



REPUBLIC OF SOUTH AFRICA

PUBLIC PROTECTOR  
MOSIRELETSI WA BATHO • MOŠIRELETŠI WA BATHO  
MUSIRHELELI WA VANHU • MUTSIRELEDZI WA VHATHU  
OPENBARE BESKERMER • UMKHUSELI WABANTU • UMWIKELI WABANTU



(012) 322 2916 • Fax (012) 322 5093    Private Bag X677 Pretoria 0001    228 Visagie Street Pretoria

Enquiries:

Please quote this reference in your reply: **7/2 – 0488/01**

Your reference:

19 July 2001

**REPORT**

**COMPLAINT BY THE AIDS LAW PROJECT AGAINST THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA (HPC).**

**1. BACKGROUND**

A complaint was lodged with our office by the Aids Law Project. The complaint contained allegations of testing and disclosure of HIV status by doctors without the consent of the patients.

Since 1996, the Aids Law Project acted on behalf of numerous clients who have reported that they have been treated unethically / unprofessionally by medical practitioners. These complaints include the following:-

- being tested for HIV without their knowledge;
- not being told of their HIV positive status after testing-thus endangering the lives of their unborn children and partners;
- being tested for HIV without their informed consent;
- being tested for HIV without pre-and / or post-test counselling;
- breach of doctor-patient privilege (breach of confidentiality);
- being subjected to abusive and discriminatory attitudes from health care workers on the basis of HIV status;
- being subjected to treatment with toxic unregistered 'drugs' (Virodene).



In 1983 the SA Medical and Dental Council (SAMDC), now the Health Professions Council (HPC) laid down guidelines for health care workers on the testing of patients for HIV. These guidelines stipulate that no patient may be tested for HIV without informed consent must be accompanied by both pre-and post-test counselling and they also state that testing for the patient's right to confidentiality must be observed.

In December 1992, the Medical Association of SA published its guidelines around testing for HIV. These essentially echoed the ethical rules set out by the SAMDC / HPC. The ethical guidelines of MASA and the SAMDC / HPC have since become legal requirements as well, following the Appeal Court decision of Jansen NO v Dr Kruger in 1994.

## 2. AIDS LAW PROJECT'S COMPLAINT

The AIDS Law Project has lodged 28 complaints of this nature with the HPC. Pursuant to these complaints, not a single doctor has been found guilty of unprofessional conduct and only one doctor has been summoned to a disciplinary hearing.

The complaints are considered by a Committee of Preliminary Enquiry and in their experience, this can take up to three years. Many of their clients have passed away before their complaints could be heard and were therefore denied the opportunity of ever having their matter considered. Even where the Committee has eventually considered the matter, the doctor's version is inevitably given credence rather than that of the complainant. Where the patient's testimony has been obtained by sworn affidavit and the doctor's version of events. This creates the impression that the HPC is more likely to believe an explanation offered by doctors. There is a very strong perception that the HPC is biased in its assessment of our clients' complaints.

When procedure has dragged on for so long that the patient has passed away, the HPC refuses to entertain the complaint, even where there are other witnesses to the alleged misconduct.

In certain matters where the HPC has found doctors innocent of any misconduct, they have requested reasons for the committee's decision in accordance with Section 33(2) of the Constitution of South Africa, which states that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. To date, not a single reason for their decisions has been forthcoming from the HPC.

It is their contention that the HPC is failing in its duty to ensure that its members respect patients' human rights. It is failing in its duty to hold its members accountable for ignoring the ethical, legal and constitutionally entrenched rights of patients with HIV to treatment that recognises their rights to dignity and respect. An HIV test has serious medical, social, psychological and legal consequences. The guidelines on testing for HIV were drafted with this in mind.

There seems to be a lack of awareness of the SAMDC / HPC guidelines or of government policy, such as the National Policy on Testing for HIV. This can easily be rectified by the HPC and should be, as a matter of urgency.



