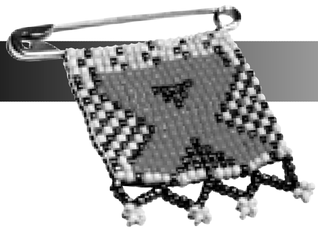


CHAPTER 13

Insurance

CHAPTER 13

Contents

13.1 HIV testing and life insurance

The **Life Offices' Association (LOA)**, an association of life insurance companies, has adopted an agreement on HIV/AIDS, which is regularly updated.

GUIDELINES

WHAT THE LOA AGREEMENT SAYS YOU MUST BE TOLD WHEN YOU APPLY FOR INSURANCE

1. *When you apply for life insurance, you will be asked to take an HIV test.*
2. *You may not be tested for HIV without giving your free and* ***informed consent****.*
3. *You may refuse to take the test.*
4. *You have the right to receive* ***pre-test counselling*** *and* ***post-test counselling****.*
5. *You have the right to have your test results treated* ***confidentially****.*

To find the LOA agreement, see References and resource materials on page 311.

If you refuse to have an HIV test, you will probably not get insurance (depending on the insurance product and the business policy of the company).

Every year, over one million people agree to have HIV tests at the request of the insurance industry. For many people, this is when they first find out about their **HIV status**.

Thousands of people are refused life insurance when they test HIV positive, and for many, this is just the start of their problems. They find that there has been a **breach** of **privacy** when their HIV status is **disclosed** without their permission, or that they are not able to get a home loan because they cannot get life insurance.

Faced with these problems, people ask whether it is fair for the insurance industry to exclude people with HIV, and what their rights are. This chapter looks at these questions and tries to give some answers.

KEY POINT

OTHER FINANCIAL PLANNING OPTIONS

People living with HIV or AIDS can also speak to their insurance company about what other financial planning options there are for you (besides a life insurance policy). For example, it may be better to consider an education policy to make sure that children are provided for.

13.2 The need for insurance

13.2.1 WHAT IS INSURANCE?

Insurance is a **contract** (agreement) between an insurance company (eg Metropolitan) and a person. It is meant to protect the person and their family from financial hardship in case something very serious, like an accident or unexpected death, happens.

GUIDELINES

IMPORTANT WORDS USED IN THE INSURANCE INDUSTRY

- *Insurance is also called 'cover', eg life cover.*
- *A person who gets insurance is called 'the **insured**'.*
- *A person who sells insurance is called 'the broker'.*
- *The money that the insured pays to the insurance company, usually every month, is called 'the **premium**'.*
- *The insurance company is called 'the **insurer**'.*
- *The possibility of the uncertain future event happening is called 'the risk' – for example: death, the loss of property by theft, and damage or destruction of a vehicle in a car accident.*
- *The insurance contract is called 'the policy'. This includes all the terms (words) and conditions the insured and insurer have agreed to.*

Insurance money helps our loved ones cope with unexpected death and injuries.

