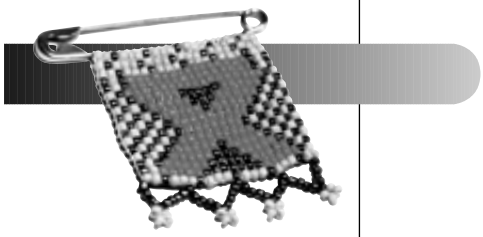


CHAPTER 15

# The rights of prisoners

CHAPTER 15

# Contents


**15.1 The rights of all prisoners** ..... **346**

**15.2 The constitutional rights of prisoners** ..... **348**

15.2.1 The rights of sentenced prisoners ..... 348

15.2.2 The rights of awaiting trial prisoners ..... 349

**15.3 The statutory rights of prisoners** ..... **350**

**15.4 Policies on HIV/AIDS in prisons** ..... **351**

**15.5 Common questions on the rights of prisoners with HIV or AIDS** ..... **353**

15.5.1 Do prisoners have the right to medical treatment? ..... 353

15.5.2 Can a prisoner be tested for HIV without consent? ..... 354

15.5.3 Do prisoners have the right to confidentiality? ..... 355

15.5.4 Can prisoners with HIV or AIDS be kept separately from other prisoners? ..... 356

15.5.5 Can prisoners get access to condoms and education about HIV/AIDS? ..... 357

15.5.6 Can Correctional Services discriminate against prisoners with HIV or AIDS? ..... 358

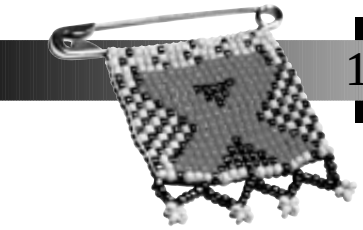
15.5.7 Can a prisoner who is very ill get early release from prison? ..... 359

15.5.8 Can a prisoner be allowed out to visit a family member or partner dying of AIDS? ..... 360

**15.6 Taking action on the rights of prisoners** ..... **361**

**Talking points** ..... **363**

**References and resource materials** ..... **364**



# 15.1 The rights of all prisoners

> *In 5 years' time we have estimated there will be 7 000 deaths a year and in 10 years' time, 45 000 deaths in prisons due to HIV/AIDS.*

Judge Fagan, Inspecting Judge of Prisons, August 2000

All prisoners have rights, including prisoners **living with HIV or AIDS**. In addition, prisoners who are awaiting trial and prisoners who have not yet been sentenced have certain extra rights.

### A PRISONER'S LEGAL RIGHTS

In *Minister of Justice v Hofmeyr* (1993), the Supreme Court said:

> *The prisoner retains all his personal rights save those abridged or proscribed by law … the extent and content of a prisoners rights are to be determined by reference not only to the relevant legislation, but also by reference to his inviolable common-law rights.*

Since this 1993 case, a new **Constitution** has been passed, and prisoners' rights are also protected by the Constitution.

Under the **Bill of Rights** in the Constitution, no person may be detained arbitrarily (for no reason) or "without just cause" (a good reason).

People who are in prison awaiting trial and sentenced prisoners lose some of their **fundamental rights**, or have their rights limited, such as the right to freedom of association, freedom of movement and residence, and freedom of trade and occupation.

But a person does not lose all of their rights as soon as they are sent to prison. They still have many legal and human rights, as set out in the Constitution and the laws on prisons and prison policy.

Section 35 of the Bill of Rights says that prisoners have the right:

> *to conditions of detention that are consistent with human dignity.*

### *PRISONERS WITH HIV*

*Prison officials may not place prisoners who have HIV in a separate section of the prison simply because the prisoners are HIV-positive. This would be a **disclosure** of information about a prisoner that would **violate** the constitutional right to dignity and to **privacy**.*

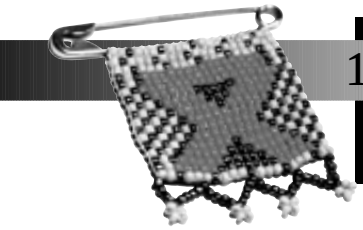
### *CLAIMING PRISON RIGHTS*

*The Bill of Rights says that all prisoners also have the right to:*

- *Consult with a lawyer or doctor, who is chosen by the prisoner.*
- *Consult and be visited by a **spouse** or **next-of-kin** (closest family).*

