



**Global
Criminalisation
Scan**



HIV
Leadership through
Accountability
SOUTH AFRICA

Country Assessment 2011

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South Africa

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This report was prepared by Catherine Kalibo.

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Acronyms

AIDS	Acquired Immune Deficiency Syndrome
ARASA	AIDS and Rights Alliance for Southern Africa
ARV	Antiretroviral
DFID	UK Department for International Development
EU	European Union
GEMSA	Gender and Media Southern Africa Network
GNP+	Global Network of People Living with HIV
HCT	HIV Counselling and Testing
HIV	Human Immunodeficiency Virus
HSRC	Human Science Research Council
IDASA	Institute for Democracy in Southern Africa
INERELA	International Network of Religious Leaders living with HIV
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
LTA	Leadership through Accountability
NAPWA	National Association of People Living with HIV and AIDS
PEP	Post Exposure Prophylaxis
PEPFAR	President's Emergency Plan for AIDS Relief
PLHIV	People Living with HIV
SAFAIDS	Southern Africa AIDS Information and Dissemination
SALRC	South African Law Reform Commission
SANAC	South Africa National AIDS Council
SWEAT	Sex Workers Education and Advocacy Taskforce
UNAIDS	Joint United Nations Programme on HIV
WAC	World AIDS Campaign
OSISA	Open Society Initiative for Southern Africa -

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As well as organisations mentioned above, this study benefits from the insights and lived experiences of people living with HIV and other key population groups. NAPWA values this contribution and hopes that the findings from this study will contribute to improving the legal and policy environment in relation to key affected populations in South Africa.

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Executive Summary

Introduction

This study (the Criminalisation Scan) was conducted by the National Association of People Living with HIV & AIDS (NAPWA) as part of the HIV Leadership through Accountability Programme (www.hivleadership.org). The aim of the study was to map and document existing laws, and policies that impact on responses to HIV in South Africa for the purpose of informing advocacy. The Criminalisation Scan documents protective as well as punitive laws and policies as they relate to people living with HIV and key populations at higher risk of HIV infection. Punitive laws have a negative impact on achieving universal access to HIV prevention, treatment, care and support (Universal Access). They include laws that criminalize unintentional HIV transmission. Positive or protective laws have an enabling impact on policies and programmes aimed at achieving universal access. For this to happen, these laws need to be promoted and enforced. They include laws and policies that prohibit discrimination on the basis of real or perceived HIV status. Assessing the extent to which these laws and policies impact on the HIV response merits follow up research and is beyond the scope of this study.

NAPWA recognizes that South Africa's recent political and legal history of Apartheid, still permeates the fabric of many communities, and informs how individuals relate to national laws and policies and their expectations around the enforceability of laws. This history gave birth to a rich Constitution¹, whose provisions will be discussed here. However, a full discussion of how this Constitution gels with or is at odds with the socio-cultural and religious beliefs of many South Africans is beyond the scope of this study or the mandate of NAPWA.

The information contained in this report is synthesized from data gathered from desk research and that provided by respondents who completed a specially developed Global Criminalisation Scan questionnaire.

Findings

The study found that South Africa has not enacted specific laws that criminalize HIV non-disclosure, exposure or transmission; nor can other criminal laws be used to initiate a

¹ The Constitution of the Republic of South Africa No. 108 of 1996:
<http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>



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prosecution. Whether or not people living with HIV should be criminalized for transmitting HIV has been a subject of vigorous debate; involving amongst others high ranking politicians, judges and academics².

Same sex sexual relations are legal in South Africa. The 1996, Constitution outlawed unfair discrimination; with sexual orientation³ being one of the many explicitly named protected grounds. However, despite this protection in the law, there have been many reported cases of discrimination, and torture of people on the basis of perceived or real engagement in same sex sexual relations⁴.

Selling or buying of sex is illegal in South Africa⁵, regardless of whether it is amongst consenting adults. As it is illegal to sell or buy sex, people who engage in this work are subject to exploitation and abuse, sometimes perpetrated by law enforcement officials.

