignorance of the law by a person who commits an offence is not an excuse for committing that offence. Not only is it in the interest of a layperson to have access to the law but also the legal system itself benefits from informed comment by the layperson, comment that cannot be informed without some knowledge of the law.

Friedland (1975) notes that every citizen continually encounters situations and problems that involve the law. To deal with these problems effectively, citizens must find out what the relevant law is and how it affects them. This has taken on a note of urgency within the context of HIV/AIDS in South Africa, where many new laws have been promulgated, which impinges on the lives of all citizens affected by the epidemic. Awareness of the law can be improved in the following ways.

The provision of basic education about law and the legal system to the public constitutes an important component in improving access to the law. Lay people ought to be familiar enough with the law and the legal system to recognise areas of activity covered by the law. People should also be taught how to find the law in those areas where questions and problems most often arise. Awareness and access can be improved by making laws more comprehensible or readable to the public. According to Friedland (1975), most laws are written by lawyers. The author argues that they excuse their mysterious legal jargon by claiming that the law is complex and requires special terms to convey its meaning precisely. However, anyone who has ever tried to make sense of a statute would be aware that such legalese fosters confusion instead of reducing it. In a democracy the law belongs to all and are written by the legislators elected by the people therefore, they should be written in the language spoken by the people.

6.5.2 Legal Literacy

One of the major areas where empowerment has played an important role is in improving adult literacy. Access to literacy is considered one of the main factors for empowerment. Legal literacy is commonly understood as knowing the 'ABCs' of law (Srilatha, 1994). The conventional wisdom is that if people know what the law has to offer them they can improve their political, economic, and social condition. Furthermore, legal literacy is a process of self and social empowerment and an essential component in a broader strategy to achieve social justice and social change.

Legal literacy generally begins as an awareness raising exercise among grassroots employees, lawyers, and activists working on legal reform. An important first step is to demystify the law by making technical legal information and services understandable and accessible (Friedland, 1975). However, legal literacy extends beyond awareness of laws. A more complex understanding of the strengths and weaknesses of both the laws themselves and their application in society is a vital component. As a tool for workplace empowerment, legal literacy promotes employees capacities to understand and critique the law and the scope of rights, to assert rights as a political resource and to take action to change the limiting definitions of their roles, status and rights in the law and in daily practice.

6.6 Legal Empowerment in the Workplace

For this to occur, employees need to have a greater understanding of HIV/AIDS legislation and even international convention documents. Armed with this understanding, they can change legal systems by advocating for the fair application of laws and by influencing legislation. Legal access and literacy is a critical strategy in empowering employees. The goals of legal empowerment in the workplace are to help employees recognise how law is relevant to their lives, to help them understand the strengths and weaknesses of laws and to teach them how to use the law as an instrument for social change. Once employees understand they are entitled to rights they cease being victims and learn to seek redress. Building on their knowledge and understanding of the law, employees can then use the law as a political resource and work toward changing laws to effect social change within the family and the larger community.

In order to foster legal empowerment in the workplace, the fundamentals of law should be taught. Employees should be taught to recognise everyday situations involving law and knowing of resources available to supply specific legal information. Friedland (1975) contends that the existing delivery of legal information should be improved by reducing the problems facing employees in handling legal questions and by improving the quality of the information dispensed. Effective legal empowerment projects can follow a variety of different strategies to pursue these goals. Some projects organise employees to facilitate awareness-raising seminars on HIV/AIDS laws in the workplace or in their local communities. These efforts serve both to educate employees individually and to mobilize groups that can press for legal reforms. However, without support from the society at large, employees alone are unlikely to propel reform movements to success. Thus, legal empowerment in the workplace serves as a powerful resource tool to effect change since once employees become proactive social agents who act upon the law to make it relevant and who know how to use and direct the law to forge new and more adequate forms of social organisation and interaction, they become empowered.

