

Cover

HIV / AIDS

CURRENT LAW & POLICY

1

Know your rights – and how to
enforce them

Inside cover

What are HIV and AIDS?

HIV is the “Human Immunodeficiency Virus”. It is the virus that eventually leads to AIDS.

AIDS is “Acquired Immune Deficiency Syndrome”. People who have HIV eventually develop AIDS because the virus makes it difficult for their bodies to fight off diseases. It is not one sickness, but is a name given to many different illnesses which people at this stage of the disease may get (such as TB and pneumonia).

It is **very important** to note that if you have HIV, it does **not** mean that you are sick. It sometimes takes years for someone who has HIV to develop AIDS. During this time, people who have HIV can lead totally normal lives.

KNOW YOUR RIGHTS – and how to enforce them

**What are your rights and what do you do if they are violated?
Who can help you?**

This pamphlet looks at your rights and the laws and policies that there are to protect them. It gives you advice on what you can do to protect your rights and what organisations there are to help you when you need help

CONTENTS

1	Introduction	2
2	The Law	3
	a The Constitution (and the Bill of Rights)	4
	b Promotion of Equality and Prevention of Unfair Discrimination Act	7
	c Labour Law	8
	d Women's rights	9
	e Medical Schemes Act	9
3	Policies	10
	a The National Policy on HIV testing	10
	b Code of Good Practice on HIV and AIDS and Employment	10
	c Patient's Charter	10
	d (SAMDC) Guidelines on the Management of Patients with HIV Infection and AIDS	10
	e The Management Strategy on HIV and AIDS in Prison	11
	f National Policy on HIV and AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions	11
4	Enforcing your rights	12
	a Civil claims	12
	b Equality Courts	12
	c The South African Human Rights Commission (SAHRC)	13
	d Commission for Conciliation, Mediation and Arbitration (CCMA)	13
	e Complaints against healthcare workers	13
	f Complaints in Prison	14
	g Criminal complaints	14

Page 1, cont

h	Non-Government Organisations (NGOs), Community Based Organisations (CBOs) and Paralegals	14
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1 Introduction

People who have HIV or AIDS are often unfairly discriminated against (treated differently or unequally to other people) because of their illness. This happens at work, in hospitals and clinics, in their communities and in all other areas of life.

President Mbeki and our government have repeatedly said how committed they are to ending unfair discrimination in South Africa **in all its forms**. For example, the government's new HIV and AIDS Strategic Plan for South Africa (2000-2005) says:

“A concerted effort by all stakeholders needs to be made to protect human rights, counter discrimination and reduce stigmatization”.

Laws, such as the Constitution (which is the highest law in the country), have been passed to end unfair discrimination on **any** ground (including HIV status). Unfair discrimination on the basis of HIV status and AIDS goes against these laws **and** against international guidelines like the United Nations International Guidelines on HIV, AIDS and Human Rights.

Unfair discrimination against people with HIV or AIDS makes it very difficult to prevent new HIV infections. This is because it makes people afraid to have an HIV test and it makes those who have HIV or AIDS afraid to be open about it and to get treatment.

[graphic]

Because it happens, many policies have also been put in place to guide people (like employers and health care workers) on how to prevent discrimination against people that have HIV or AIDS.

2 The Law

The law is made up of two main parts, common law and legislation. Both of these are just as important and must be followed by everyone.

Common law is law and rules that have been passed down over the years without being written down. It includes things like the crimes of murder and theft.

Legislation is written law. Because the common law comes from long ago, governments have to write new laws to cover new situations. These written laws are known as **Acts**.

The Courts have an important role to play in both enforcing the law and in explaining what it means. Decisions of courts have to be following by everyone.

In this section, we will look at some of the important laws that protect the rights of **all people, including those who have HIV or AIDS.**

NOTE



This pamphlet gives very general information. It is part of a series that looks at the issues covered here in much more detail, such as:

- Knowing your HIV status – issues around HIV testing (Pamphlet 2)
- Who has the right to know? (Pamphlet 3)
- Your rights in the workplace (Pamphlet 4)
- Your right to health care (Pamphlet 5)
- Your rights in prison (Pamphlet 6)
- Women, HIV and AIDS (Pamphlet 7)
- Lesbians and Gay men – your rights in the AIDS epidemic (Pamphlet 8)

There will soon be new pamphlets on children, sex workers, welfare grants and changes to the Criminal law.

a. The Constitution (and Bill of Rights)

The Constitution is the highest law in the country. Everyone must follow it and no laws or policies can go against it. It has all the **human rights** that are protected in South Africa in the Bill of Rights (Chapter 2 of the Constitution). Those that are important for people who have HIV or AIDS are listed and a brief explanation of what each right means in relation to HIV and AIDS is given in this section.