Unless prescribed for medicinal use, it is illegal to use, carry and deal in narcotic substances⁶. However, injecting drug use is growing within South African communities⁷. Adult HIV prevalence amongst people who use drugs is estimated at 12.4%⁸.

South Africa does not have laws that restrict entry, stay or residence in the country for HIV positive non nationals.

South Africa has a number of laws and policies that ensure that people living with HIV are protected within the labour market. Examples of these are given in the discussion section.

² See, for example:

<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=141446&sn=Detail>. Accessed on 20 /11/2011

³ Chapter 2: Section 9 (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth

⁴ See for example: Vasu Reddy, Cheryl-Ann Potgieter, and Nonhlanhla Mkhize, "Cloud over the rainbow nation: 'corrective rape' and other hate crimes against black lesbians", *HSRC Review*, 5(1) (March 2007): 10–11

⁵ Section 20(1A)(a) of the Sexual Offences Act, 23 of 1957 and Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007

⁶ Drugs and Drug trafficking Act, no. 140 of 1992. South Africa.

⁷ Plüddemann A, Parry CDH. *The Nature and Extend of Heroin Use In Cape Town: Part 2 - A community survey*. Medical Research Council; Cape Town: 2004.

⁸ <http://www.ihra.net/sub-saharan-africa>



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Conclusion:

Post-apartheid South Africa has one of the most comprehensive bills of rights in the world, entrenched in the Constitution of the country⁹. It includes an unqualified right to life. There are several protective laws for people living with HIV in South Africa and, in addition, sexual orientation is expressly mentioned as a ground upon which discrimination is forbidden. However, despite there being many protective laws and policies, these are not adequately promoted and enforced with the result that many people suffer discrimination and or abuse on account of, amongst other things, their sexual orientation and/or HIV status. The study found that three of the areas of law examined here are the subject of public scrutiny and debate:

- Lack of criminal sanctions for intentional or negligent transmission of HIV;
- Legal prohibition against sex work and;
- Negative societal attitudes and low enforcement rates against hate crimes perpetrated against people of the same sex.

Recommendations:

This is a summary of the recommendations that follow from the study:

For NAPWA and other networks of people living with HIV and key populations:

- Prioritize and implement programmes that raise legal and rights literacy amongst people living with HIV and key affected populations.

For Government and relevant government institutions in South Africa:

- Introduce measures to ensure that the rights guaranteed in the Constitution are protected and respected and the laws safeguarding these rights enforced;
- Institute a body with the specific task of monitoring data on homophobia related hate crimes, ensuring effective law enforcement and victim support and providing more resources towards apprehending the perpetrators of these crimes.
- Review all laws that might have the unintended consequences of increasing HIV risk and social exclusion and impeding access to HIV treatment, care and support. These include laws that prohibit sex work.

⁹ Chapter 2: Constitution of South Africa (1996). Found at www.info.gov.za/documents/constitution/



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1. Introduction

1.1 Country Background Information

The Republic of South Africa is located at the southern tip of the African continent. It comprises of nine provinces. Its neighbours in the southern part of Africa include Namibia, Botswana and Zimbabwe to the north, Mozambique and Swaziland to the east, while Lesotho is an enclave surrounded by South African territory.

The HIV epidemic presents a major social and economic challenge to South Africa. UNAIDS estimates that, globally, 34 million people were living with HIV by the end of 2010¹⁰. Of these, South Africa has the largest number of HIV-positive nationals in the world. In a population of about 48 million people, an estimated 5.6 million people are said to be living with HIV. Of this number, 3.2 million are women and 280,000 children. An estimated 1.9 million children below the age of 17 have been left orphaned due to HIV and AIDS related deaths¹¹.

In the early years of the post apartheid government, there was a well documented denial of the existence of a link between the HIV virus and AIDS by the leadership of the country.¹² For some time, they insisted that the many deaths in the country were due to malnutrition, thus poverty rather than HIV, being the route cause.