6.7 Conclusion

HIV/AIDS has had and will continue to have a significant impact upon the workplace in a number of different ways. But the ideal response to contain this impact has yet to be developed. The current legal response by the government has embraced the option of ensuring that people who are infected and affected by HIV/AIDS, receive the protection of the law. Acts explicitly relating to non-discrimination and to aspects of HIV/AIDS infection have been promulgated as the most effective response strategy. The findings of this research have revealed that this legal remedy has not been successful in the context of local government specifically, the Durban Metropolitan Unicity Municipality. One of the most disturbing findings was the high prevalence of stigmas attached to people with HIV/AIDS that originated from management and employees. Given the fact that HIV/AIDS has been around for almost two decades, it is surprising to note that stigmas still thrives.

An alternative legal model that is based on the empowerment of people, is recommended. Legal empowerment in the workplace is proposed as being a much more effective strategy in containing HIV/AIDS and its social and economic consequences. Empowerment of employees is important for society as a whole because empowerment and participation are at the heart of action for social change. It is not only about having access to meaningful decision-making bodies, but also about having the knowledge, skills and confidence to try to solve a problem in society, to bring something new into that society. The empowerment model is intended to encourage individuals to use their abilities by enabling them to take decisions. This is done using the law as an instrument of social change. Empowerment however, may mean little more than giving employees the opportunity to make suggestions for change. This question of how far control is transferred to workers is vital to an understanding of empowerment.

BIBLIOGRAPHY

1. AIDS Law Project, (2000). Submission the Draft National Policy on Testing for HIV in terms of Section 2 of the National Policy for Health Act, 1990, Act No. 116 of 1990.
2. Aithal, A (1999) 'Wissen, Macht, Transformation - Interkulturelle und internationale Perspektiven (knowledge, power, transformation - intercultural and international perspectives), Frankfurt am Main.
3. Albertyn, C. (2000) 'Prevention, Treatment and Care in the Context of Human Rights,' Expert Group Meeting on "The HIV/AIDS Pandemic and its Gender Implications" 13-17 November 2000, Windhoek, Namibia.
4. Annan, K. (1998). Report by the Secretary-General on the Work of the Organisation, 1988, United Nations, A/53/1, paras 173-174.
5. Arndt, C. and Lewis, J.D. (2000) 'The Macro implications of HIV/AIDS in South Africa: A Preliminary Assessment,' South African Journal of Economic, August, 2000.
6. Bailey, K.D. (1978) 'Methods of social research,' New York, The Free Press.
7. Bartlett, W.C. (1988) 'AIDS: Legal Issues of Federal Concern,' Ottawa, Library of Parliament Research Branch.
8. Bayer, R. (1989) 'Private acts, social consequences: AIDS and the politics of public health,' New York, Free Press.
9. Bayer, R. (1992) 'As the second decade of AIDS begins: an international perspective on the ethics of the disease,' AIDS, Vol. 6, pp. 527-32.
10. Berg, S. (1988) 'Snowball sampling,' in Kotz, S. and Johnson, N. L. (Eds.) Encyclopedia of Statistical Sciences Vol. 8.
11. Bogdan, R. C. and Biklen, S. K. (1982) 'Qualitative research for education: An introduction to theory and methods,' Boston, Allyn and Bacon.
12. Brandt, A.M. (1998) 'AIDS in historical perspective: four lessons from the history of sexually transmitted diseases,' American Journal of Public Health, Vol. 78, No. 4, pp. 367-371.
13. Broom, J. (1993) 'HIV and the Law,' Australian Institute of Criminology, July 1993, Queensland.

