

Cover

HIV / AIDS
CURRENT LAW & POLICY

8

Lesbians and Gay Men -
your rights in the
AIDS epidemic

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.

LESBIANS AND GAY MEN – your rights in the AIDS epidemic

What rights to lesbians and gay men
have in the AIDS epidemic?

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1 Introduction

Since people first found out about AIDS, gay men have been associated with AIDS and HIV. It is not being gay that puts gay men at risk, but sex that has a higher risk of HIV infection and the fact that gay people experience discrimination.

The stereotype of a gay man is someone who has unprotected sex with many partners. The stereotype of a lesbian is someone who has safe sex in a monogamous relationship. These stereotypes do not help to stop HIV infection – it is not only gay men who have anal sex and lesbians are at risk too. There are also many people who are bisexual (who have sex with men and women).

Gay men and lesbians have led the way in dealing with HIV and AIDS. In Africa, AIDS is seen as a heterosexual disease, so gay men have not been included in policies and campaigns. Many gay men are dying because of the focus on heterosexual infection with HIV. Lesbians, on the other hand, are completely ignored.

[graphic]

Our Constitution is the first in the world to specifically recognize the right to equality and non-discrimination regardless of sexual orientation. But many laws still discriminate against gay people. For example, the right to be free from hate speech mentions race, gender and religion but not sexual orientation.

Gay men and lesbians experience unfair discrimination in their communities, at work and in life generally. This discrimination has increased with the AIDS epidemic. When it comes to HIV and AIDS, gay men and lesbians face discrimination because of their medical condition, because of their sexual orientation and sometime because of their gender.

2 Why are gay men at risk?

Some kinds of sex carry more risk of HIV infection than others. Unprotected anal sex is high risk because the skin of the anus can tear when a penis penetrates it, making HIV infection much easier.

3 What about lesbians?

AIDS affects all people, including lesbians. Generally, sex between women involves activities that are low risk, but there are some things (like fisting and oral sex) that have some risks. Many lesbians are also in heterosexual relationships where they are placed at risk of HIV infection. Because lesbians experience widespread discrimination, their special needs when it comes to sex are often ignored.

4 And Bisexual and Transsexuals?

The Constitution says you cannot be discriminated against because of your sexual orientation, sex or gender, but the law does not recognize the wide range and variety of sex and life choices that are made. Bisexuals and transsexuals are often completely ignored when it comes to their special needs, and they even face discrimination from some gay men and lesbians.

5 Safer sex

Unprotected sex where the vagina or anus is penetrated by a penis is **very high risk**. HIV is carried in body fluids like blood, semen and the fluid inside the vagina. HIV infection happens not often during penetrative sex when the semen of an infected person comes into contact with the inside of the vagina or anus, or when the fluids or blood inside the vagina or anus of an infected person enter openings on the penis.

Blood (including menstrual blood), semen and vaginal fluids contain more HIV than other body fluids (like saliva, tears and urine).

Oral sex is **low risk**.

An **open sore** on your fingers, private parts or in your mouth, makes it easier for HIV infection to take place during sexual activity.

[graphic]

There is **no risk** in kissing, hugging, touching or talking to someone with HIV.

Sexually transmitted diseases, if not treated early, put you at risk of HIV infection because the sores on your genitals make it easy for HIV to get inside your body.

Condoms are the best protection against HIV infection and other sexually transmitted diseases. You can also use **latex gloves** (like health care workers use) and **dental dams** (a piece of latex that can be used during oral sex on the vagina or anus), but they are not widely available. Many lesbians and gay men make creative use of condoms to suit their sexual needs.

6 Important laws

a. The Constitution (and Bill of Rights)

The Constitution is the highest law. 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).

When looking at the Bill of rights, it is important to remember that human rights can **never** be taken away, 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 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;
- It makes sense to allow this, because searches are necessary to make sure the police are able to stop criminals.

[graphic]

The following rights are important for gays and lesbians and people with HIV or AIDS. (A more detailed list can be found in pamphlet 1.)

Equality – All people must be treated equally. You can not be **unfairly discriminated** against for any reason, including your sexual orientation, gender or sex. You can also not be discriminated against if you have HIV or AIDS.

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.

Freedom and Security of the person – You have the right to “bodily integrity”, which means you decide what happens to your body. You cannot be forced to take 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.

Housing, health care, food, water and social security – These rights are very important for people who have HIV or AIDS. You cannot be refused treatment because you are gay or a lesbian or because you have HIV or AIDS. (Note that the Constitution only gives you the right to have **access** to these things.)

NOTE

For more information on your right of access to health care, please see pamphlet 5.

