

Cover

HIV / AIDS
CURRENT LAW & POLICY

6

Your rights in prison

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.

**What rights do prisoners with HIV or AIDS have?
Can they be separated from other prisoners?
Is HIV or AIDS a ground for early release?**

**In this pamphlet, we answer these questions and explain
what prisoners with HIV or AIDS can do to protect their rights.**

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1 Introduction

Because of the conditions in prison, prisoners may be at greater risk of being infected with HIV.

NOTE – the word “prisoner” means anyone in prison. This includes sentenced prisoners and those in prison while they are awaiting trial.

This is because:

- A common way of being infected with HIV is through unprotected sex (sex without a condom). Of the various kinds of sex, anal sex is one of the most dangerous. Unprotected anal sex has more risk than most other kinds of sex because the skin of the anus can tear when a penis penetrates it, making HIV infection much easier. Many male prisoners have anal sex, either by choice or by force. When force is used, the possibility of the skin tearing is even greater.
- Prisoners that inject drugs are at risk if they share needles with other prisoners.
- Many prisoners get tattoos in prison. If the needles used to tattoo you have been used on other people, your risk of being infected with HIV is increased.
- Prisoners do not have as much information as people outside prison and so may not know as much about HIV and how it is transmitted from one person to another.

Newspaper article – A New York Times article on 1 September 1999 stated that there is much more HIV infection in prisons than amongst people outside. This, they said, was partly because very few prisons offered HIV prevention programmes.

A newspaper article in February 2000 quoted the Minister of Correctional Services as saying there were only 2 600 known cases of HIV in South African prisons at the end of December 1999 (out of a total of 162 638 prisoners). However, this figure is based on the fact that very little information is available, because many prisoners are afraid to be tested.

For these reasons, it is important that laws and policies are put in place to help people avoid being infected with HIV and to protect them when they are. It is also as important that prisoners have as much information as possible about HIV and AIDS.

? What is the difference between a policy and a law?

Laws must be followed by **everyone** in the country.

Policies are guidelines that **should** be followed by everyone. They are not laws, but are often based on laws and can become law in time. If a court uses a policy to make its decision, the policy becomes part of the law. If the government sets the policy though, government employees must follow it. The Department of Correctional Services is developing the major policy for HIV and AIDS in prison. It is called the "Management Strategy for HIV and AIDS in Prison" and is discussed later in this pamphlet.

2 Prisoners, HIV and AIDS and the Law

a. The Constitution and the Bill of Rights

The Constitution is the highest law in the country. Everyone has to follow it and no laws or policies can go against it. It has a list of all the **human rights** that are protected in South Africa in the Bill of Rights (Chapter 2 of the Constitution).

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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;
- There must be a reason to limit the right and it must make sense to do so; and
- The limitation must not do away with the right altogether.

e.g. The right to privacy says you, your property and your home cannot be searched, and your property cannot be taken away from you. However, the Correctional Services Act (which is explained later) says that, to make prisons safe, you, your cell and your belongings may be searched and anything illegal or dangerous that you have can be taken away from you.

This is a limitation of your right to privacy that is allowed by the Constitution because:

- The Correctional Services Act is a law which applies to all prisoners equally;
- It makes sense to allow this, because searches are necessary to make sure everyone in prison is safe; and
- The limitation does not do away with the right to privacy altogether because the Act has rules about how searches must be conducted, which are there to protect your privacy.

Searches in prison – Your privacy must be respected as much as possible during searches. This includes:

- Making sure only women search women and only men search men; and
- Respecting your right to dignity (so you should not be strip-searched in public).

Unfair and fair discrimination

To discriminate against someone 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 infected with HIV. While this clearly discriminates against people who have HIV, it is fair because it is necessary to stop the spread of HIV.

These are the rights in the Bill of Rights that relate to prisoners with HIV or AIDS.

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

Human dignity – Your dignity must be respected. Prisoners with HIV or AIDS must not be separated from others and must be treated with respect.

Freedom and Security of the person – You have the right not to be tortured or punished in a cruel, inhuman or degrading way. You cannot be forced to have an HIV test.

Privacy – Your privacy must be respected. So, health care workers cannot tell anyone other than you what the result of your HIV test is.

Education – You have a right to basic education, including Adult Basic Education and Training. You can take part in higher education (for example, studying for a degree). However, you have to pay for this yourself. You also have a right to education and information about HIV and AIDS.