When looking at the Bill of Rights, it is important to remember that human rights can **never** be taken away from you but they can be **limited (or reduced)**. The rule is:

- Rights can only be limited by a law that applies to people generally; and
- There must be a good reason to limit the right and it must make sense to do so.

e.g. Even though the right to privacy says you cannot be searched, the Criminal Procedure Act allows the police to search you.

This is a limitation that is allowed by the Constitution because:

- The law applies to all people; and
- It makes sense to allow this, because searches are necessary to make sure the police are able to stop criminals.

[graphic]

Unfair and fair discrimination

To discriminate against some is to treat them unequally or differently to other people. While it is usually unfair to treat someone this way, sometimes it is fair to do so and is allowed. For example, people who have HIV are not allowed to donate blood. This is because HIV is carried in your blood and if your blood were given to someone else, they would get HIV. While this clearly discriminates against people who have HIV, it is fair because it is necessary to stop the spread of HIV.

Equality – All people must be treated equally. You can not be **unfair discriminated** against for any reason, such as your gender, sex, race, disability and so on. You can also not be discriminated against if you have HIV.

Human dignity – Your dignity must be respected. For example, you must be treated with respect when visiting a clinic.

Freedom and Security of the person – You have the right to “bodily integrity”, which means you decide what happens to your body. So, you cannot be forced to have an HIV test. You also have the right not to be made part of a medical experiment unless you give your informed consent (which means you must know what will be done to you and what the consequences will be for you).

Privacy – Your privacy must be respected. Only you can decide who should know the result of your HIV test.

Freedom of movement and residence – You have the right to live wherever you want. You cannot be forced out of your community just because you have HIV or AIDS.

Freedom of trade, occupation and profession – You can choose the type of work you want to do (as long as you have the right qualifications and experience). You cannot be denied work or benefits just because you have HIV.

Labour relations – You have the right to be treated fairly at work. For example, you cannot be dismissed just because you have HIV.

Housing, health care, food, water and social security – These rights are very important for people who have HIV or AIDS. But the Constitution only gives you the right to have **access** to them. It then goes on to say that the government “must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights”.

Page 6

This does **not** mean that you have a right to these things. For example, you do not have the right to health care. Instead, the right of **access** to health care means the government:

- Must use the money that it has to **try** to give everybody health care. If it cannot afford certain treatments or medicine, the courts will not force it to give these to people.
- Should pass laws to make it easier for people to get health care. For example, a new law has been passed making it easier for everyone to get medical aid.

It does not **just** mean the government has to try to make medicine available. For example, the government is also making it possible for people to get access to health care by building clinics in rural areas.

Children – Children under the age of 18 have special rights, including the right to **basic** health care. It could be argued that the treatment of HIV is basic health care for children.

Education – You have a right to basic education, including Adult Basic Education and Training. Schools cannot refuse to teach children who have HIV.

Access to information – You have the right to information which the government has about you. You can also get information from another person if you need it to protect your rights. However, if someone wants to get information from your doctor about your HIV status, they can only get it if you give your informed consent.

Access to courts – You can have a legal problem decided by a court. So, if you are unfairly discriminated against because of your HIV status, you can go to court to have the matter sorted out.

[graphic]

Arrested, detained and accused persons – This deals with people who have been accused of a crime or who are in detention. The rights of prisoners are covered in detail in pamphlet 5.

b. Promotion of Equality and Prevention of Unfair Discrimination Act (No 4 of 2000)

This law is based on the right to equality in the Constitution. Like the Constitution, it says that everyone is equal and that you may not be unfairly discriminated against for any reason. This Act will coming into effect during 2001.

? Does the Promotion of Equality and Prevention of Unfair Discrimination Act say I cannot be unfairly discriminated against because I have HIV or AIDS?