*The HIV/AIDS **epidemic** does not affect these rights. In fact, because of the **discrimination** that prisoners with HIV have suffered, it makes it even more important to ensure that prisoners claim their rights.*

*Prisoners have the right to be visited by their families.*



# 15.2 The constitutional rights of prisoners

## 15.2.1 THE RIGHTS OF SENTENCED PRISONERS

In South Africa, there have been a number of court cases with important decisions on discrimination and the rights of prisoners with HIV.

*For more on discrimination against people with HIV or AIDS, see Chapter 2 on page 29.*

The Department of Correctional Services (DCS) has committed itself to a policy of **non-discrimination** in handling prisoners with HIV. But a lot of **unfair discrimination** still takes place in prisons.

Under the Bill of Rights, all prisoners have the right:

- To equality
- Not to be tortured
- Not to be punished in a cruel, inhuman or degrading (insulting) way
- To dignity
- To exercise
- To adequate (satisfactory) accommodation
- To adequate nutrition
- To adequate medical treatment.

***SAME RIGHTS FOR PRISONERS WITH HIV***

*All prisoners (awaiting trial, awaiting sentence and sentenced prisoners) have rights.*

*Prisoners with HIV should be treated in exactly the same way as all other prisoners. It is **unlawful** for a prisoner to be treated differently (eg kept separately or refused work) because of HIV status.*

## 15.2.2 THE RIGHTS OF AWAITING TRIAL PRISONERS

*For more on the Constitution and Bill of Rights, see 4.1 on page 66 and 4.9 on page 83.*

*For more on HIV testing and court evidence, see 14.3.1 on page 318.*

An awaiting trial prisoner is a person who has been charged with a crime. As an awaiting trial prisoner, you are **presumed** (believed) to be innocent. This is a very important principle of the law that is accepted by democratic countries internationally.

It is meant to protect innocent people from being wrongly convicted, and is also necessary to ensure that all people get a fair and proper trial.

***PRESUMPTION OF INNOCENCE***

*A prisoner awaiting trial has the right to be presumed innocent even if:*

- *The person is accused of a very serious crime (eg rape or murder).*
- *The person has been refused bail.*
- *There is already strong evidence to show that the accused person is guilty.*

*The HIV status of an accused person, including a suspected rapist or murderer, should not negatively affect the judgement about his guilt.*

The Bill of Rights further protects the rights of people who are accused of a crime by making it unlawful to force a person to make a confession or admission (eg whether he/she has tested HIV positive) that could be used as evidence against the person.

***BEING FORCED TO CONFESS***

*If a person who is in prison awaiting trial was beaten into confessing that he had infected another person with HIV, this information may not be used against him in his trial.*

# 15.3 The statutory rights of prisoners

Statutory rights are rights in **statute laws** passed in Parliament.

The *Correctional Services Act* sets out the rights of prisoners and the rules that the Department of Correctional Services (DCS) must follow in running the prisons under its control.

EXAMPLES

***DCS RULES***

- *Every prisoner must keep his/her person, clothing, bedding and cell clean and tidy.*
- *The DCS must provide what is needed to ensure a clean prison environment, eg providing cleaning utensils.*

*The Department of Correctional Services must ensure a clean prison environment.*