1.2 Responses to HIV and AIDS in South Africa

The World AIDS Day report of 2011¹³ from UNAIDS highlights some of the comprehensive policies and programmes that South Africa has instituted to address the HIV epidemic, although some of these are yet to have a significant impact. The report estimates that 40 -59 % of people living with HIV who are eligible for treatment are receiving antiretroviral

¹⁰ UNAIDS World AIDS Day Report 2011: found at: http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2216_WorldAIDSday_report_2011_en.pdf *Report on the global AIDS epidemic*

¹¹ UNAIDS: <http://www.unaids.org/en/regionscountries/countries/southafrica/> (accessed on 29/07/2011)

¹² <http://www.independent.co.uk/news/world/africa/a-president-in-denial-a-ravaged-nation-denied-hope-460967.html>

¹³ http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2216_WorldAIDSday_report_2011_en.pdf



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therapy (ARV)¹⁴. Whilst not meeting the needs of all those eligible for treatment, South Africa has the largest ARV treatment programme in the world. In April 2010, the government launched a nationwide HIV Counseling and Testing campaign (HCT) with the aim of testing 15 million South Africans in just over a year¹⁵. The government has also committed a significant amount of national resources to the national AIDS response. External partners are also contributing significantly to compliment government efforts. Major contributors include the U.S. President's Emergency Plan for AIDS Relief (PEPFAR) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (GFATM)¹⁶.

1.3 HIV Leadership through Accountability Programme

The HIV Leadership through Accountability programme is collaboration between the Global Network of people living with HIV (GNP+), the World AIDS Campaign (WAC), national networks of PLHIV and national Civil Society campaign platforms. The programme is funded by UKaid from DFID and combines specific HIV evidence-gathering tools, national AIDS campaigns and targeted advocacy for Universal Access. The programme will run for five years and involve 11 countries in total. National networks of PLHIV are leading the effort to document the experiences of people living with HIV and have employed a number of internationally tested and validated tools aimed at strengthening the evidence on five key areas:

- Stigma and discrimination (The People Living with HIV Stigma Index)
- The level of involvement of people living with HIV (The GIPA Report Card)
- Documenting and analyzing current experiences in criminalization of HIV transmission (The Global Criminalization Scan)
- Documenting and analyzing human rights violations against PLHIV (Human Rights Count!)
- Sexual and Reproductive Health and Rights of PLHIV (Advancing the Sexual and Reproductive Health and Rights of PLHIV: A Guidance Package) supporting PLHIV networks to engage in national processes for the development and/or adaptation of sexual and reproductive health services for key populations.

¹⁴ www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2216_WorldAIDSday_report_2011_en.pdf - Page 20, accessed on 20/11/2011

¹⁵ South Africa Info: <http://www.southafrica.info/about/health/hivtesting-210710.htm>, accessed on 20/11/2011

¹⁶ Country Progress Report -2010: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/southafrica_2010_country_progress_report_en.pdf



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2. Criminalisation Scan

“Criminalization of HIV transmission” is a phrase that is used to refer to enacting of laws directed at punishing behavior that may transmit HIV and the application of general laws in a manner that targets those with HIV who may transmit the virus. The Global Criminalization Scan (The Scan) is a programme that was developed to respond to this growing trend. The Scan was developed by the Global Network of people living with HIV (GNP+) in partnership with regional PLHIV networks, supported by UNAIDS. It has been expanded to include laws that:

Criminalize unintentional transmission/exposure to HIV; Criminalize commercial sex amongst consenting adults; Criminalize same sex sexual relations; Impose compulsory or coercive drug treatment for people who use drugs or prohibits the provision of harm reduction services for people who use drugs; Restrict or deny entry/stay/residence or require deportation of HIV positive non-nationals.

2.1 Objective of the Study:

As a part of this global initiative launched by GNP+, the Scan was developed after a realization that prosecutions for ‘alleged’ HIV non-disclosure, exposure or transmission were on the increase and many countries were considering introducing new legislation. This study aims:

- To document information on national or state level laws and practices that have an impact on responses to HIV and feed this information into the Global Criminalisation Scan;
- To document the extent to which these laws are enforced;
- To provide an easily accessible hub of resources and research on the subject;
- To inform global advocacy to revise laws and practices that have a punitive effect and promote those with a positive effect.