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

This law gives detail to 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 because you are gay or a lesbian, or for any other reason.

NOTE

For more information on this Act, please see pamphlet 1.

This law also tries to make it easier, cheaper and quicker for complaints of unfair discrimination to be sorted out by creating **Equality Courts**.

c. 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” (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. You will not have to pay a higher premium.

The Act says medical aid schemes must give a minimum benefit (which is set by government) to people who have HIV or AIDS. Many medical aid schemes have special options or programmes for people who have HIV or AIDS.

NOTES

- You have until 31 March 2001 to join a medical aid (called an amnesty), or you will have to pay more for medical aid, especially if you are over 30, for the rest of your life. This is known as a “late joinder penalty”.
- If you have HIV or AIDS when you join a medical aid scheme, you may have to wait a year before you get any of the extra benefits the scheme offers. So, for the first year, you can only get the minimum benefit.
- If you change jobs and join a new medical aid scheme within 3 months, and you were a member of your previous scheme for at least 2 years, you will **not** be subject to the late joinder penalty and you will also not have to wait a year to get all the extra benefits that the scheme offers for pre-existing illness.
- Unlike before, workers can choose to join any option offered by a medical aid scheme (as long as you can afford it). So, you can join special programmes the scheme may have for people with HIV or AIDS.
- You may be asked to have a medical exam (including an HIV test) to qualify for extra benefits.

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By paying an extra amount, you become part of this option and are entitled to more than the minimum benefits (such as more money each year for medicine). Workers who have HIV should check with their medical aid schemes to see if they can get this extra cover.

If you are a member of a medical aid, you can add dependents (such as blood relatives, your wife, husband, same sex partner, customary wife or husband, and children) to it, which means they are covered too (although you will have to pay more).

7 Common issues faced by gays and lesbians

Lesbians and gay men experience many forms of direct and indirect discrimination:

a. Discriminatory Laws and practices

Laws that make some sexual choices illegal do not just go against the right to privacy, dignity and equality – they also make it harder for gay people to get access to direct and open safer sex information. These laws also make it harder for gay men and lesbians to be open about their sexual orientation, and they encourage prejudice.

It is much harder to prevent HIV infection when people experience prejudice and discrimination because of their sexual orientation. Reporting rape or sexual assault is very difficult for people whose life choices are widely seen as illegal or immoral.

The Sexual Offences Act (No 23 of 1957)

The Sexual Offences Act (which used to be called the Immorality Act) was used to make a lot of the sexual practice of gay men illegal. It used to say that **sodomy** (anal sex) and “**unnatural acts**” (like oral sex and masturbation) between men were **illegal**.

The National Coalition for Gay and Lesbian Equality successfully challenged the law that said sodomy is illegal in the case of **National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others (CCT 11/98)**. As a result, anal sex between men is no longer illegal.

National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others – CCT 11/98

The Constitutional Court decided that laws making anal sex between men a crime go against the **right to equality** and unfairly discriminate against gay men on the basis of sexual orientation.

The Court also said gay people are a vulnerable minority group in our society. Laws against anal sex criminalise their most intimate relationships. This devalues and degrades gay men and violates their **right to dignity**.

Lastly, making anal sex a crime criminalises private conduct between consenting adults, which causes no harm to anyone else. This intrusion on the innermost sphere of human life violates the **right to privacy**.

The same Act says it is **illegal** for sex between women or between men if one of the people having sex was under the age of **19**. For heterosexual sex, the age of consent is 16.

The **South African Law Commission** has published a new **draft Sexual Offences Act** which:

- Proposes that the age of consent be set at **16 for everyone**;
- Says the definition of **rape** must change to recognize that both men and women can be raped, and both men and women can be charged with rape. (At the moment, the law is that rape is forced sex where a penis penetrates a vagina.) Until the new definition is in force, men who are forced to have sex can report it as **sexual assault**. If the police do not take your complaint seriously you can report them to the **Independent Complaints Directorate** (ICD), which deals with complaints against members of the police.

Contact the ICD Head Office on 012-320-0431 or write to Private Bag X941, Pretoria, 0001

Donating blood

All donated blood is screened for HIV. This is to prevent people who receive blood from being exposed to HIV. It has become common for people to be asked to fill in a questionnaire before being allowed to donate blood. One of the questions is whether or not you have had sex with a man or are gay.