13.2.2 WHY TAKE OUT INSURANCE?

EXAMPLE

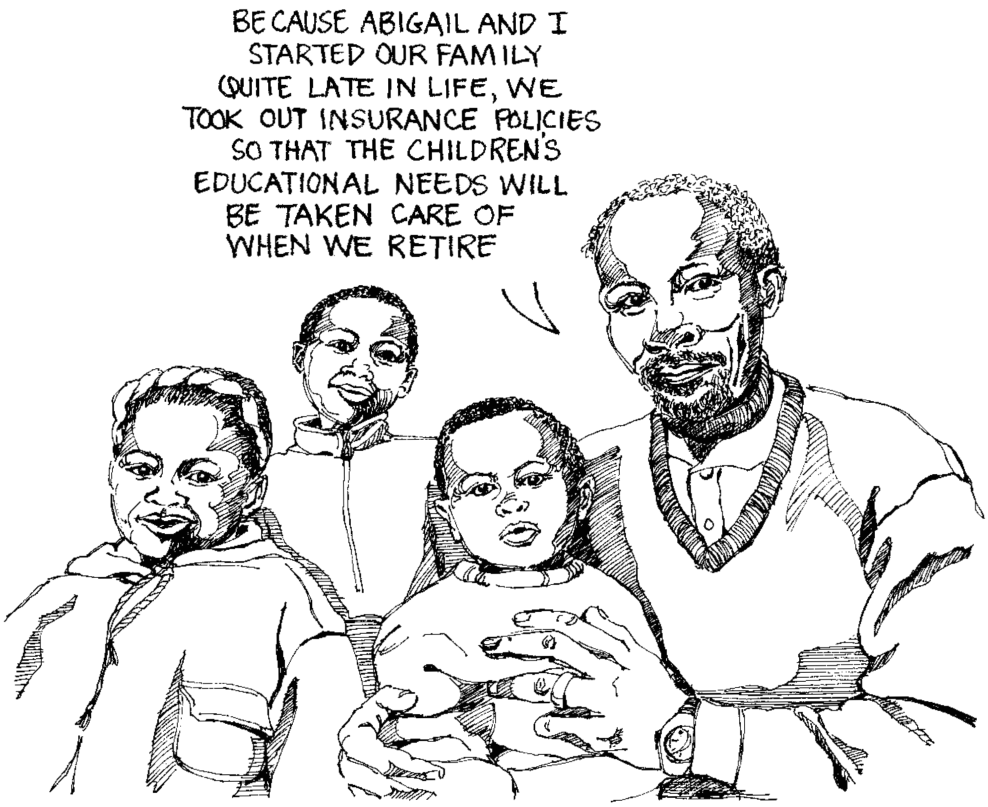
SECURING A FUTURE FOR CHILDREN

Siphiwe has 3 children. She has a good job, but she is worried that if she dies unexpectedly, her children will be left without any financial support. She decides to insure her life for R200 000. This means that if she dies, her children will inherit R200 000. This will help them to continue with their studies and their lives.

Insurance is based on a fear that an uncertain event like early and unexpected death may in fact happen.

We try to protect ourselves and our **dependants** against a possible loss of money if the event happens, by paying an insurance company to take on the risk. This means that the insurance company promises to pay the insured or his/her dependants, by paying money to cover the loss, when the event happens. In return you pay a monthly premium.

Insurance policies may be especially important to families where there is only one breadwinner or where there are still young children.



13.3 Types of insurance contracts

There are 2 main types of insurance contract:

- Indemnity insurance
- Non-indemnity insurance.

13.3.1 INDEMNITY INSURANCE

Indemnity insurance is when the insurance company agrees to compensate you for a loss that you may suffer as a result of the event you have insured yourself against – for example: if you insure your house against fire and your house burns down, you will be compensated.

When the contract is taken out, a maximum amount that the insurance company will pay out is agreed in the contract and your monthly premiums are based on this maximum amount. But the actual amount that the insurance company will have to pay in the end is not known, and will depend on the value of your loss.

EXAMPLE

INDEMNITY INSURANCE

If you are involved in a car accident, and your vehicle can only be repaired at a cost of R11 000, the insurance company will pay this amount.

13.3.2 NON-INDEMNITY INSURANCE

Non-indemnity insurance is a type of insurance where the insured and insurer agree on the amount that the insurance company will pay if something happens to you – for example: life insurance or disability insurance.

The higher the amount you want you or your dependants to receive, the higher the premium that you will have to pay.

EXAMPLES

NON-INDEMNITY INSURANCE

- *You can insure your life for R150 000. This means that if you die, your dependants will receive that amount of money.*
- *You can insure yourself against disability for R150 000. This means that, if you are no longer able to work, you will get that amount of money.*

13.4 The approach of most insurance companies

Your decision to apply for life insurance or disability insurance is voluntary. Equally, the insurance company does not have a duty to accept your application.