2.2 Methodology

The data in this report is qualitative and quantitative in nature and was collected using, amongst other things, the standard Global Criminalization Scan questionnaire. The questionnaire was sent to relevant government, civil society organizations, UN agencies, human rights organizations and others working on issues relating to people living with HIV and key affected populations. The complete list is listed in the table below:



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AIDS and Rights Alliance for Southern Africa	AIDS Consortium
AIDS Legal Network	Center for the Study of AIDS
Commission for Gender Equity	Equality Project
Foundation for Human Rights	Gender and Media Southern Africa Network
Gender Links	Human Rights Development Initiative
Human Science Research Council – HSRC	Institute for Democracy in Africa – IDASA
International Network of Religious Leaders living with HIV	Joint United Nations Programme on HIV
Open Society Foundation of Southern Africa	Open Society Initiative for Southern Africa
Section 27 Incorporating, AIDS Law Project	Sex Workers Education and Advocacy Taskforce
South Africa National AIDS Council - SANAC	Southern Africa AIDS Information and Dissemination SAFAIDS
Southern Africa AIDS Trust	Triangle Project
Women’s Legal Center	

Of these, only two provided fully completed questionnaires. This represents an overall response rate of approximately 8.7%. A number of organizations, gave details of other organizations they felt were more relevant and would complete the questionnaire more comprehensively. Some of the organisations contacted responded that they did not have the information required and were not in a position to complete the questionnaire satisfactorily.

Other activities undertaken in the course of gathering this information include:

- researching legal and other databases;
- contacting groups representing key populations for in-depth information;
- analysis of laws, case studies and societal attitudes as evidenced by media reports and other key sources.

2.3 Limitations:

The main challenge in implementing the study was the low response rate from the questionnaires. This could be attributed to the fact that the issue of criminalisation, though



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a subject of national debate over the last decade, is not seen as a priority issue in the HIV response in South Africa. The main focuses on HIV in South Africa is currently on the prevention of new HIV infections and scaling up access to HIV testing and follow up treatment, care and support for people diagnosed with HIV.

The low response from the respondents could also be due to the fact that the questionnaire required a considerable amount of legal information which many organisations did not have at hand.

Following the low response, the approach was changed with NAPWA requesting organisations to highlight any laws, proposals for laws, or debates relating to HIV and criminalization. This method proved useful as there were a number of responses from the identified respondents and other resource persons which formed the starting point of desk research conducted by NAPWA.

3. Key Findings and Discussion

3.1 Criminalisation – HIV non-disclosure, exposure, transmission

There are no legal provisions to prosecute people living with HIV for exposing or transmitting HIV to others. In addition, there is no legal obligation for people living with HIV to disclose their HIV positive status to sexual partners.

In 2001, the South Africa Law Reform Commission (SALRC) was tasked to look into this issue of willful and negligent transmission of HIV and give recommendations. The key point from the recommendations was that, if the country chose to punish such acts, it was not necessary to enact a specific law but rather use the existing criminal laws. It concluded that "an HIV-specific statutory offence/s will have no or little practical utility; the social costs entailed in creating an HIV-specific statutory offence/s are not justified; and an HIV-specific statutory offence/s will infringe the right to privacy to an extent that is not justified."¹⁷ A recommendation from SALRC was that members of the public who feel aggrieved by another's conduct should use the common law civil and criminal remedies which are available.

The Criminal Law Amendment Bill (2003) proposed that non-disclosure of HIV status prior to consensual sex be classified as rape¹⁸. This proposal was not adopted when the bill was approved in 2007. Instead, the law requires that convicted rapists be tested for HIV, with longer prison sentences imposed on rapist found to be HIV positive¹⁹.