Like the Constitution, this law says you may not be unfairly discriminated against. It then goes on to list the “grounds” (reasons) on which you cannot be unfairly discriminated against. This list is the same as that in the Constitution and it does not include HIV status or AIDS. It then says that, in addition to the listed grounds, you cannot be unfairly discriminated against for any reason if this would “undermine your human dignity”. Since unfairly discriminating against you because you have HIV or AIDS would definitely undermine your human dignity, it is clearly not allowed.

Many people and organisations (including the ALP) wanted “HIV status or AIDS” to be in the list of grounds. We believe this would it totally clear that this kind of discrimination is not allowed. The people who wrote the law could not agree though, but they did recognize that HIV status is a major cause of unfair discrimination. So the law says an “Equality Review Committee” must be set up to look at (among other things) whether to add HIV status and AIDS to the list. It has until mid 2001 to do this. At the time that this pamphlet was written, this Committee was being set up and was expected to start work in July 2000.

Lastly, the Act also specifically mentions (in Schedule 1 – “Illustrative List of Unfair Practices in Certain Sectors”) that insurance companies should not unfairly refuse to give services to people just because they have HIV or AIDS.

c. Labour Law

There are many laws in place to prevent you from being unfairly discriminated against when you apply for a job and at work. They include:

Employment Equity Act (No 55 of 1998)

This Act says:

- You can't be discriminated against because of your HIV status at work, or when you apply for a job; and
- You can't be asked to take a test at work or when you apply for a job **unless** the Labour Court has given your employer permission to do so.

Labour Relations Act (No 66 of 1995)

This Act says that you may not be **unfair** dismissed (dismissed for an unfair reason). This would include being dismissed just because you have HIV or AIDS. However, if you are not able to work anymore, you can be dismissed, as long as **fair procedures** have been followed. Fair procedures include your employer trying to find you other work to do or changing the work that you do so you can do it even though you are sick. If your employer does not do this, the dismissal will be unfair.

Occupational Health and Safety Act (No 85 of 1993)

Employers must provide as safe a working environment as possible, including reducing the risk of being infected with HIV at work.

Mine Health and Safety Act (No 29 of 1996)

Employers of mineworkers must provide a safe working environment. Again, this means they must reduce the risk of you being infected with HIV at work.

Compensation for Occupational Injuries and Diseases Act (No 130 of 1993)

This Act deals with compensation (money) for people who are injured at work or catch a disease as a result of their work. If you get infected with HIV because of a work-related accident, you can claim compensation.

Basic Conditions of Employment Act (No 75 of 1997)

This Act says **all** workers are entitled to basic standards such as sick leave. People with HIV or AIDS are also entitled to sick leave.

Your rights as a worker are covered in pamphlet 4.

d. Women's Rights

New laws protect women's rights. Some of these are:

- The Domestic Violence Act (No 116 of 1998);
- Maintenance Act (No 99 of 1998); and
- Choice on Termination of Pregnancy Act (No 92 of 1996).

NOTE

These are discussed in more detail in Pamphlet 7.

e. Medical Schemes Act (No 131 of 1998)

In the past, medical aid schemes could refuse to take people who were already sick or they could make them pay more than other people. From February 1999, this is no longer allowed. Instead, medical aid schemes must accept anyone who wants to join them as long as the person can afford the contributions. The "premium" (which is the amount you have to pay) is based on how much you earn (and how many dependents you want to add) and not on whether you are sick. So, if you have HIV, you can still get medical aid and you will not have to pay a higher premium than other people just because you have HIV. This Act is discussed in detail in various pamphlets.

3 Policies

A number of policies have been developed with guidelines on how to deal with HIV and AIDS. These are not laws, but are often based on laws and can become law in time. If a Judge in a court case uses a policy to reach a decision, it becomes law. If the government sets the policy, all government employees must follow it.

a. The National Policy on Testing for HIV (Draft)

This policy has been developed by the Department of Health to cover HIV testing. It deals mainly with HIV testing by health care workers and scientists and should come into operation later this year (2000). We look at it in detail in pamphlet 2.

b. Code of Good Practice on HIV and AIDS and Employment (Draft)

This code has been developed to guide employers, trade unions and employees on how to stop unfair discrimination and how to manage HIV and AIDS at work. It is dealt with in pamphlet 4.