14. Burris, S. (1998) 'Law and the Social Risk of Health Care: Lessons from HIV Testing,' *Albany Law Review*, Vol. 61, pp. 831-893.
15. Burris, S. (1999) 'Studying the Legal Management of HIV-related Stigma,' *The American Behavioural Scientist*, Thousand Oaks, Vol. 42, April 1999.
16. Cotterrell, R. (1984) 'The Sociology of Law: An Introduction,' Sydney, Butterworths.
17. De Waal, J., Currie, I. and Erasmus, G. (2000) 'The Bill of Rights Handbook,' 4th edition, Law Society of South Africa, Juta and Co LTD.
18. Dorrington, R., Bourne, D., Bradshaw, D., Laubsher, R. and Timeaus, I.M. (2001) 'The Impact of HIV/AIDS on Adult Mortality in South Africa,' Medical Research Council, Sept. 2001.
19. Eisner, E. W. (1991) 'The enlightened eye: Qualitative inquiry and the enhancement of educational practice,' New York, Macmillan Publishing Company.
20. Ely, M., Anzul, M., Friedman, T., Garner, D., and Steinmetz, A.M. (1990) 'Doing Qualitative Research: Circles within Circles,' Falmer Press.
21. Enel, P., Manuel, C. and Charrel, J. (1992) 'Ethical Confusion: Detection of HIV Seropositives,' *AIDS & Public Policy Journal*, Vol. 7(1), pp. 42-49
22. Evans, R. 'Living with AIDS,' *Law Institute Journal*, Vol. 12, pp. 8-9.
23. Evian, C. (1995) 'Primary AIDS Care,' 2nd Edition, Jacana Education, Johannesburg.
24. Farquhar, G (1999) 'Health-South Africa :NGO's reject plans to reveal HIV/AIDS status' Cape Town, Inter Press Service, October 21, 1999.
25. Faugier, J. and Sargeant, M. (1997) 'Sampling hard to reach populations,' *Journal of Advanced Nursing*, Vol. 26, pp. 790-797.
26. Field, M. A. (1990) 'Testing for AIDS: Uses and Abuses.' In: Gostin, L.O. and Curran, W. (eds), *The Harvard AIDS Legislation Project*. *American Journal of Law and Medicine*, XVI (1-2), pp. 34-106.
27. Fox, R.D. (1991) 'Law Against Social Change' Paper presented at the annual convention of the American Psychological Association, San Francisco. <http://www.uis.edu/~fox/papers/law-against.html>
28. Friedland, M.L. (1975) 'Access to the Law,' Carswell/Methuen, Toronto.
29. Fuller, R. and Petch, A. (1995) 'Practitioner Research. The Reflexive Social Worker,' Buckingham and Philadelphia, Open University Press.

30. Gostin, L.O. and Curran, W. (eds), (1988) The Harvard AIDS Legislation Project. American Journal of Law and Medicine, XVI (1-2), pp. 34-106.
31. Griffiths, P., Gossop, M., Powis, B. and Strang, J. (1993) 'Reaching hidden populations of drug users by privileged access interviewers: methodological and practical issues,' Addiction, Vol. 88, pp. 1617-1626.
32. Gruskin, S. (1998) 'Human Rights and Public Health: An Overview,' Speech Presented at the XII International AIDS Conference, Geneva, Switzerland, June 1998,
<http://www.hri.ca/partners/fxbcenter/publications>
33. Hamblin, J. (1991) 'The Role of the Law in HIV/AIDS Policy,' AIDS, Vol. 5, pp. 239-243.
34. Harber, M.C. (1998) 'Social Policy implications for the care and welfare of children affected by HIV/AIDS in KwaZulu-Natal,' Unpublished Masters Dissertation, University of Natal, Durban.
35. Hepple, B. (2000) 'Work, Empowerment and Equality,' Geneva, International Labour Organisation, ILS, Public Lecture.
<http://www.ilo.org/public/english/bureau/inst/papers/publics/hepple/>
36. Hermann, D.H.J. (1991) 'AIDS and the Law.' In Reamer, F.G. (ed). AIDS and Ethics. New York, Columbia University Press.
37. Heywood, M. and Hassan, F. (1998) 'The Employment Equity Act and HIV/AIDS a step in the right direction,' Industrial Law Journal, Centre for Applied Legal Studies, Juta & Company Ltd.
38. Heywood, M. (1998) 'Thirty Million and Counting: The Urgent Need to Move Policy to Comprehensive Interventions', Canadian HIV/AIDS Legal Network and Canadian AIDS Society, Montreal.
<http://www.aidslaw.ca/Newsletter/spring99/geneva98-2.htm>
39. Heywood, M. (2000) 'HIV/AIDS and the World of Work in South Africa: Much ado about nothing?' Aids Law Project, April 2000, South Africa.
<http://www.hri.ca/partners/alp/resource>
40. Hodges-Aeberhard, J. (1999) 'Policy and Legal Issues relating to HIV/AIDS and the World of Work,' International Labour Office, Geneva, November 1999.
<http://www.ilo.org/>
41. ING Barings (1999) 'The Demographic Impact of AIDS on the South African Economy,' Johannesburg, December 1999.