Whether or not people living with HIV should be criminalized for transmitting HIV has been a subject of vigorous debate²⁰. In September 2010, the Western Cape Premier and National Opposition leader Hellen Zille was quoted as saying HIV positive people who knowingly have unprotected sex without disclosing their status should be charged with attempted murder. The link below will provide more information on the matter. In an article, entitled, "Tackling

¹⁷ South Africa Law Reform Commission; Project 85; 5th Interim report on HIV and AIDS, 2001: http://www.justice.gov.za/salrc/reports/r_prj85_harmb_2001apr.pdf

¹⁸ Criminal Law (Sexual Offences) Amendment Bill (2003) Section 2 (2) (b) http://www.chr.up.ac.za/undp/domestic/docs/legislation_41.pdf

¹⁹ <http://criminalhivtransmission.blogspot.com/2010/09/south-africa-opposition-leader-hellen.html>

²⁰ Including, amongst others, the Premier of Western Cape, Helen Zille and Constitutional Court Justice, Edwin Cameron.



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the new AIDS denialism”²¹ she argues that introducing these criminal sanctions would serve not only to punish those who transmit HIV, but also as a prevention measure. The proponents of criminalization highlight three major factors that prompt calls for criminalization:

- a high prevalence of HIV;
- the high cost of treating people living with HIV and;
- a high incidence of cases of sexual violence.

In South Africa in 2006 there were close to 55 000 reported rape cases, adding the estimated unreported cases, gives an estimate of 450 000 rape cases that year²². In addition to this, certain cultural beliefs promote the spread of HIV, such as the idea that sex with a virgin can cure someone of the disease. The calls for actions are generally directed at the executive and legislative bodies to take appropriate steps, namely the use of the coercive power of the state to deal with those who wilfully or negligently transmit HIV.

Those who are against having specific laws argue that should such laws exist, it will greatly discourage HIV testing, since the safest thing before the law would be not to know ones’ HIV status.²³ Such laws would also stigmatize people living with HIV as potential criminals and thus increase self-stigma. They argue that it also places the burden of preventing HIV transmission very heavily on PLHIV and absolves their partners. This could lead to selective and arbitrary prosecution of the socially and/or economically marginalized. These kinds of laws are likely to be either ineffective or lead to a conviction based on insufficient evidence.

Justice Edwin Cameron, who is a judge of the Supreme Court of Appeals in South Africa and also one of the world’s leading figures on HIV and the law, has spoken in many forums against criminalization of HIV transmission. During the International AIDS Conference in Mexico in 2008, Justice Cameron was quoted as saying “Criminalization is a poor tool for regulating HIV infection and transmission”. He said he understood that society feared the deadly virus and public officials might want to invoke laws against those who recklessly transmit it to others. But, he argued that, “Criminalization is warranted only where someone sets out, knowing he has HIV, to infect another and succeeds.”

According to the UNAIDS, there is no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Such

²¹<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en//page71639?oid=267743&sn=Detail&pid=71639>

²² http://www.rape.co.za/index.php?option=com_content&view=article&id=875:rape-statistics-south-africa-a-worldwide-2010&catid=65:resources&Itemid=137

²³ Burris, Scott C., Cameron, Edwin and Clayton, Michaela, *The Criminalization of HIV: Time for an Unambiguous Rejection of the Use of Criminal Law to Regulate the Sexual Behavior of Those with and at Risk of HIV* (August 6, 2008). Available at SSRN: <http://ssrn.com/abstract=1189501> or <http://dx.doi.org/10.2139/ssrn.1189501>



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laws would only serve to undermine the public health and infringe on human rights. UNAIDS, therefore, urges that should there be laws, then they should only be limited to cases where a person does indeed know that he/she is HIV positive and acts with the intention of transmitting the infection and does indeed transmit it²⁴.

3.2 Same sex sexual relations

The constitution of South Africa is very clear on the issue of non-discrimination of people who engage in same sex sexual relations; Section 9 of the Constitution, adopted in 1996, prohibits discrimination and disadvantage on the basis of race, gender, sex, religion, and many other criteria including sexual orientation. Prior to 1994, lesbian, gay, bisexual and transgender (LGBT) people had no legal protection. Sexual acts between two consenting adults of the same sex, even those conducted in private, were criminalized. In this regard, South Africa is one of a few countries on the African continent, providing legal protection to same sex couples.