Patients are reluctant to undergo testing for HIV if they suspect that health care workers will not adhere to the testing guidelines and will not be held accountable for abuse of patients' human and legal rights.

They enclosed a list of their current cases with the HPC. Many of these cases involve domestic workers who were tested without consent. In a number of them, the doctors are alleged to have disclosed the HIV test results to the employer without the consent of the worker. This has resulted in dismissals and unemployment for women who are often the breadwinners of their families and extended families.

### 3. MEETING WITH HPC

Our office wrote a letter dated 14 February 2001 to the Health Professions Council of South Africa regarding the matter and we suggested a meeting with them. A response was received from the HPC giving detailed explanation about individual complaints against doctors. Thereafter a meeting was held with the officials of the HPC. From preliminary discussions with the officials of HPC, it appeared that delays in setting a matter before to preliminary inquiry is caused by the request by the Attorneys of doctors for extension to give written explanations by the doctors.

Other delays are caused by the instances where the ALP has written categorically clear that the matter is confidential. This gives them problems because the matter will have to be discussed by a lot of people during the preliminary inquiry.

The preliminary committee evaluates complaints and explanation given by the doctor against the background of rules / regulations that apply to establish if there is a prima facie case.

If there is a prima facie case, they direct it to the Registrar to hold a formal inquiry.

A concern was also raised by the officials of the Public Protector office that most complaints received by the HPC ended at the preliminary committee. Therefore it seems there is a high standard of proof laid at an early stage of inquiry.

It also transpired that a lot of cases reported to the council, after the committee has given the explanation of the doctor to the ALP, they expect the ALP to comment on that and if they have new evidence furnish the committee before the committee makes a decision.

The ALP finds it difficult to proceed with the matter because their patients are either dead because of the disease or cannot be traced - this is because cases takes long before they are taken to the committee.

The office also observed that a lot of cases taken to the council, the council accept the explanation of the doctor.



The Registrar explained that a lot of cases end because witnesses are not available or the ALP request them to close the file if the patient is dead or not traceable.

The Registrar also informed the meeting that the Legal Services Department has been requested to fast track Aids related cases because of the limited life-span of patients. Though no explanation was given as to how are they going to fast track the cases.

Our office is concerned about the delay in finalising the complaints and the perception of always accepting the doctors explanation even though that is contrary to the guidelines.

#### 4. MEETING WITH THE ALP & SAHRC

On 28 June 2001 our office held a meeting with the ALP and SAHRC to discuss what transpired during our meeting with HPC and decide what is the SAHRC going to investigate and what fall within the mandate of the Public Protector.

The meeting agreed that the Public Protector will focus on the issue of undue delay in settling matters before preliminary committee and what structures are in place or can be put in place to fast track Aids related cases.

#### 5. RECOMMENDATIONS:

The Public Protector's office makes the following recommendations:

- 5.1 That the HPC educate doctors about the HIV / AIDS guidelines and make it a point that they measure doctors conduct with the guidelines during the Preliminary Inquiry.
- 5.2 That the HPC regulate the time limit given to doctors to give explanations to their conduct, because this can be abused in that the life span of the patient is shortened. If there is no response within the stated period - refer the matter for hearing.
- 5.3 That records be kept of the preliminary committee proceedings which can be available to the aggrieved person if need be. Detailed reasons why preliminary committees findings should be given.
- 5.4 That the HPC should consider legislation regarding compulsory indemnity insurance to be taken by doctors to avoid a situation where the victim will not be compensated because the doctor is insolvent.
- 5.5 That a way be found of involving somebody who can champion the cause of the complainant at the preliminary stage.

5.6 That the aspects of ALP's complaint not covered by the Public Protector's recommendations be pursued further by the SAHRC.

**Mrs B J MKHWEBANE-TSHEHLA  
SENIOR INVESTIGATOR**

*048801\_g/jmm*