



**SOUTHERN AFRICA  
LITIGATION CENTRE**

# Informed consent & HIV testing

# Requirement of informed consent

- ▶ Requirement of informed consent for medical treatment is reflective of two ideals:
  - ▶ That the decision regarding medical treatment should ultimately be that of the patient and not health worker;
  - ▶ That the right to determine what shall be done to one's own body places a duty on health workers to impart adequate information for the patient to make a rational decision.
- ▶ Informed consent cannot be assumed, must be expressly obtained
- ▶ **C v Minister of Correctional Services** 1996 (4) SA 292 (T)
  - ▶ Held informed consent for an HIV test requires adequate pre-test counselling which includes providing patient with information on meaning of HIV infection, manner in which transmitted, nature of test and consent required, psychological and legal implications of test, what to be expected if result is positive.

# Violation of the right to dignity

- **NM and Others v Smith and Others** [2007] ZACC 6
  - Disclosure of an individual's HIV status without her consent violated her right to dignity given the stigma and discrimination surrounding HIV in SA.
- **Diau v Botswana Building Society** (IC no 50/2003)
  - Interconnectedness of right to dignity with all other rights
  - “The right to dignity requires us to respect that an individual is the master of his own body and destiny and that he is free to resist any potential violation to his privacy or bodily integrity. To punish an individual for refusing to agree to a violation of privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human. Punishing the applicant for refusing an invasion of her right to privacy and bodily integrity is inconsistent with human dignity. This is particularly so in the context of HIV/AIDS where even the remotest suspicion of being HIV/AIDS can lead to intense prejudice, ostracisation and stigmatisation.”



# Cruel, inhuman or degrading treatment

- ▶ **Kingaibe and Chookole v Attorney General** (2009/HL/86)
  - ▶ Held mandatory HIV testing amounted to a violation of the prohibition against inhuman and degrading treatment and privacy
  - ▶ “This is a case where at the time they were subjected to mandatory testing for HIV, the petitioners were deprived of vital information regarding their personal health and their dignity was lowered, their privacy was invaded without their consent.”
- ▶ **Diau v Botswana Building Society** (IC 50/2003)
  - ▶ Applicant refused to submit HIV test result to employer
  - ▶ “To punish an individual for refusing to agree to a violation of her privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human.”



# Freedom and security of person

- ▶ **Diau v Botswana Building Society** (IC 50/2003)
  - ▶ “The right to liberty is captured by section 3(1) of the Constitution, goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein individuals may make inherently private choices free from irrational and unjustified interference by others. Choosing whether to test or not is a private decision striking at the heart of personal and individual autonomy and no entity, the state or any employer ought to be permitted to interfere, barring any compelling reasons in favour of interference.”



# Mandatory HIV testing case in Malawi

## Facts:

- ▶ **A group of women were –**
- ▶ Arbitrarily released by police in 2009 as part of a sweeping exercise
- ▶ Not informed of the basis for their arrest
- ▶ Taken to District Hospital where blood taken from applicants in presence of police officer and health workers
- ▶ Not informed of reasons for tests, consent was not requested and not counselled
- ▶ Taken to Magistrate's Court and charged with spreading venereal disease
- ▶ Prosecutor read out particulars of offence including HIV status in open court
- ▶ Applicants had no legal representation at time of arrest, tests or trial
- ▶ Convicted for spreading venereal disease
- ▶ Two years later, after attending a workshop on rights, they filed an application for judicial review



# Requirement of informed consent?

- ▶ Consent only valid where given **freely, voluntarily and without coercion** by a patient with the capacity to consent on the basis of adequate information on nature and consequences of proposed HIV tests
- ▶ Whether consent present is a factual question:
  - ▶ Did the doctor obtain specific consent from each individual or did she assume presence of consent on the basis of referral from police?
  - ▶ If no consent was present – is there a law which removes consent in circumstances and authorises medical practitioner to disclose accused' information without obtaining consent for such disclosure?
- ▶ **If the accused consented:**
  - ▶ Was the accused's ability to consent affected by fear, fatigue or distress?
  - ▶ Was the accused able to seek legal advice prior to her consent?
  - ▶ Did the lack of privacy during the consultation affect the accused's willingness to ask questions in order to receive sufficient information to make an informed decision?
  - ▶ Was the accused coerced into giving consent in hope of being released?
  - ▶ In the absence of a legal representative, was the accused's consent influenced by the fear that a refusal to submit to an intimate search might imply guilt?