42. Jackson, H. (1992) 'AIDS : action now-information, prevention and support in Zimbabwe,' AIDS Counselling Trust/School of Social Work, Harare, Zimbabwe.
43. Jewkes, R. and Mvo, Z. (1997) 'Women's perception of Kayelitsha Midwife obstetric Unit,' Report 2, In: Study of health-care seeking practices of pregnant women in Cape Town. CERSA-Women's Health, Medical Research Council, Pretoria.
44. King, R. (2000) 'Sexual behavioural change for HIV: Where have theories taken us?'
<http://www.unaids.org/>
45. Kirby, M. (1988) 'The new AIDS virus – Ineffective and Unjust laws,' Journal of Acquired Immune Deficiency Syndromes, 1: 304-312.
46. Kirby, M. (1991) 'The Ten Commandments,' National AIDS Bulletin, March 1991, pp. 30-31.
48. Kirby, M. (1996) 'Human Rights and the HIV Paradox', Lancet, Vol. 348, pp. 1217-1218.
49. Kirby, M. (2000) 'Psychiatry, Psychology, Law and Homosexuality,' April, 27 2000.
50. Linders, S.H. and Peters, B.G. (1989) 'Implementation as a guide for policy formulation: A question of "when" rather than "whether",' International Review of Administrative Science, Vol. 55, pp. 631-652.
51. Loewenson, R. and Whiteside, A. (1998) 'HIV and AIDS in Southern Africa,' in Implications of AIDS for Demography and Policy in Southern Africa, (Ed) Alan Whiteside, University of Natal Press.
52. Lyons, C. (1990) 'Basic Information on HIV Infection,' Focus Paper No. 12.
<http://gbgm-umc.org/programs/hiv/focus.html>
53. Makhanya, M. (2000) 'A new chink in the ANC's armour,' Sunday Times, October 29, 2000.
54. Mann, J. (1993) 'Human Rights and the New Public Health,' Health and Human Rights, Vol. 3(1), pp. 229-233.
55. Mann, J. and Tarantolo, D. (1996) 'AIDS in the World II: Global Dimensions, Social Roots and Responses,' New York, Oxford University Press.
56. Mark, R. (1996) 'Research made simple: A Handbook for Social Workers,' California, Sage Publications.
57. Mattessich, P.W. and Monsey, B.R. (1992) 'Collaboration: what makes it work; a review of research literature on factors influencing successful

collaboration,' St. Paul (MN), Amherst H. Wilder Foundation.

58. May, J. (1998) 'Poverty and Inequality in South Africa,' (ed). Report prepared for the Office of the Executive Deputy President and the Inter-ministerial Committee for Poverty and Inequality, Praxis Publishing, Durban.
59. Merriam, S. (1998) 'Case Study Research in Education: A Qualitative Approach,' New York, Jossey-Bass.
60. Moore, R. (1996) 'Crown Street Revisited', Sociological Research Vol. 1(3) <http://www.socresonline.org.uk/1/3/2.html>
61. Ngweni, C. (1999) 'HIV in the Workplace: Protective Rights to Equality and Privacy,' SAJHR, Vol. 15, Part 4.
62. Niskanen, W.A. (1996) 'Bureaucracy and Public Economics,' Aldershot, Edward Elgar.
63. O' Loughlin, E. (2001) 'AIDS becomes a crisis of space,' Durban, 5 May 2001, World News.
64. Patton, M. Q. (1990) 'Qualitative Evaluation and Research Methods,' (2nd ed.) Newbury Park, Sage Publications.
65. Pereira, D. (1996) 'HIV/AIDS and its 'Willing Executioners': The Impact of Discrimination,' Murdoch University Electronic Journal of Law, Vol. 6, No. 4 December, 1999.
66. Pierre, J. (1997) 'State Models and Economic Development: Controversies, Convergencies and Consequences,' paper presented at the International Political Science Association conference, Seoul, Korea, 17-21 August 1997.
67. Pierre, J. and Peters, B.G. (2000) 'Governance, Politics and the State,' Political Analysis Series, London, Macmillan Press.
68. Pile, J. (2000) 'Debswana tackles AIDS with anonymous testing,' Business Day, 8 June 2000.
69. Posner, P. (1998) 'Unfunded Mandates,' Washington, DC, Georgetown University Press.
70. Rappaport, J. (1984) 'Studies in Empowerment: Steps Towards Understanding and Action,' Prevention in Human Services, Vol. 3, No. 2/3, Spring 1984.
71. Schneider, H. and Stein, J. (1997) 'From policy on paper to action on the ground: contextual issues affecting implementation of the National AIDS Plan in South Africa. In: The South African National STD/HIV/AIDS Review, 4-18 July 1997, Comprehensive report, Medical Research Council.