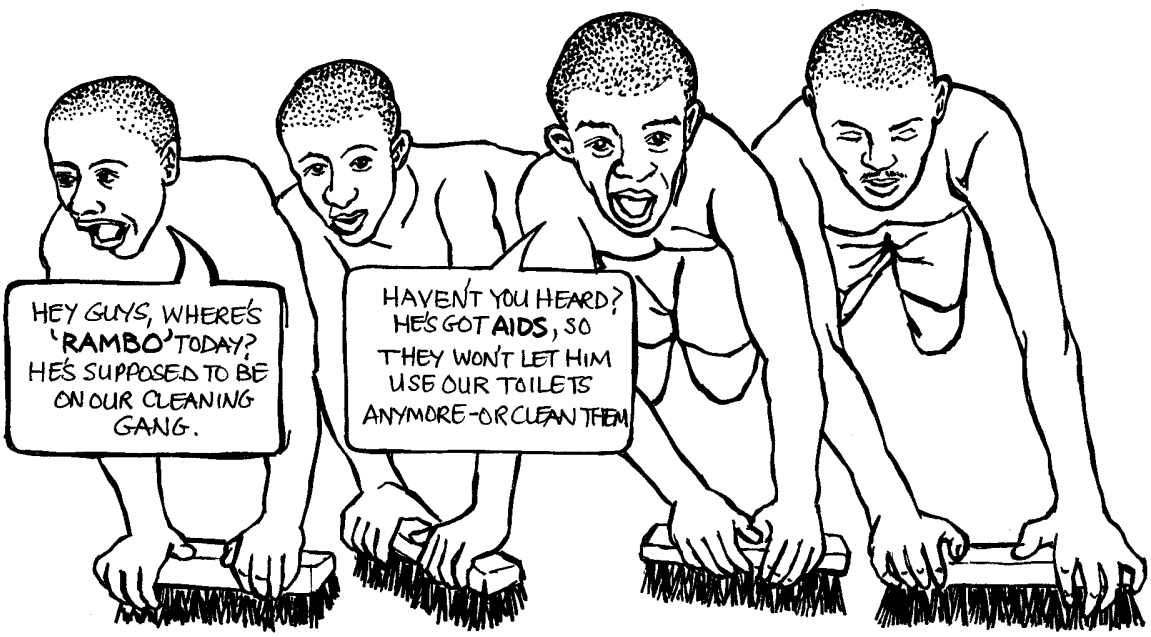
# 15.4 Policies on HIV/AIDS in prisons

The Department of Correctional Services (DCS) developed a policy on managing HIV/AIDS in prisons in 1996. In 2000, a new Management Strategy on HIV/AIDS in Prisons was developed. This policy and strategy is based on:

- Human rights principles such as the right to equality and non-discrimination.
- The fundamental rights in the Bill of Rights.
- World Health Organisation (WHO) Guidelines on the treatment of prisoners.

The DCS Management Strategy covers prisoners and prison staff. In this chapter, we focus on the rights of prisoners living with HIV or AIDS. As employees, prison staff have the same rights as all employees in relation to HIV/AIDS.

*For more on employees' rights, see Chapter 7 on page 153.*




*An incident like this is discriminatory and can be challenged by Rambo.*

## *PRISON POLICY PRINCIPLES ON HIV/AIDS*

***Non-discrimination***

*Prisoners living with HIV or AIDS may not be discriminated against.*

***Confidentiality***

*Prisoners have the right to confidentiality about their HIV status. They may not be forced to disclose their HIV status.*

***HIV testing***

*Compulsory HIV testing is prohibited. HIV testing may only be done with written, informed consent. Voluntary testing and counselling should be encouraged.*

***Education and information***

*All prisoners must be given education and information on HIV/AIDS and how to prevent transmission of HIV. Education must be ongoing.*

***Condoms***

*Condoms should be freely available to prisoners at all times.*

***Segregation***

*Prisoners living with HIV or AIDS may not be segregated (separated) from other prisoners on the basis of their HIV status. Segregation is only allowed when a prisoner poses a risk to other prisoners – for example:*

- *A prisoner has an infectious illness like hepatitis.*
- *A prisoner behaves aggressively towards other prisoners.*

***Medical treatment***

*Prisoners and staff living with HIV or AIDS should receive treatment and care. However, this does not include anti-retroviral treatment.*

***Counselling before parole or release***

*Prisoners with HIV should be given counselling, including information on how to prevent HIV transmission, before release.*

*For documents on prison policy, see References and resource materials on page 364.*

# 15.5 Common questions on the rights of prisoners with HIV or AIDS

## 15.5.1 DO PRISONERS HAVE THE RIGHT TO MEDICAL TREATMENT?

The right to adequate medical treatment generally means that a prisoner with HIV should have **access to** the same kinds of treatment and care that are available to the community.