Recently, a gay man answered yes to this question and was told that he would not be allowed to donate blood. He laid a complaint with the South African Human Rights Commission (SAHRC). The SAHRC agreed that this was unfair discrimination and has ordered that this question be removed from questionnaires.

b. Young lesbians and gay men

Lesbian, gay, bisexual and transgender youth are at greater risk of being infected with sexually transmitted diseases and HIV because:

- Sex education at schools is usually only about heterosexual sex. Youth who are in same sex relationships don't have their concerns and issues addressed. Neither are they able to speak about their sexuality openly without the risk of being persecuted.
- The age of consent (presently 19 for same-sex sexual acts) is discriminatory because it makes same-sex relationships illegal until the people involved are 19 years old. The national average for first time sex is 14 for boys and 15 for girls. The age of consent (when you are legally old enough to agree to have sex) will be changed to 16 for everyone if the Law Commission's recommendations are followed.

The **South African National Schools Act** prohibits any form of unfair discrimination and the **Gauteng Education Act** specifically prohibits discrimination based on sexual orientation.

c. Lesbian and Gay families

The marriage laws in South Africa do not recognize that gay, lesbian and transgender people live in a variety of intimate relationships. For example, if a gay couple is renting a house or flat and one partner dies, the surviving partner could be evicted if the lease is in the name of the person who died. If this happens to you, you should not that the Constitution says no one can be evicted from their home without a court order.

The Constitution also says ...

You may not be discriminated against on the basis of **marital status**. The **Promotion of Equality and Prevention of Unfair Discrimination Act** says that marital status includes “being single, married, divorced, widowed or in a relationship, **whether with a person of the same or opposite sex**.”

The Department of Welfare defines a **family** as any people who choose to live together and “function as a unit”. This way of looking at family is an example that all government departments should follow.

Adoption

The Child Care Act allows an unmarried or divorced person to adopt a child. However, it doesn't say that two unmarried persons can adopt a child together. So if a same sex couple want to adopt a child, the partner who is not granted custodial rights doesn't have any security.

The first adoption by a lesbian was allowed in August 1995, with the approval and support of the Johannesburg Child Welfare and the child commissioner. The first official adoption by a male couple was not that easy.

This case involved a child who had tested positive to antibodies for HIV. The child commissioner allowed the couple to foster the child because there were no other alternatives. When they applied for the final adoption, the child tested negative for HIV. The couple was then told that they would not make suitable parents. The decision was challenged, and in September 1996 the adoption was granted.

[graphic]

Gay prisoners

Prisons allow prisoners out for a short space of time if their husband or wife is dying. Recently, a gay prisoner wanted to visit his life partner who was terminally ill and about to die. The prison authorities refused to allow this and so he took them to court. Just before the case was to be heard, the prison authorities changed their attitude and allowed him to visit his dying partner.

The revised policy for prisons on dealing with HIV and AIDS at last recognizes that men in prison have sex with other men. It says condoms must be available to all prisoners at all times. Segregation of prisoners on the grounds of their HIV status or sexual orientation is also not allowed.

These are major breakthroughs for gay and lesbian prisoners and an indication that the prison authorities may at last be realizing that unfairly discriminating against people because of their sexual orientation (or the type of sex they have) is against the law. For more information on the rights of prisoners, see pamphlet 6.

d. Lesbians and gay men at work

When it comes to hiring, promotions, benefits and work-related privileges, lesbians and gay men face a great deal of unfair discrimination. The Employment Equity Act does not allow discrimination on the basis of sexual orientation, sex, gender or HIV status. Even so there are many areas where lesbians and gay men can lose out. Although many laws and policies still discriminate against gay men and lesbians, they can be challenged because the Constitutional right to equality includes sexual orientation.

Medical Aid: As mentioned already, the law around medical aid has changed to include same-sex partners in the definition of a dependent.

Compassionate Leave: If a family member is ill or dies, many employers allow compassionate leave. Gay and lesbian relationships are often not recognised in the same way. This is not allowed and this kind of discrimination can be challenged.

Pensions and Provident Funds: If your same-sex partner dies without leaving a will, you probably won't get a pension or provident fund payout because these normally go to the **next-of-kin**. While a husband or wife is legally recognised as next-of-kin, a lesbian or gay partner is not. This makes it very important for people in same-sex relationships to draw up a will – especially if you have HIV or AIDS.

Occupational Injuries: You are entitled to compensation if you are injured at work. Lesbians and gay men face discrimination because the Compensation Commission only pays out to husbands, wives or children. This can be challenged.

Case – Langemaat v Minister of Safety and Security and Others 1998 (4) BCLR 444

Ms Langemaat, a lesbian who worked for the police, wanted to add her partner to her medical aid. The medical aid refused to accept her because only “dependents” could be added. The word “dependent” covered only husbands, wives and children. The judge ruled that this went against the Constitution. Although same sex “marriages” are not yet recognised by our law, this case shows that people in same sex relationships must be given the same rights as heterosexual married couples.