c. Patient's Rights Charter

The Patient's Rights Charter deals with the rights that all patients have and explains what your right to health care means. It is dealt with in pamphlets 3 and 5.

d. South African Medical and Dental Council (SAMDC) Guidelines on the Management of Patients with HIV Infection and AIDS

These guidelines were developed by the SAMDC, which is now called the Health Professions Council of South Africa. They set out the rules that its members are expected to follow when testing and treating patients with HIV and AIDS. They are dealt with in various pamphlets.

e. The Management Strategy on HIV and AIDS in Prison

The Department of Correctional Services has a policy to make sure prisoners with HIV or AIDS are treated properly in prisons. It is covered in pamphlet 6.

f. National Policy on HIV and AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions

This policy states that no learners or educators (teachers) can be excluded from schools or higher education institutions because of their HIV status. Testing of learners and educators is not allowed. Learners and educators cannot be forced to say what their HIV status is, but if they choose to, this information must be treated with confidentiality. It also calls for sex and sexuality education (including education on HIV and AIDS) at all institutions of learning. It will be dealt with in detail in the future pamphlet of Children's Rights.

4 Enforcing your rights

There are many ways to protect and enforce your rights, and many organisations to help you do so.

NOTE – The contact details of all organisations mentioned are at the back of this pamphlet.

a. Civil claims

You can **sue** (bring a case against) anyone who violates your rights and causes you harm. However, this is quite difficult to do and you will probably need a lawyer to help you. If you cannot afford a lawyer, you can apply to the **Legal Aid Board** for assistance. If you are successful, a lawyer will be appointed to assist you. This does not happen very often though, which is one of the reasons why other organisations and courts have been set up to assist people for free.

b. Equality Courts

The Promotion of Equality and Prevention of Unfair Discrimination Act says Magistrates and Judges must be trained on this law. Once this has been done, the courts in which they sit will become “**Equality Courts**”. You will be able to make complaints of unfair discrimination at these courts. The Magistrate or Judge will look at your complaint and decide how it can be dealt with as quickly and cheaply as possible. This may mean sending your complaint to another organisation (such as the South African Human Rights Commission) if that organisation could help you more quickly or cheaply.

The training of Judges and Magistrates is expected to start towards the end of 2000. It is hoped that these courts will start working from December 2000 in some areas. However, it will be a long time before Magistrates and Judges from all the courts have been trained and so it might take a while before the court closest to you is an Equality Court. If you feel you have been unfairly discriminated against, you should check with the court nearest you to see if they can help you.

c. The South African Human Rights Commission (SAHRC)

The SAHRC is set up by the Constitution to (amongst other things):

- Protect all the rights in the Bill of Rights; and
- Check what government has done to make it possible for people to get access to the rights to housing, **health care**, food, water, social security, education and a health environment.

One of the ways it protects human rights is by helping people whose rights have been violated. If you believe **any** of your rights in the Bill of Rights have been violated in any way, you can make a complaint to the SAHRC. The SAHRC will then try to solve your problem for you (for free), or will send your complaint to another organisation that may be better able to assist you.

The SAHRC has developed a draft policy on HIV and AIDS. This policy recognizes that people with HIV and AIDS face high levels of unfair discrimination and that this discrimination has a negative impact on public health (because people are afraid to test or to seek treatment). It deals with a wide range of issues, including testing, confidentiality, employment, education, women, children, prisons, sex workers and gay men and lesbians. It also states that the SAHRC will “take steps to secure appropriate redress for the violation of the rights of people with HIV”.

During 1997, the SAHRC held its first National Conference on Human Rights. At this conference, the SAHRC adopted a resolution to fight against all forms of HIV and AIDS-related discrimination.

d. Commission for Conciliation, Mediation and Arbitration (CCMA) and Bargaining Councils

The CCMA has been set up to assist people who have been treated unfairly at work or who have any dispute with their employer.