The Correctional Services Act says that:

- The DCS must provide adequate health care services to all prisoners so that they can lead a healthy life.
- All prisoners have a right to medical treatment.
- Prisoners can ask to be treated by their own doctor at their own cost – but this does not include a traditional healer.
- A prisoner cannot be forced to have a medical examination, test or treatment, unless his/her medical condition is creating a threat to the health of others.

*For more on health rights, see Chapter 6 on page 115.*

*Prisoners can ask to be treated by their own doctor at their own cost.*

**ANTI-RETROVIRAL TREATMENT IN PRISON**

In *Van Biljon and Others v Minister of Correctional Services* (1997), the High Court ordered the Department of Correctional Services to provide combination **anti-retroviral therapy** to two prisoners:

> *Even if it is accepted as a general principle that prisoners are entitled to no better medical treatment than that which is provided by the State for patients outside, this principle can, in my view, not apply to HIV infected prisoners. Since the State is keeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside, the adequate medical treatment with which the State must provide them must be treatment which is better able to improve their immune systems than that which the State provides for HIV patients outside.*

The Court decided:

- A prisoner's right to medical treatment depends on an examination of the circumstances (eg prison conditions) to decide what is adequate.
- As the two prisoners had been prescribed anti-retroviral treatment by a doctor, this was considered adequate medical treatment for their condition and circumstances.
- This decision did not mean that all prisoners with HIV should receive expensive drugs.

***DCS POLICY ON ANTI-RETROVIRAL TREATMENT***

*Current DCS policy is not to give anti-retroviral treatment to prisoners. This is in line with the Department of Health's policy not to purchase or provide anti-retroviral drugs for use in the public health sector.*

*For more on health policy, see 4.7 on page 79.*

## 15.5.2 CAN A PRISONER BE TESTED FOR HIV WITHOUT CONSENT?

It is unlawful for anybody – including a prisoner – to be tested for HIV against their wishes or without their knowledge.

After admission to prison, every prisoner is given a health examination. This can include testing for contagious or **communicable diseases** (such as hepatitis or tuberculosis) if the medical officer thinks this necessary.

### *CLAIMING RIGHTS AROUND CONSENT AND COUNSELLING*

- ***Informed consent*** *must always be given for an HIV test. This is the law and the official policy of the DCS.*
- *Informed consent means that the person must understand the purpose of the test and what the result may mean for him or her.*
- ***Pre-*** *and* ***post-test counselling*** *are important parts of informed consent.*

*For more on rules for HIV testing, see 6.3 on page 132.*

### THE MEANING OF INFORMED CONSENT

***In*** *C v Minister of Correctional Services* (1995), a prisoner brought an action against the DCS because he had been tested for HIV without giving his informed consent. The judge ruled in the prisoner's favour saying:

> *Generally speaking, it is axiomatic that there can only be consent if the person appreciates and understands what the object and purpose of the test is, what an HIV positive result entails and what the probability of AIDS occurring thereafter is.*

## 15.5.3 DO PRISONERS HAVE THE RIGHT TO CONFIDENTIALITY?

### *THE RIGHT TO CONFIDENTIALITY*

*Prisoners have a right to confidentiality about private things like their health.*

If a prison official knows about the HIV status of a prisoner or another member of staff, the official may only tell someone else with the consent of the prisoner or member of staff.

DCS policy on HIV test results says:

> *These results must be treated as a confidential matter at all times.*

Following World Health Organisation (WHO) guidelines, any kind of marking or coding of a prisoner's file or cell to indicate HIV status, is prohibited.

## 15.5.4 CAN PRISONERS WITH HIV OR AIDS BE KEPT SEPARATELY FROM OTHER PRISONERS?

Because prisoners have a right to privacy and dignity, it is unlawful to segregate prisoners with HIV from the rest of the prison population.

Segregation makes it impossible for a prisoner to keep information about his/her health private because the reason for the segregation becomes known to warders and other prisoners.

In 1996, the DCS officially ended its policy of segregating prisoners with HIV.