72. Schneider, H. and Stein, J. (1998) 'Implementing AIDS policy in post-apartheid South Africa,' Centre for Health Policy, University of Witwatersrand.
73. Sejersted, F. (1993) 'Democracy and the Rule of Law: Some Historical Experiences of Contradictions in the striving for good government,' in Constitutionalism and striving for Democracy ed. J. Elster and R. Slagstad. New York.
74. Selwyn, N. and Robson, K. (1998) 'Using e-mail as a research tool,' Social Research Update. Issue 21.
<http://www.soc.surrey.ac.uk/>
75. Smith, A. (2000) 'HIV/AIDS in KwaZulu-Natal and South Africa,' Department of Virology, Faculty of Medicine, University of Natal.
<http://www.und.ac.za/med/virology/hivrevsmith.html>
76. Spreen, M. (1992) 'Rare populations, hidden populations and link-tracing designs: what and why?' Bulletin Methodologie Sociologique, Vol. 36, pp. 34-58.
77. Srilatha, B. (1994) 'The Meaning of Women's Empowerment: New Concepts from Action,' in Population Policies Reconsidered, (eds) Sen, G., Germain, A. and Lincoln, C. Boston, Harvard University Press, pp. 127 - 138.
78. Strauss, A. and Corbin, J. (1990) 'Basics of qualitative research: Grounded theory procedures and techniques,' Newbury Park, Sage Publications.
79. Temkin, S. (2001) 'Employers Blamed for Poor Awareness of Law,' Business Day, October 30, 2001.
77. Thomas, E. and Crewe, M. (2000) 'Local Authority Responses to HIV/AIDS: An Overview of a few key Cities,' Urban Health and Development Bulletin, Vol. 3, No. 2, June 2000.
78. UNAIDS (1999) 'Epidemiological Fact Sheet on HIV/AIDS and sexually transmitted infections,' Geneva.
<http://www.unaids.org/>
79. UNAIDS (2000), AIDS Epidemic Update. December 2000. Geneva.
<http://www.unaids.org/>
80. Van Meter, K. (1990) 'Methodological and Design Issues: Techniques for Assessing the Representatives of Snowball Samples,' NIDA Research Monograph, pp. 31-43.

81. Van Wyk, C. (2000) 'The need for a new Statutory offence aimed at harmful HIV related behavior: The general public interest perspective,' *Codicillvs*, Vol. Xxx1, No. 1, May 2000, UNISA.
82. Weber, M. (1946). From Max Weber. H.H. Gerth & C.W. Mills (Eds.). New York: Oxford University Press.
83. Werdel, A.A. (1990) 'Mandatory AIDS Testing: The Legal, Ethical and Practical Issues,' *Notre Dame Journal of Law, Ethics & Public Policy*, Vol. 5, pp. 155-255.
84. Whiteside, A. and Sunter, C. (2000) 'AIDS: The Challenge for South Africa,' Human and Rousseau, Tafelberg.
85. Whiteside, A. and Woods, G. (2000) 'Aids in KwaZulu-Natal: An Emerging Threat.'
<http://www.und.ac.za/und/politics/hsf/aids.htm>
86. Wilkinson, D. and Davies, G.R. (1997) 'The increasing burden of tuberculosis in rural South Africa: the impact of the HIV epidemic,' *South African Medical Journal*, 87(4), pp. 447-50.
87. World Bank (2000) 'Reforming Public Institutions and Public Sector,' Group Poverty Reduction and Economic Management (PRiM) Network, A World Bank Strategy, November 2000.
<http://www.worldbank.org/>
88. World Health Organisation Global Programme on AIDS (1991) 'Current and Future Dimensions of the HIV/AIDS Pandemic: A capsule Summary,' Geneva: WHO, April 1991.
89. Yin, R. (1984) 'Case Study Research: Design and Methods' Sage, 1st Ed.