Note – The new Medical Schemes Act now says “dependents” includes same sex partners.

“Household” and “Dependants”: The definitions of “household” and “dependents” in the Public Services Act (which is used by all government departments and many private companies) discriminates against same-sex couples.

The definition of **household** includes a husband or wife, child, relative or domestic worker. This definition discriminates on the basis of marital status, sexual orientation, sex and gender.

The definition of **dependents** is “members of the household excluding servants”. This means your same-sex partner is not considered a dependent.

New SAPS Policy: In December 1995 the South African Police Service (SAPS) issued a new policy on gay and lesbian police officers.

In this, the SAPS recognised the right to equality in any appointment, promotion or transfer and that the police service “does not equate the ability, competence or potential of an individual in terms of their particular sexual orientation”. It also noted that “no discrimination in terms of their sexual orientation shall be tolerated” (Police Policy, 1995).

South African National Defence Force (SANDF): The SANDF said in 1996 that it would not discriminate against any of its members on the grounds of sexual orientation.

e. Lesbians, gay men and violence

The new **Domestic Violence Act** gives people in same-sex relationships protection from the law in the form of a **protection order**. It doesn't matter what kind of relationship you have, how serious it is or how long you have been together. (See pamphlet 7 for more detail.) Lesbians and gay men who experience problems getting help under this law can contact the Independent Complaints Commission.

Men who are forced to have sex by other men can lay a charge of **sexual assault**. The proposed definition of **rape** in the new Sexual Offences Act will broaden the definition of rape to include men and women as victims and perpetrators.

8 Planning Ahead

a. Wills and Powers and Attorney

If your same-sex partner becomes ill, their family can exclude you from decisions about their medical care and treatment. By drawing up a **will** and a **power of attorney**, you can empower your partner to make decisions on your behalf.

Wills: Because lesbian and gay marriages are still not legally recognised, you should draw up a clear will that says what you want to happen to your possessions after you die.

Power of attorney: If you are sick or unable to make decisions or take care of your affairs, you can draw up a power of attorney. This is a document that says another person can take care of things for you. Lesbians and gay men with HIV or AIDS can draw up a power of attorney that gives their partner permission to do certain things. You can decide what they can do. For example, they can have access to your savings account, but not your credit card.

b. Medical Care

Health care workers often assume that people are heterosexual when they treat for the first time. Many lesbians, bisexuals and gay men are scared to be open about their sexual orientation because they may be discriminated against.

It can be important for your doctor to know your sexual orientation, but this is information that doctors and health care workers have to treat with respect. They are legally and ethically obliged to respect your right to **privacy** and **confidentiality**.

Whatever your sexual orientation or whether you are infected with HIV, you have the same right of access to health care as everyone else.

Remember: You cannot be tested for HIV without your **informed consent**. So a doctor can't test you because you are a gay man and he thinks you might be infected with HIV, unless you agree to the test. And only **you** can decide you else should know the results of an HIV test.

NOTE

For more information on testing, see pamphlet 2. for more information on confidentiality, see pamphlet 3.

c. Welfare

The Welfare department says that it will not exclude gay men, lesbians and bisexual people from social services. The department also includes lesbian and gay youth, as well as people with HIV and AIDS, in its youth programme.

9 Protecting your rights

If a doctor or health care worker refuses to treat you, or does not treat you properly because of your sexual orientation or because you have HIV or AIDS, this is illegal. You can:

- Sue (bring a case against) the individual, hospital or clinic; or
- Complain to the Health Professions Council or another professional body.

<p>NOTE Contact details of organisations mentioned are at the back of this pamphlet.</p>

If you are unfairly discriminated against because of your sexual orientation or because you have HIV or AIDS, you can make a complaint to:

- The South African Human Rights Commission; and
- The Commission for Gender Equality.

You can also contact an NGO such as:

- The National Coalition for Gay and Lesbian Equality (telephone **011 487 3810/1/2**); or
- AIDS Law Project. Our contact details are on the back of this pamphlet.

<p>NOTE For more information on how to protect your rights, please see pamphlet 1.</p>

You can also purchase a copy of the Exit Newspaper, which lists various lesbian and gay services from around the country.

Inside back cover

Contact Details

Independent Complaints Directorate

Private Bag X941
Pretoria 0001
Tel: -12-320-0431

Health Professions Council of South Africa

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

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

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

National Coalition for Gay and Lesbian Equality (NCGLE)

P O Box 27811
Yeoville 2143
Tel: 011-487-3810/1/2

Commission for Gender Equality

P O Box 32175
Braamfontein 2017
Tel: 011-403-7182

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 lesbians and gay men have in the AIDS epidemic?

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.