Before entering into an insurance contract, the company needs information from you to help assess the risk to the company of issuing a contract. This information also helps the company to decide what premiums to charge.

EXAMPLE

SMOKING IS HIGH RISK

A smoker would be seen as a 'high risk' because of the higher chance of the smoker dying of cancer or lung disease. For this reason, a smoker would be charged a higher premium so that the insurance company will not lose money if the smoker dies shortly after taking out insurance.

Insurance companies check **applicants** for serious diseases (eg diabetes), or habits (eg smoking), that may affect their life expectancy (how long you are likely to live). This is done through questionnaires, medical examinations, urine, blood and other tests.

The principle of insurance is that the minority of people who die or become disabled are paid for by the majority, who are likely to remain well.

EXAMPLE

HIGHER PREMIUMS

Older people or people who smoke are more likely to die quicker than young, non-smoking people. As a result, new policy-holders who are older or who smoke, pay higher premiums.

HIV screening

Life insurance companies also screen (check) life insurance and disability insurance applicants for HIV.

Insurance companies say they screen for HIV because:

- People with HIV will probably die or be **incapacitated** at a younger age.
- The risk of insuring people with HIV is too great.
- They have a duty to take care of those people already insured, to make sure that their insurance will not be disadvantaged by high risk members.
- They want to make sure that other people do not have to pay higher premiums to balance the risk of having people living with HIV or AIDS on a scheme.

As a result, insurance companies protect themselves by:

- Asking a person to have an HIV test before an insurance contract is agreed to, and
- Putting clauses into contracts that exclude **liability** (legal responsibility) or limit the amount they will pay out if a person dies of AIDS-related illness (called '**exclusion clauses**' – see 13.7 on page 304).

KEY POINT

POLICIES FOR PEOPLE WITH HIV

A few companies offer special policies for people with HIV. Most insurers charge high premiums and often limit the amount that a person's life can be insured for.

13.5 Agreeing to an insurance contract

An insurance contract comes into existence by agreement between the insurer and the insured. In this way, it is like any other contract.

13.5.1 THE DUTY TO DISCLOSE

The company will ask you for information that it needs to assess the risk involved. They get most of this information from answers to questions on the application form that you will have to complete.

KEY POINT

DISCLOSING MATERIAL FACTS

You have a legal duty to disclose all 'material facts' which may affect the company's assessment of your risk – in other words, you must mention all facts that can influence the company's decision to grant you insurance.

Insurance companies say a person's HIV status is a material fact which must be disclosed.

CASE

AN APPLICANT'S DUTY TO DISCLOSE MATERIAL FACTS

In *Southern Life Association v Johnson* (1993), Mr Johnson applied for life and disability cover. When he applied, he was asked to say if he had had a blood test in the last 5 years. He did not disclose a blood test that was carried out on him to decide if he had a blood disorder. He was not aware that he suffered from the blood disorder. No symptoms had developed at the time of the application and he believed that he was in good health.

Only later, when his health got worse, his doctor told him what the problem was. The insurance company decided not to pay him the disability cover.

The Supreme Court decided:

- Mr Johnson should have disclosed the fact that he had the blood test.
- The undisclosed fact was 'material' and thus the company was allowed to refuse to make any payment under the insurance policy.

13.5.2 THE RESULTS OF NON-DISCLOSURE

If you do not disclose all material facts, the results of this non-disclosure can be serious:

- If you deliberately answer a question falsely, you can be charged with fraud.
- The insurer may declare the contract 'null and void' (as if it never existed) if the insurer thinks your answer would have affected the assessment of the risk.
- The insurer may also declare the contract null and void if you are **negligent** (eg make a mistake) in answering a question on a material fact.

In these situations, the insurance company will not have to pay out on the contract, even if there is a death or serious damage to property.