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

Arrested, detained and accused persons – While in prison you:

- Have a right to know why you are being detained;

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- Can consult with a lawyer;
- Can communicate with and be visited by your family, wife, husband, a religious counsellor and your own doctor. If you are a gay or lesbian prisoner, you can be visited by your partner as well; and
- You must be kept in conditions that respect your human dignity. This includes the rights to adequate:
 - Exercise;
 - Accommodation;
 - Food;
 - Reading materials; and
 - Medical treatment

For more information on the Bill of Rights, see pamphlet 1 in this series.

b. Correctional Services Act (No 111 of 1998)

This Act (law) covers prisons and everything that happens in them. It also gives much more detail about the **rights** that prisoners have. However, only the parts relating to HIV and AIDS are dealt with in this pamphlet.

Health Care

The Department of Correctional Services must provide you with health care, as far as it is possible to do so with the money they have. You can be visited and treated by your own doctor if you can afford it.

HIV Testing

You must consent (agree) to any medical test, unless your refusal

Case – Van Biljon and others v Minister of Correctional Services and Others 1997 (4) SA 427 (C)

In this case, four prisoners with HIV took the Minister to court to force the prison to give them anti-retroviral drugs. Two of them had been given these drugs and the prison then stopped giving these to them. The other two had not been given these drugs at all. The Minister argued that the prison could not afford this. While the judge ordered the prison to keep giving the drugs to the first two, it did so because the Minister had not shown that the prison could not afford it. **However, it is unlikely that this means all prisoners with HIV have a right to these drugs.**

would cause a health risk to other people. This means you cannot be forced to have an HIV test unless you **consent** to it.

Recently, the Commissioner of Correctional Service has called for **all** prisoners to be tested for HIV and has asked whether it would

? **What does “consent” mean?**

The general rules about HIV testing are covered in pamphlet 2. They can be summarized as follows:

- An HIV test is a **medical procedure**.
- You must give **informed consent** to a medical procedure.
- **Informed consent** means you must know exactly what the test is and what the consequences will be for you if you test positive. To make sure you know this, you should be given counseling before the test (this is called “**pre-test counseling**”).
- Pre-test counseling should give you enough information to properly decide whether or not you want to have the test.
- Once you have had counseling, you must be given time to decide what you want to do.
- If you decide **not** to have the test, no one can force you to.
- If you have the test, you must be given counseling when the results are given to you. This is called “**post-test counseling**”.

“offend human rights activists if we separated (prisoners with HIV) from the rest of prisoners”. However, testing of prisoners without consent (and separating HIV positive prisoners), goes against both the Act and the Management Strategy. It also goes against the case of **C v Minister of Correctional Services**, in which the judge said HIV testing can only be done with the **informed consent** of a prisoner.

Segregation

The act allows for prisoners to be segregated (kept separately from

Case – C v Minister of Correctional Services 1996 (4) SA 292 (TPD)

In this case, a prisoner was given an HIV test. He had been told that the test was an HIV test and that he had the right to refuse. But even though there was a prison policy that testing of prisoners could only be done with informed consent, he was not given pre-test or post-test counseling and had been given very little time to decide whether or not to have the test. When he found out that he had HIV, the prisoner sued the Minister for violating his right to privacy. The court agreed and said that, because he had not been given proper pre-test and post-test counseling and had little time to decide, he had not given **informed consent** to the test.

[newspaper article]

Concern over ever younger prison inmates

others) only when:

- A prisoner asks for it;
- As a punishment;
- A medical officer recommends it;
- A prisoner is violent or is threatened with violence;
- A prisoner has escaped and been caught and there is a reason to believe the prisoner will try to escape again; or
- When the police have asked the Head of the Prison to do so in the interests of justice.

Segregation can only be for a very limited time. The segregation of prisoners with HIV or AIDS goes against this law, the Management Strategy, the United Nations International Guidelines on HIV, AIDS and Human Rights, and the World Health Organisations Guidelines on prisons.

It also does not make sense to separate prisoners with HIV because:

- They pose no risk to other prisoners;
- It makes prisoners afraid to test for HIV. It is important that prisoners be encouraged to test, because there are major benefits in knowing your HIV status; and
- Prisoners could be in the “window period”, which means you could have HIV and still test negative.

The “window period”

It can take up to 3 months from when someone gets infected with HIV until the body starts to create anti-bodies to fight the infection. An HIV test involves checking to see whether these anti-bodies are present in the blood. During this time, which is known as the “window period”, an HIV test would show a negative result. So, even if someone has tested negative, it does not mean they are not infected.

Case – W and Others v Minister of Correctional Services (Unreported Cape Town Supreme Court Case No. 2432/96)

In this case, the judge ordered that prisons must:

- Treat the status of all prisoners with HIV or AIDS with confidentiality;
- Protect prisoners from stigmatization because of their HIV status or sexual orientation;
- Make sure condoms are provided to prisoners;
- Make treatment available to prisoners with HIV and AIDS;
- Only test prisoners for HIV with their informed consent;
- Not deny prisoners work just because they have HIV;
- Not discriminate against prisoners with HIV as far as accommodation and ablution facilities; and
- Provide education and information on HIV and AIDS to all prisoners **and** prison staff.