# Requirement of informed consent for medical tests in police custody

- **S v S; W v Official Solicitor** [1970] 3 All ER 107, Lord Reid:
  - “There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will. In my view, the reason is not that he ought not to be required to furnish evidence which may tell against him. The real reason is that English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d’etat but by gradual erosion and often it is the first step that counts. So it would be unwise to make even minor concessions.”
  - See also **W v W** [1962] 2 All ER 84.
  - **Hayes v Florida** 470 US 811 (1985) – Supreme Court held that DNA may not be taken from an unconsenting arrestee unless ‘reasonable suspicion’ that committed criminal act and ‘reasonable basis’ to believe arrestee’s DNA will establish connection with that crime
  - **Ferguson v Charleston** 532 US 67 (2001) – testing of pregnant women on cocaine use – purpose of testing was to gather evidence – amounted to unreasonable search and seizure
  - **Friedman v Boucher** 580 F 3d 847 (2009) – collection of DNA evidence without a warrant cannot be justified by mere chance that desired evidence might be obtained, violates privacy



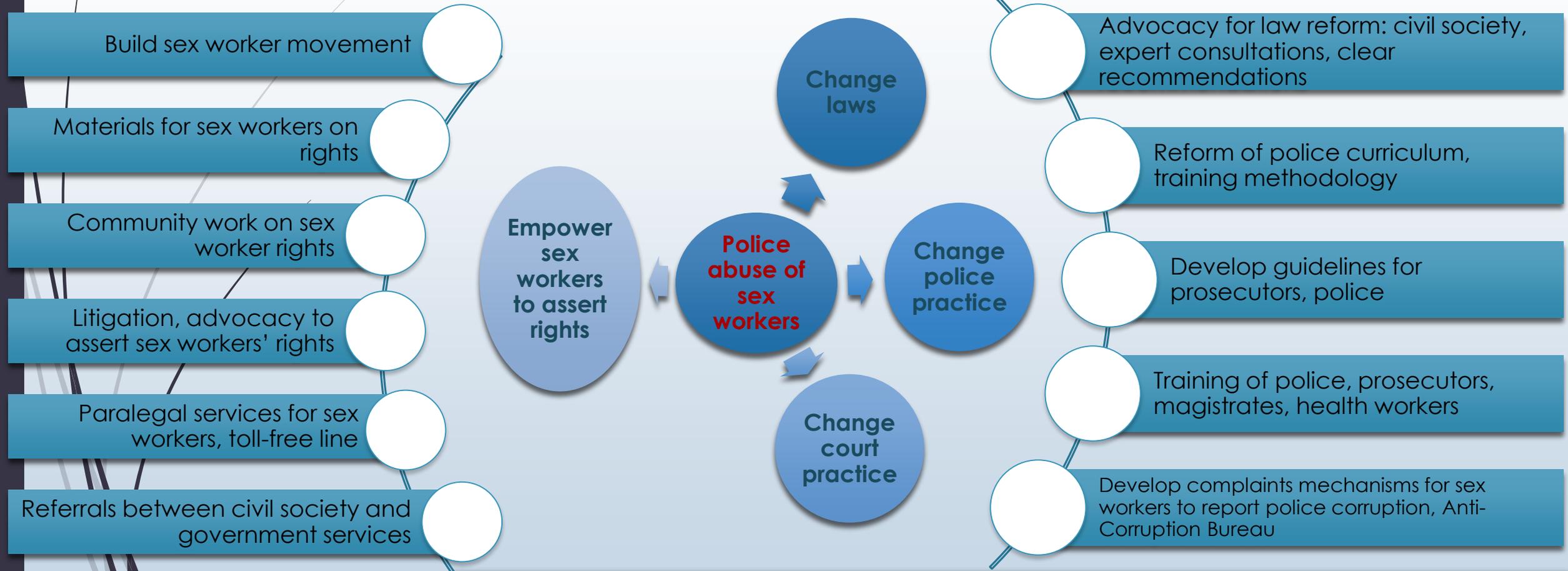
# Mandatory HIV testing case in Malawi

## Main issues for determination:

- ▶ Review of decision of Officer-in-Charge of Police Station and District Health Office to subject applicants to mandatory HIV tests without their consent it:
  - ▶ Unlawful, unreasonable and arbitrary, and this constitutes an unfair administrative action
  - ▶ A violation of the applicants' constitutional rights to privacy and liberty of person, to non-discrimination, to freedom from cruel, inhuman and degrading treatment and to dignity of person

# How do we ensure and sustain change?

## Case study: Working as partners to make linkages to improve sex workers' rights in Malawi



### Broadening impact:

- Use research, advocacy and litigation to also call for reforms in countries with similar laws
- Link to other marginalised groups affected by same laws and practices