KEY POINTS

CAUTION IN ANSWERING QUESTIONS

- *Think very carefully about every question on the insurance application form.*
- *If you are not sure how to answer, get help to fill in the form.*

Non-disclosure can result in the insurer declaring the policy 'null and void'.

13.6 HIV tests and insurance procedures

Many people find out their HIV status when they are tested for HIV as part of an insurance application:

- Often, people are tested without informed consent and with inadequate or no pre-test counselling.
- Most applicants are not given post-test counselling. Many insurance companies do not offer post-test counselling, but instead forward HIV positive test results to the applicant's doctor, leaving the doctor to talk to the applicant.

This means that many people find out their HIV status in an unsupportive environment, with no counselling, and also have their first experience of discrimination (when they are denied insurance). This kind of experience does not encourage people to come forward for counselling and treatment.

The *National Policy on Testing for HIV* says that people can only be tested for HIV with their informed consent, and with pre- and post-test counselling. The policy will be attached to the new Health Act, which will become law in 2003.

For the National Policy, see References and resource materials on page 311.

KEY POINTS

RIGHT TO PROPER COUNSELLING

The Life Offices' Association has adopted a Protocol on HIV/AIDS, which also sets out an applicant's right to give informed consent.

The Protocol says the insurer must cover:

- *Costs of pre-test counselling, and*
- *One session of post-test counselling.*

This means it is your right to ask the broker for proper counselling before and after the HIV test.

KEY POINTS

CHALLENGING VIOLATIONS OF YOUR RIGHTS

- *If you are asked to sign a consent form without pre-test counselling and informed consent, this **violates** your right to **autonomy** (to make decisions for yourself).*
- *If you do not receive pre- and post-test counselling, you can make a **civil claim** against the company.*

For more on informed consent, see 6.3 on page 132.

For more on civil claims, see 17.8 on page 428.

GUIDELINES

PROCEDURES FOLLOWED BY MOST INSURANCE COMPANIES

1 ***Consent form***

You will be asked to fill in an application form. This form will probably include a consent form – the form that says you give your permission for an HIV test to take place.

2 ***Doctor details***

You will also be asked to give details of your personal doctor (your family doctor or a doctor who you trust). The results of the HIV test will be sent to this doctor, so it is important that his/her details are correctly written down.

3 ***The test***

An HIV test will be done by a doctor or laboratory chosen by the insurance company. They will tell you where to go for the test.

4 ***Test result***

The result of the HIV test is then usually sent to a doctor employed by the insurance company. This person is usually called the 'chief medical officer'. The chief medical officer will open a file for you. The file will include all medical information relevant to the application, including the results of the HIV test.

5 ***Positive test result – Life Register***

If a test result is positive, your insurance application may be rejected. If it is rejected, your name will be put in code on the LOA's ***Life Register*** *as someone who has been refused insurance. This means that if you apply for insurance at another company, they will also reject your application. 'In code' means that the information about your HIV status will not be able to be read by anyone, except those people who know what the code is. This is done to stop unauthorised people from getting to know your status.*

6 ***Positive test result – telling your doctor***

If the result is positive, your personal doctor will be told in writing. This doctor is expected to contact you to tell you the result. An insurance company will not tell you directly.

7 ***Negative test result***

If the results are negative, and all the other conditions of the insurance company are satisfied, you will be told that your application for insurance has been successful. Your doctor is not contacted if the results are negative.

For more on the Life Register, see 13.8.3 on page 307.

13.7 Exclusion clauses

Clauses in an insurance policy which say that the insurance company will not pay out in some situations are called ‘exclusion clauses’. Most companies have exclusion clauses that deal with HIV and AIDS, for example: a clause which says that the insurance company does not need to pay if the insured commits suicide or dies of AIDS.
A big problem with exclusion clauses is that some of them are vague and very broad, giving insurance companies wide powers to decide if a death is in some way HIV- or AIDS-related.