There are also Bargaining Councils to assist people who work in large industries (such as the motor industry). The CCMA and Bargaining Councils are discussed in pamphlet 4.

e. Complaints against health care workers

You can sue a health care worker for violating your rights, and you can make a complaint to one of the bodies that have been set up to control them. These include the **Health Professions Council** and **South African Nursing Association**.

f. Complaints in Prison

Prisoners can make complaints to the Head of the Prison, to an Independent Prison Visitor or to the **Office of the Inspecting Judge**. This is explained in detail in pamphlet 6.

g. Criminal complaints

Sometimes, when people violate your rights they also commit a crime.

Examples

- A health care worker who does a blood test on you without your consent commits the crime of **assault**; and
- A person who insults you or damages your reputation commits the crime of **crimen injuria**.

If this happens to you, you can go to any police station to lay a charge against this person.

h. Non-Government Organisations (NGOs), Community-Based Organisations (CBOs) and Paralegals

There are many NGOs and CBOs, such as the **AIDS Law Project**, that are able to assist you or give you advice if your rights are violated.

Paralegals are people who have been trained to give basic assistance to people. They will be able to help you or to refer you to someone who can. Check in your community whether there is a Paralegal Office or Advice Centre.

Dictionary

The following medical terms are often used when people talk about HIV and AIDS:

HIV

Human Immunodeficiency Virus that causes AIDS.

AIDS

Acquired Immune Deficiency Syndrome. This means the body cannot fight infections because the immune system is weakened.

Antibodies

These are produced by the **immune system** to fight against the causes of disease.

Anti-retroviral drugs

Drugs that stop or reduce the rate that HIV spreads through the body. Use of these drugs is known as anti-retroviral therapy.

Immune System

The body's way of fighting infection and disease.

Opportunistic Infections

Infections that people with HIV or AIDS get because their immune system is weak.

Sero-conversion

When your body makes anti-bodies to fight HIV, this is called "sero-conversion". After this, an HIV test will give a positive result. Sometimes people get sick when this happens (sero-conversion illness). Many people don't notice and, because there are no signs, they do not know they have HIV unless they have a test.

Window Period

This is the period of up to 3 months between HIV infection and when the body makes anti-bodies to fight it (when sero-conversion takes place). During this time, an HIV test can give a negative result even if you are infected with HIV.

Page 16

Your notes

Inside back cover

Contact Details

Legal Aid Board

Private Bag X163, Pretoria 0001
Tel: 012-481-2700

South African Human rights Commission

Call the SAHRC on 011-484-8300 or write to
SAHRC
Private Bag 2700, Houghton 2041
Fax: 011-484-1360

Commission for Conciliation, Mediation and Arbitration

Call the CCMA on 011-377-6600 or write to
CCMA
Private Bag X96, Marshalltown 2107

Health Professions Council of South Africa

P O Box 205, Pretoria 0001
Tel: 012-338-9300
Fax: 012-328-5120
Web: www.hpcsa.co.za

South African Nursing Council

P O Box 1123, Pretoria 0001
Tel: 012-420-1000
Fax: 012-343-5400

AIDS Law Project (ALP)

Centre for Applied Legal Studies
University of the Witwatersrand
Private Bag 3, Wits 2050, South Rfrica
Tel: 011-717-8600
Fax: 011-403-2341

Office of the Inspecting Judge

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

**The AIDS Legal Network has a
training programme on
HIV, AIDS and the Law.**

For details, contact

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021-423-9254

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Back cover

This pamphlet looks at your rights and the laws and policies that there are to protect them. It gives you advice on what you can do to protect your rights and what organisations there are to help you when you need help.

This pamphlet forms part of the following series:

- Pamphlet 1 Know your Rights – and how to enforce them
- Pamphlet 2 Knowing your HIV status – issues around HIV testing
- Pamphlet 3 Who has the right to know?
- Pamphlet 4 Your rights in the workplace
- Pamphlet 5 Your rights to health care
- Pamphlet 6 Your rights in prison
- Pamphlet 7 Women, HIV and AIDS
- Pamphlet 8 Lesbians and Gay men – your rights in the AIDS epidemic

You can get copies of all of these pamphlets from the AIDS Law Project at the following address:

AIDS Law Project
Center for Applied Legal Studies
University of the Witwatersrand
Private Bag 3, Wits 2050, South Africa
Tel: 011-717-8600 Fax: 011-403-2341
Email: alpadm@law.wits.ac.za

Look out for new pamphlets in the series (including pamphlets on children and the rights of sex workers) which will be available soon.