### *CHALLENGING SEGREGATION*

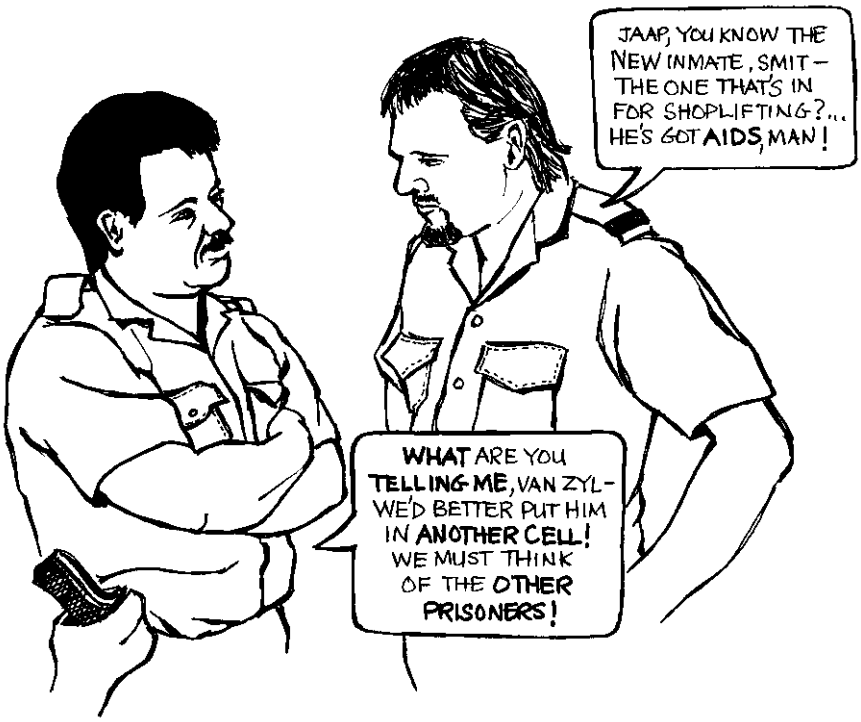
*Prisoners who still experience segregation are being treated unlawfully and can take steps to challenge the prison authorities.*

*For more on how HIV is transmitted, see 1.3 on page 13.*

Segregation is only allowed if it is ordered by the prison's medical officer on medical grounds. In such a case the prisoner must be examined at least once a day by a medical practitioner. The time periods for segregation are very strict and may never go over 37 days.

### *CONTAGIOUS DISEASES*

*If a prisoner has a communicable (contagious) disease like tuberculosis or hepatitis, he/she can be segregated on medical grounds. HIV is not a contagious disease. Most of the illnesses caused by AIDS are not infectious.*




*Van Zyl can only tell Jaap about prisoner Smit's HIV status if the new prisoner consents to this. It is unlawful to segregate a prisoner with HIV or AIDS.*

## 15.5.5 CAN PRISONERS GET ACCESS TO CONDOMS AND EDUCATION ABOUT HIV/AIDS?

Prisoners face the same risks of HIV infection as other South Africans. In fact, conditions in prisons usually mean that there is a higher risk of HIV infection in jail. They therefore have the right to the same steps to protect themselves as people in free society.

The DCS has made a commitment to provide HIV education and condoms to prisoners "on the same basis as condoms are provided in the community". Each prison currently designs its own education programme – but there are national guidelines which can be followed.

***WHAT PRISONERS CAN DEMAND TO MAKE THIS POLICY EFFECTIVE***

*Access to materials that educate people effectively about the risks of HIV infection (as a result of sex between men) and how to live as normally as possible with HIV.*

*Free access to methods, such as condoms, to protect themselves from HIV infection during sex.*

The present policy in prisons is that condoms are available freely and anonymously. Condoms are also available on request from the medical officer or a social worker.

*Prison conditions sometimes increase the risk of HIV infection.*

## 15.5.6 CAN CORRECTIONAL SERVICES DISCRIMINATE AGAINST PRISONERS WITH HIV OR AIDS?

The courts have said that prisoners with HIV have the right not to be discriminated against.

### RESPECTING THE RIGHTS OF PRISONERS WITH HIV OR AIDS

In *W and Others v Minister of Correctional Services* (1996), the Supreme Court ordered the Minister of Correctional Services, the Commissioner of Correctional Services, the Commander of Pollsmoor Prison and the Provincial Minister of Health to respect the rights of prisoners with HIV or AIDS.