EXAMPLES

DIFFERENT TYPES OF EXCLUSION CLAUSES

Having HIV or AIDS at the time of death

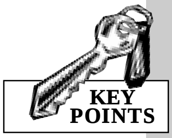
Here the clause may say that the company will not pay if the insured has HIV or AIDS at the time of death. But a person who has HIV will not necessarily die of an AIDS-related condition, eg he/she could be killed in a car accident. Sometimes the insurance company will still refuse to pay out even if the cause of death has nothing to do with AIDS.

The company deciding on cause of death or disability

Some exclusion clauses say that the insurance company will not pay out if the company decides that the insured has died or become disabled because of HIV or AIDS. This allows the insurance company to decide what the cause of death or ***disability*** *is on its own.*

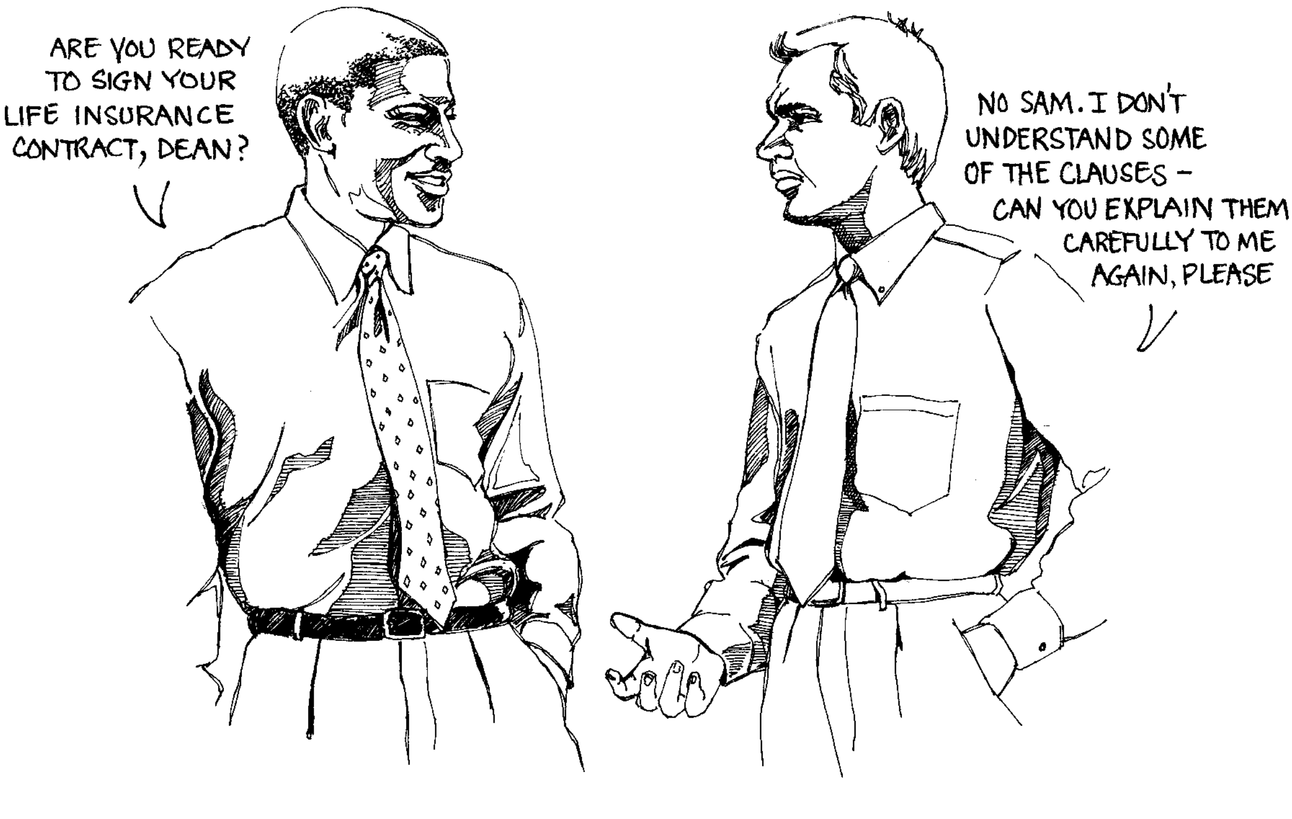
For contact details of ALP, see R8 on page 483.