Despite this, the ALP has received many complaints from prisoners with HIV about segregation, unfair discrimination and inadequate medical treatment.

3 Policy – The Management on HIV and AIDS in prison

The Department of Correctional Service has recently revised its policy to deal with HIV and AIDS in prison. The new policy explains how the Department plans to deal with HIV and AIDS. It says:

Education and Information

All prisoners must be given the following information on admission (and regularly while in prison):

- How HIV leads to AIDS;
- How you get infected with HIV and how you do **not**;
- The symptoms of HIV infection, including those that need immediate attention (night sweats; diarrhoea for more than 2 weeks; major weight loss; and oral thrush).

You must be given information on admission and on a regular basis on how to prevent HIV infection.

? *How do you get infected with HIV?*

You can be infected with HIV, or be infected by another person by:

- Having sex without a condom. Anal sex without a condom is particularly dangerous;
- Sharing of needles with other drug users or sharing needles for tattoos.

You do **not** get HIV from sharing toilets, tea cups or showers with people who have HIV.

You must be given information on high-risk practices such as anal intercourse, sharing of needles, tattoos and so on.

You must be given brochures on HIV and AIDS in your own language. These brochures must also be in all prison libraries.

You should be shown videos, and posters on HIV and AIDS should be put up in prisons.

All prisons and youth development centers must run HIV and AIDS education programmes.

Education on HIV and AIDS must be taught to **all** learners and students.

Protection from risk

Prison staff and prisoners must be protected from the risk of HIV infection. This includes:

- Education;
- Encouraging openness and discussion about HIV; and
- Practicing “Universal Precautions”.

? **What are “Universal Precautions”?**

These are the things you and prison staff can do to reduce the risk of getting infected with HIV, such as:

- Treat blood and body fluids (such as mucus and urine) with care.
- Wear gloves or plastic bags over your hands when dealing with all bodily fluids.
- If you get any of these on your skin, wash it as soon as possible with cold running water and soap.

Condoms

Since anal sex has a big risk of HIV infection, it is important that prisoners can **easily** get condoms **at all times**. There should be boxes of condoms at clinics, near the cells, at the hospital and so on. They should also be in areas where prisoners can get them without anyone seeing.

All education programmes must deal with how to use condoms and the need to use them at all times.

HIV testing

The strategy says that “compulsory testing is forbidden” and that “under no circumstances is an HIV test to be done without **written and informed consent**”.

If a child under 14 is to be tested, the consent of the parent is required **in writing**.

Confidentiality

Because you have a right to privacy, only you can decide who to tell the result of your test.

NOTE

For more information on this topic, see pamphlet 3.



Segregation

The strategy says that you may not be separated from other prisoners just because you have HIV. However, it does recognize that, **when treating a prisoner with AIDS**, it may be necessary to do so. (Remember – HIV and AIDS are not the same thing.) This can only be done when the prisoner may pose a risk to others, for example, if the prisoner has an infectious illness such as TB.

Medical treatment

The strategy says the Department will **not** provide “anti-retroviral therapy” to prisoners. These are expensive drugs (like AZT) that slow down the spread of HIV in your body.

Counseling prior to parole or release

Prisoners with HIV should be given counseling before being on parole or release. This should include information on how to prevent the spread of HIV.

4 Women prisoners (and their children)

While women prisoners (and their children) have the same rights as other prisoners and are covered by all the same laws and policies, they have special needs. So, both the Correctional Services Act and the Management Strategy have special sections dealing with women prisoners and their children.

NOTE

See pamphlet 7 for more information on the rights of women.

a. Correctional Services Act

Women prisoners are allowed to keep their children with them until the child is 5 years old. The Department must provide food, clothing and health care for the child.

b. Management strategy

In addition to the education and information about HIV and AIDS given to **all** prisoners, **pregnant** women must be given education on:

- Pre-natal care (health care before the child is born);
- Family planning; and
- Proper care of TB if they have it.

A pregnant women cannot be forced to have an HIV test. Nor can she be forced to have her baby tested. **However, there are many benefits to knowing whether you or your baby have HIV.** For example:

- There may be drugs available at the prison to help reduce the risk of your child getting HIV.
- You will be able to get more information on how to reduce the risk of the virus being passed on to your child. So, you may decide to give your baby milk formula rather than breast feeding it.

Women should be given counseling on the risks of breast-feeding if they have HIV.

5 Rape in prison

Rape (forced sex without your consent) is, unfortunately, common in prisons. Because violent sex increases the possibility of tears in the skin of the anus, it is important for you to **immediately** see a health care worker if this happens to you. Prison officials will help you to do this (and to lay a charge against your attacker with the police).

The United Nations Guidelines (mentioned above) also say that prison authorities should take steps to prevent rape.