The Court ordered them to:

1. *Observe confidentiality about the status of all persons who are HIV positive or suffering from AIDS.*
2. *Protect, as far as possible, prisoners from stigmatisation on account of their HIV status or sexual orientation.*
3. *Provide, or cause to be provided, condoms to all prisoners.*
4. *Provide or make available the necessary and appropriate medical attention and treatment to HIV positive prisoners.*
5. *Carry out and permit testing for HIV or AIDS only with the informed consent of the prisoners involved.*
6. *Not deprive any prisoner of access to work solely on the basis of his or her HIV status.*
7. *Not discriminate against HIV positive prisoners compared to other prisoners as far as the provision of accommodation and ablution facilities are concerned.*
8. *Provide appropriate education and information about the HIV and AIDS condition to staff and prisoners.*

## 15.5.7 CAN A PRISONER WHO IS VERY ILL GET EARLY RELEASE FROM PRISON?

A prisoner who is very ill may be allowed to be released from prison early. While prisoners with HIV do not have any special rights to early release, a prisoner dying of AIDS is likely to be considered for early release.

A person's health status can can also affect the sentence he/she receives. If it is known to a court, the HIV status of a person who has been found guilty may be either a **mitigating** (lessening) or an **aggravating** (increasing) factor in sentencing.

*For more on sentencing, see 14.4 on page 320.*

GUIDELINES

### *CORRECTIONAL SUPERVISION AND PAROLE*

*Under the Criminal Procedure Act, a judge is allowed to sentence a person to a period of* ***correctional supervision*** *(punishment outside of prison) if the judge feels that there are strong reasons to avoid sending that person to prison. A person's bad health can be a good reason.*

*Under the Correctional Services Act, the Commissioner of Prisons also has the power to give a prisoner parole (early release) or change the prisoner's sentence to correctional supervision, if the prisoner is diagnosed by a medical officer as being in the final stages of a terminal disease (eg cancer, AIDS).*

CASE

### RELEASE UNDER CORRECTIONAL SUPERVISION

In *State v Cloete* (1995), the Supreme Court released a prisoner serving 5 years for fraud early from prison and placed him under correctional supervision by a judge. The judge decided that the prisoner's medical condition (his HIV status) was a good reason to release him and said that:

> *his condition is such and has changed so that to continue to serve imprisonment would be far harsher a sentence for him than for any other person serving a similar sentence.*

Under current DCS policy, early release is not often recommended. When the DCS considers release, different factors are taken into account.

***FACTORS INFLUENCING EARLY RELEASE***

- *The type of crime committed*
- *The length of the prison sentence*
- *The social support that will be available to the prisoner after release.*

## 15.5.8 CAN A PRISONER BE ALLOWED OUT TO VISIT A FAMILY MEMBER OR PARTNER DYING OF AIDS?

Yes. Departmental of Correctional Services (DCS) policy allows prisoners to visit dying relatives, and this includes family members who are dying of AIDS. But DCS policy on visiting dying family members does not include **same-sex** partners in a relationship. This is unfair discrimination.

***VISITING A GAY PARTNER DYING OF AIDS***

In *Booysen v Correctional Services* (2000), a Paarl prisoner took the DCS to court because he was not allowed out to visit his gay partner who was dying of AIDS.

The prisoner said that this **violated** his right to non-discrimination on the basis of **sexual orientation**.

The case was settled out of court and the DCS allowed the visit. The DCS policy on same-sex relationships has not yet officially changed and may need to be challenged in court in future.

*For more on the rights of lesbians and gay men, see Chapter 10 on page 225, including discussion on partners and families in 10.4 on page 235.*

# 15.6 Taking action on the rights of prisoners

The law is very clear about HIV and prisoners' rights. But it is still important to challenge all discrimination and abuse, and when the prison authorities do not carry out their duties to prisoners.

EXAMPLES

***PRISON AUTHORITIES NEGLECTING THEIR DUTIES***

- *They don't make condoms available.*
- *There is no education on health and safer sex issues.*

Prisoners have the right to take legal action and several prisoners have already been successful in using the law to fight discriminatory policies.