If you believe an insurance company is unfairly refusing you insurance benefits, you should contact the AIDS Law Project for help.



CAREFULLY CHECKING EXCLUSION CLAUSES BEFORE SIGNING

- *Some clauses say that the insurance company will not pay out if the insured dies of AIDS, an AIDS-related condition or an HIV-related condition.*
- *It is very important to read the conditions of the policy carefully before you sign an insurance contract – look out especially for exclusion clauses. Read the exclusion clause and ask for clarity on what it means.*
- *If you are concerned about any of the clauses, do not sign the contract before you discuss these clauses with someone who can explain them to you.*
- *Ask someone to explain the policy to you if:*
  - *The contract is written in difficult legal language, or*
  - *The contract is not written in your first language, or*
  - *You are not able to read the contract.*



13.8 Confidentiality

13.8.1 THE PROBLEM

A **breach** of **confidentiality** often happens when insurance companies test people for HIV and do not respect the confidentiality of the insurance applicant.

EXAMPLE

A BREACH OF CONFIDENTIALITY

John applied for life insurance and was turned down because he tested HIV positive. Later he found out that his broker had told other people at the local football club that John had been refused insurance because he had AIDS. John decided to make a civil claim against the broker.

KEY POINTS

CHALLENGING A BREACH OF CONFIDENTIALITY

- *You have the right to have your medical condition and HIV status kept confidential unless you have consented to a particular person being told.*
- *If you can prove that an insurance company has leaked this information, you can make a civil claim against them.*

For more on confidentiality, see 6.2 on page 120.

For more on civil claims, see 17.8 on page 428.

The main problem in cases around confidentiality is that it is often difficult to find out who gave out the information about you. There are always a number of people involved in dealing with an insurance application – for example: the chief medical officer, the broker, the company's accountants, and filing clerks in the insurance company. Any one of these people can become aware of your HIV status, and **unlawfully** tell others.

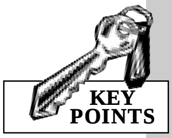
13.8.2 THE INSURED'S DOCTOR

Exclusion clauses can also present other problems for people with HIV and AIDS. An insurance company can only know that an insured has died or become disabled as a result of HIV or AIDS if it is informed about this fact. The best person to provide this information is the insured's doctor.

For more on ethical duties, see 6.2.2 on page 120.

Remember: every doctor has an ethical and legal duty only to give out confidential information (eg on HIV status) when the patient clearly gives the doctor permission to disclose this information.

For this reason, insurance companies often ask to be allowed to contact the insured's doctor after the insured has died or become unable to work to get any information that is "necessary for an assessment of the claim". This can include information about your HIV status, your general health, and the cause or suspected cause of your death or incapacity.



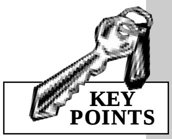
CAUTION IN SIGNING CLIENT AUTHORISATION FORMS

- *Permission to contact your doctor is usually given in the insurance contract when you sign it.*
- *Sometimes, you may be asked to sign a separate form (called a 'client authorisation form').*
- *If you sign a contract or a form with this kind of clause, then the insurance company has the right to ask these questions and your doctor must answer them.*
- *Ask the company if the policy includes a clause or form like this.*
- *Get advice before you sign anything.*

13.8.3 THE LIFE REGISTER

The Life Offices' Association (LOA) is allowed to store information about people who apply for insurance and those who are turned down on a list called the 'Life Register'. The names of people who test positive for HIV are put in code on this list. This means that once an insurance company has refused to give you insurance, it is very difficult to find another insurance company that would be prepared to insure you.