6 Is HIV status a ground for early release?

HIV status alone is **not** a ground for early release. However, if you have AIDS and especially if you are terminally ill, it can be. The Correctional Services Act and the Management Strategy say that you can be released early on medical grounds. This will probably only be considered though if you are in prison on a minor charge.

Case State v Cloete 1995(1) SACR 367 (w)

In an appeal made in 1994, a prisoner serving 5 years for fraud was released early from prison and placed under correctional supervision by a judge.

The judge revised a decision made by the magistrate and ruled that the prisoner's medical condition (his HIV status) was a good reason to release him and agreed that "his condition is such and has changed so that to continue to serve imprisonment would be a far harsher sentence for him than for any other person serving a similar sentence".

7 What to do if your rights are violated

NOTE – the addresses of the organisations mentioned are on the inside back cover of this pamphlet

a. Complaints to the Head of the Prison

The Correctional Services Act says that you must be given a chance to make a complaint on admission **and every day you are in prison**. The Head of the Prison must then solve the complaint. If your complaint is about an assault (including rape), you must be taken to a medical officer for an examination. You must also be assisted to lay a criminal charge with the police.

If you are not satisfied with what the Head of the Prison does to sort out your complaint, the Head of the Prison must then refer the complaint to the Area Manager.

If you are not satisfied with the Area Manager's response, your complaint must be given to an Independent Prison Visitor (IPV). The role of IPVs is discussed later.

b. The Judicial Inspectorate

The Correctional Services Act sets up a Judicial Inspectorate. This is an independent structure that is headed by an Inspecting Judge, who is assisted by Inspectors. They inspect prisons to find out:

- The way prisoners are treated;
- The conditions under which they are being kept; and
- Any corrupt or dishonest things taking place.

c. Independent Prison Visitors (IPVs)

IPVs will eventually be appointed in all provinces. At present, there are IPVs working in prisons in the Western Cape and Gauteng.

IPVs visit prisons at least twice a month. They interview prisoners to find out if they have any complaints and check the register of complaints in the Head of the Prison's office to see whether the Head of the Prison is following these up.

If you make a complaint to an IPV, the IPV will follow it up for you. If you have been assaulted or raped, they will make sure you are taken to a medical officer for an examination and will help you to lodge a complaint with the police.

If the complaint is a serious one (such as rape, assault and separation), the IPV will send it to the Inspecting Judge immediately.

d. South African Human Rights Commission (SAHRC)

You can make a complaint to the SAHRC when **any** of your rights are violated. The SAHRC will either handle your complaint itself (for free) or will send it to another organisation if that organisation is better able to help you. If this happens, you will be informed.

e. NGOs

There are many NGOs dealing with prisoners and with HIV and AIDS issues, which will try to help you solve your complaint. Two of these are:

- **NICRO** (National Institute for Crime Prevention and Reintegration of Offenders); or
- **South African Prisoners' Organisation for Human Rights (SAPOHR).**

f. Lawyers

You can see a lawyer in prison, who can assist you to make a complaint. The Bill of Rights says the State must give you a lawyer if you cannot afford one and "a substantial injustice would otherwise result".

Inside back cover

Contact Details

Office of the Inspecting Judge

If your rights are **seriously** violated (especially if you are raped or tortured), you can write to (or ask someone to help you write to):

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

South African Human Rights Commission

Gauteng – Private Bag 2700, Houghton 2041
Tel: 011-484-8300 Fax: 011-484-1360

Eastern Cape – P O Box 1854, Port Elizabeth 6001

Tel: 041-582-4094/2611 Fax: 041-582-2204

KwaZulu Natal – P O Box 1456, Durban 4000

Tel/Fax: 031-304-7323/4/5

Northern Province – P O Box 55796, Pietersburg 0700

Tel: 015-291-3500/3504 Fax: 015-291-3505

Western Cape – P O Box 3563, Cape Town 8000

Tel: 021-426-2277 Fax: 021-426-2875

NICRO

P O Box 11410, Johannesburg 2000

Tel: 011-336-5236/7

South African Prisoners' Organisation for Human Rights (SAPOHR)

P O Box 61715, Marshalltown 2107

Tel: 011-832-1008

AIDS Law Project

Centre for Applied Legal Studies

University of the Witwatersrand

Private Bag 3, Wits 2050, South Africa

Tel: 011-717-8600

Fax: 011-403-2341

Inside back cover, cont

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

**For details, contact
Mary Caesar
021-423-9254
e-mail: aln@kingsley.co.za**

Back cover

What rights do prisoners with HIV have?
Can they be separated from other prisoners?
Is HIV or AIDS a ground for early release?

In this pamphlet, we answer these questions and try to explain what prisoners with HIV or AIDS can do to protect their rights.

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.