DRAFT HIV/AIDS WORKPLACE POLICY

PREAMBLE

The Durban Metropolitan Unicity Council and its employees are committed to ensuring that the working environment is safe and healthy as per the requirements of South African Occupational Health and Safety Act 1993 and in terms of the Code on HIV/AIDS and Employment as adopted by Southern African Development Community as well as in terms of the Code of Good Practise on Key Aspects of HIV/AIDS and Employment dated 01 December 2000 of the Minister of Labour as contained in Government Gazette No. 21815 under Government Notice No. R1298.

The Unicity Council's HIV/AIDS Policy is based on the fundamental principles of human and patient rights. The HIV/AIDS policy aims to achieve a balance in protecting the rights of all parties including those infected and affected and a balance between rights and responsibilities and, also between individual protection and co-operation between all the parties/stakeholders involved.

OBJECTIVES

- 1.1 The primary objective is to set out guidelines for employers and trade unions to implement so as to ensure individuals living with HIV/AIDS infection are not unfairly discriminated against in the workplace. This includes provisions regarding:
 - (i) creating a non-discriminatory work environment;
 - (ii) dealing with HIV testing, confidentiality and disclosure;
 - (iii) providing equitable employee benefits;
 - (iv) dealing with dismissals;
 - (v) managing grievance procedures and
 - (vi) provision of a Wellness Centre in the most cost effective way.
- 1.2 The secondary objective is to provide guidelines for employers, employees and trade unions on how to manage HIV/AIDS within the workplace. Since the HIV/AIDS epidemic impacts upon the workplace and individuals at a number of different levels, it requires a holistic response which takes all of these factors into account. The secondary objective therefore includes principles on the following:
 - (i) creating a safe working environment for all employers and employees;
 - (ii) developing procedures to manage occupational incidents and claims for compensation;
 - (iii) introducing measures to prevent the spread of HIV/AIDS;
 - (iv) developing strategies to assess and reduce the impact of the epidemic upon the workplace;
 - (v) supporting those individuals who are infected & affected by HIV/AIDS so that they may continue to work productively for as long as possible.
 - (vi) the Council shall provide assistance to employees who wish to undergo voluntary testing for HIV/AIDS.

2. PRINCIPLES

- 2.1 The Unicity Council and its employees confirm that a policy is developed and implemented in consultation and participation with all stakeholders.
- 2.2 Employees living with HIV/AIDS have the same rights and obligations / responsibilities as all other staff
- 2.3 Confidentiality regarding the HIV/AIDS status of any member of staff shall be maintained.
- 2.4 Mechanisms will be created to encourage openness, acceptance and support for those who voluntarily disclose their HIV/AIDS status within the workplace (breaking the silence)
- 2.5 No person living with HIV/AIDS shall be unfairly discriminated against within the employment relationship or within any employment policies or practices.
- 2.6 Occupational HIV/AIDS exposure will be limited through effective use of universal precautions, hazard control measures and post exposure prophylaxis.
- 2.7 All parties/stakeholders are committed to eradicating the disease through every possible means such as education and other preventative measures.

POLICY COMPONENTS

3.1 EDUCATION, AWARENESS AND PREVENTION PROGRAMMES

- 3.1.1 The Council recognises that education is the most effective way to prevent the spread of HIV/AIDS and supports comprehensive and ongoing HIV/AIDS and health education programmes for all employees.
- 3.1.2 Every employee in the Council shall attend at least one HIV/AIDS education programme on a yearly basis or if a need arises on a more regular basis
- 3.1.3 Information, education, awareness and prevention programmes will be developed and implemented with participation of all appropriate stakeholders and will involve recognised representatives of Labour. Council will also, wherever possible and available, utilise community based organisations and other resources in its intervention programme.
- 3.1.4 The nature and extent of a workplace programme should be guided by the needs and capacity of each individual workplace.