Any member of the LOA can see this list, although the LOA says that the information is kept in a coded form, and that only a limited number of people are allowed to see it. The insurance industry says that it needs this list to prevent fraud in applications for insurance.



MONITORING THE LOA

- *The LOA's list can lead to **unfair discrimination** against people with HIV or AIDS.*
- *The LOA is not allowed to keep personal information that has nothing to do with an application on this register, eg a person's **sexual orientation**.*

13.9 Cancelling the policy

EXAMPLE

DECIDING ON CANCELLING A POLICY

Bongi has found out that she has HIV. She has had an insurance policy for 5 years, but knows that the policy excludes people who die of AIDS. She wants to know what to do.

Many insurance contracts allow the insured person to cancel the policy and claim the value of their contributions – in other words, the total of the premiums paid up to that date, excluding administrative costs. This is called ‘surrendering’ the policy.

The administrative fee subtracted by the insurance company may be large – so as an insured you should think carefully to decide if it is worth surrendering the policy.

Often it is only possible to surrender a policy after a fixed period, usually 1 or 2 years after the policy was first bought. A cancellation before this will mean that you will lose all your contributions.

KEY POINTS

CAUTION IN CANCELLING A POLICY

- *If you surrender a policy and want insurance again, you will have to re-apply. Then you will be expected to pay higher premiums for the same benefit, because you are older.*
- *Surrendering a policy can be useful if you need money urgently and you have no available cash.*
- *Get good advice before making a decision about cancelling a policy.*

13.10 Insurance and home loans

Before a bank will give you a bond as a home loan, they need to be sure that you earn enough money to be able to afford to repay the loan. They also want to be sure that, if you are unable to pay back the loan (eg when you die or are badly injured in an accident), you have enough assets for them to recover the full amount that was loaned.

If you do not have assets, most banks demand that people take out life cover insurance for the same amount as the loan. They ask you to cede (transfer) this life cover to them, so that if you die or are disabled, they will be able to recover the value of the loan by claiming your insurance policy.

Because most people with HIV are refused life cover, it becomes very difficult to get home loans. The banks argue that the life cover is necessary to reduce the amount of risk. But they admit that if a person is unable to afford bond repayments, the bank has the right to repossess the house, and recover the loan.

GUIDELINES

For more on complaints about insurance agents or companies, see 17.4.6 on page 413.

FACING PROBLEMS WITH HOME LOANS

- *Try to persuade the bank to grant you the bond without life cover. Some banks are willing to grant a bond of less than R100 000 without life cover.*
- *Ask a parent, business partner or friend if they will be a surety for you.*
- *Get legal advice from a lawyer or paralegal before you make any decisions.*

Talking points

1 What can you do to make sure that insurance companies do not abuse your rights when you apply for insurance?

2 A person with HIV dies of pneumonia and the insurance company decides that she would have recovered if she did not have HIV.

- *Do you think the insurer will have enough reason to avoid having to pay out?*

3 What can we do to ensure that insurance companies or doctors do not breach the confidentiality of people with HIV?

4 Is it unfair discrimination if banks refuse someone a loan because they have HIV?

- *What can we do to challenge this policy?*

References & resource materials

LAWS

Long Term Insurance Act, No 52 of 1998.

POLICY DOCUMENTS

Life Offices' Association (LOA), Protocol on HIV/AIDS, October 2000.

Department of Health: HIV/AIDS Policy Guideline – Testing for HIV, August 2000 (based on National Policy).

CASES

Southern Life Association v Johnson, 1993(1) SA 203.

REPORTS, MANUALS AND OTHER USEFUL MATERIALS

AIDS Law Project and Lawyers for Human Rights: HIV/AIDS and the Law: A Trainer's Manual (First Edition), July 1997.

WEBSITES

AIDS Law Project: **www.alp.org.za**

AIDS Legal Network: **www.redribbon.co.za/legal**

Life Offices' Association: **www.loa.co.za**