The Correctional Services Act sets up a Judicial Inspectorate with the duty to inspect prisons. Independent Prison Visitors will eventually be appointed in all provinces. Their job is to:

- Visit prisons twice a month.
- Check up on complaints and what is being done about them.
- Give serious complaints to the head of the Judicial Inspectorate (the Inspecting Judge) to follow up.

*Prisoners have the right to take legal action against prison authorities.*

For more on taking up constitutional cases, see 17.2 on page 399.

For more on criminal charges, see 17.7 on page 425.

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

## TAKING UP PRISON RIGHTS ISSUES

### Reporting complaints

*You can report complaints through the regular complaints procedures of all prisons. Complaints are made directly to the Head of the Prison, who must walk around the prison daily.*

### If the response is not satisfactory

*If you are not satisfied with the response of the Head of the Prison, write to the Area Manager. If you are still not satisfied with the Area Manager's response, your complaint must be given to an Independent Prison Visitor, who can take up your case with the Inspecting Judge. You can write to:*

The Office of the Inspecting Judge
Private Bag X9177
Cape Town 8000.

GUIDELINES

### If the complaint is very serious

- *Ask to see a lawyer of your choice. Do this by requesting to use the telephone. Then write to the Head of the Prison to arrange for a visit by the lawyer.*
- *Think about making a criminal or civil case against the DCS.*
- *Think about making a complaint to the* ***Public Protector*** *or the* ***Human Rights Commission****.*
- *Ask to make copies of all documents (eg letters,* ***affidavits****).*

### Finding a lawyer

*For advice or help finding a lawyer, you can contact an NGO dealing with prisoners or HIV/AIDS and human rights, for example:*

NICRO
PO Box 11410
Johannesburg 200
Tel: (011) 336 5236/7

South African Prisoners' Organisation
for Human Rights (SAPOHR)
PO Box 61715
Marshalltown 2107

To contact the AIDS Law Project, AIDS Legal Network or other HIV/AIDS organisations for assistance, see R8 on page 483.

To contact the South African Human Rights Commission (SAHRC), see 17.2.2 on page 399.

# Talking points

**1** Dan is accused of rape. He has been refused bail and is in prison awaiting trial. The police are demanding that Dan confess to knowing that he has HIV.

- *Is this legal?*

**2** The DCS policy says that condoms should be easily available to prisoners. Yet many prisoners complain that they still have to go to a health care worker to get a condom.

- *Do you think this encourages condom use?*

**3** Do you think that medical care for prisoners with HIV or AIDS should include receiving a diet with adequate nutrition to make sure that their immune systems do not weaken?

**4** Do you think all prisoners with HIV should benefit from the decision (in the State v Cloete case) to release a prisoner under correctional supervision because of his medical condition?

**5** Do you think DCS policy should change to allow prisoners to visit same-sex partners who are dying of AIDS?

- *What about a prisoner visiting an ill heterosexual partner when they are not married?*

## LAWS

Constitution of the Republic of South Africa Act, No 108 of 1996.

Correctional Services Act, No 8 of 1959.

Criminal Procedure Act, No 51 of 1977.

Employment Equity Act, No 55 of 1998.

## POLICY DOCUMENTS

Department of Correctional Services: Management Strategy – HIV/AIDS in Prisons, 1999.

World Health Organisation Guidelines on HIV/AIDS in Prisons.

## CASES

Booysen v Correctional Services, 2000 (unreported).

C v Minister of Correctional Services, 1996 (4) SA 292 (T).

Minister of Justice v Hofmeyr, 1993 (3) SA 131 (C).

S v Berliner, 1967 (2) 193 (A).

S v Cloete, 1995 (1) SACR 367 (W).

Van Biljon & Others v Minister of Correctional Services, 1997 (4) SA 441 (C).

W & Others v Minister of Correctional Services, CPD, 1996 (unreported: Case No 2434/96).

## REPORTS, MANUALS AND OTHER USEFUL MATERIALS

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

ALP: HIV/AIDS Current Law & Policy booklet 6: 'Your rights in prison', July 2000.

AIDS Legal Network (ALN): ALQ – The AIDS Legal Quarterly (quarterly magazine).

## WEBSITES

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

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