3.2 JOB ACCESS

There shall be no direct or indirect pre-employment/pre-placement test for HIV/AIDS unless authorisation has been given by the Labour Court. Employees shall be given the normal medical tests of current fitness for work and these tests shall not include testing for HIV/AIDS.

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 shall not be permitted.

3.3 WORKPLACE TESTING AND CONFIDENTIALITY

- 3.3.1 There shall be no compulsory workplace testing for HIV/AIDS.
- 3.3.2 Persons living with HIV or AIDS have the legal right to confidentiality about their HIV/AIDS status in any aspect of their employment. An employee is under no obligation to inform management of her/his HIV/AIDS status. Information regarding the HIV/AIDS status of an employee shall not be disclosed without the employee's written consent.
- 3.3.3 Confidentiality regarding HIV/AIDS information of an employee or prospective employee shall be maintained.

3.4 JOB STATUS

HIV/AIDS status shall not be a factor in job status, promotion or transfer.

3.5 HIV/AIDS TESTING AND TRAINING

There shall be no compulsory HIV/AIDS testing for training.

3.6 MANAGING ILLNESS AND JOB SECURITY

- 3.6.1 No employee shall be dismissed on the basis of HIV/AIDS status nor shall HIV/AIDS status influence retrenchment procedures.
- 3.6.2 Employees with HIV/AIDS related illness shall have access to reasonable medical treatment to improve immunity and shall be entitled, without discrimination, to agreed existing sick leave provisions.
- 3.6.3 HIV/AIDS infected employees shall continue to work under normal conditions in their current employment for as long as they are medically fit to do so

3.7 OCCUPATIONAL BENEFITS

- 3.7.1 Council and Labour shall ensure that all occupational benefits are non-discriminatory and provide support to all employees including those with HIV/AIDS infection.
- 3.7.2 Council and Labour shall ensure that all occupational benefit scheme rules are non-discriminatory.
- 3.7.3 Information from benefit schemes on the medical status of an employee shall be kept confidential and shall not be used by management or any other party for any purpose whatsoever.

3.8 RISK MANAGEMENT

Where there may be an occupational risk of acquiring or transmitting HIV/AIDS infection, appropriate precautionary measures shall be taken to reduce such risk, including clear and accurate information and training on the hazards and procedures for safe work. The Council's Needlestick Injury Protocol will apply to those workers in high risk occupations.

3.9 PROTECTION AGAINST VICTIMISATION

Employees infected by or believed to be infected by HIV/AIDS shall be protected from stigmatisation and discrimination by co-workers, management or clients. Information and education are essential to maintain the climate of mutual understanding necessary to ensure protection.

3.10 GRIEVANCE HANDLING

Standard grievance handling procedures in Council, in labour and in civil laws that apply to all workers shall apply to HIV/AIDS related grievance.

3.11 ASSESSING THE IMPACT OF HIV/AIDS ON THE WORKPLACE

The Council and Labour in partnership shall collect, compile and assess data on HIV/AIDS, sexually transmitted diseases and tuberculosis and use such information to accelerate the fight against HIV/AIDS

4 INTERVENTION PROGRAMME

The intervention programme shall be dealt with by Management and Labour at the Bargaining Council.

5 MONITORING AND REVIEW

5.1 Responsibility for monitoring of the policy for its successful implementation and evaluation for its effectiveness shall lie with Council and Labour. Monitoring of the implementation of the Council's HIV/AIDS policy must take place on a regular basis as per the recognition agreement between Council and its Trade Unions.

5.2 Review of the HIV/AIDS workplace policy shall take place on a regular basis or as agreed to between Council and Labour in the light of epidemiological and scientific information.

5.3 Review of the intervention programme shall take place on a regular basis or as agreed to between Council and Labour.