In most African cultures, the idea of two people of the same sex engaging in sexual relations is deemed as unnatural, un-African and even evil. Those who find themselves attracted to persons of the same sex cannot dare to disclose their sexual orientation for fear of retribution. Even South Africa that has legalized these relations still records very high levels of homophobia.

Since the end of Apartheid and the adoption of the Constitution, more than 30 items of legislation have changed to guarantee freedom from discrimination by the State or legal and natural persons, on the grounds of sexual orientation. Changes include²⁵:

- Protection for gays and lesbians in the workplace;
- Prohibiting the registration of political parties which advocate hatred and violence on the basis of sexual orientation;
- Recognition of families led by a same-sex couple;
- Protection of children of families led by a same-sex couple;
- Allowing same-sex spouses to register for medical benefits
- Prohibition of discrimination for same sex couple when securing accommodation;
- Elimination of death duties for same-sex spouses;

However, despite this protection in the law, there have been many reported cases of discrimination, and torture of people on the basis of perceived or real engagement in same

²⁴ UNAIDS Policy Brief on Criminalization: 2008

²⁵ "Lesbian and Gay Equality in South Africa: What has been achieved?," The Lesbian and Gay Equality Project, 2004-AUG-22 at: <http://www.equality.org.za/>



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sex sexual relations²⁶. Bullying and harassing of gays and lesbians is still very common in the community. In particular, there has been an increase in reported incidents of lesbians who have been gang-raped, beaten and in a few cases murdered²⁷ on account of their sexuality. Cases of 'corrective' rape against women who are identified as being lesbians are on the increase²⁸ especially in the townships. In April 2011, Noxolo Nogwaza was raped by eight men and murdered in KwaThema township near Johannesburg. According to Luleki Sizwe²⁹, a charity which helps women who have been raped in the Western Cape, more than 10 lesbians per week are raped or gang-raped in Cape Town alone. Many of the cases are not reported because the victims are afraid that the police will laugh at them, or that their attackers will come after them. Human rights activists are lobbying the government to take action against the perpetrators of these attacks (termed corrective rape).

In March 2011, the Triangle Project together with Rape Crisis Cape Town presented a memorandum at a meeting hosted by the Ministry of Justice and Constitutional Development. The focus of the meeting was on the 'Corrective Rape' of lesbian women. The memorandum was endorsed by a number of organizations and activists across South Africa. The Memorandum called on the Justice Ministry to implement immediate and concrete measures to improve the way in which the criminal justice system handles violent crimes against lesbian, gay, bisexual, transgendered and intersex (LGBTI) people.

3.3 Sex Work and the Law

Selling or buying of sex is illegal in South Africa³⁰, regardless of whether it is amongst consenting adults. The Sexual Offences Act of 1957, has the following provision:

a) Persons living on earnings of prostitution or committing or assisting in commission of indecent acts

1A Any person 18 years or older who:

a) has unlawful carnal intercourse or commits an act of indecency with any other person for reward...shall be guilty of an offence.

Commercial sex work is a big driver of the epidemic in South Africa, with an estimated 19.8

²⁶ See for example: Vasu Reddy, Cheryl-Ann Potgieter, and Nonhlanhla Mkhize, "Cloud over the rainbow nation: 'corrective rape' and other hate crimes against black lesbians", *HSRC Review*, 5(1) (March 2007): 10–11

²⁷ Kelly, Annie (12 March 2009). "Raped and killed for being a lesbian: South Africa ignores 'corrective' attacks". *The Guardian*. <http://www.guardian.co.uk/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa>. Retrieved 2012-02-23.

²⁸ http://www.actionaid.org.uk/101756/hate_crimes_the_rise_of_corrective_rape_in_south_africa.html

²⁹ http://www.change.org/groups/luleki_sizwe

³⁰ Section 20(1A)(a) of the Sexual Offences Act, 23 of 1957 and Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007



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percent of all new HIV infections relating to sex work in 2010³¹. Sex workers are often exposed to other factors that, such as injecting drug use, poverty and gender based violence which increase their vulnerability to HIV infection³².

In the run up to the 2010 FIFA World Cup, sex work received a great amount of attention; it was feared that the international sporting event would increase demand for paid sex. However a study funded by the United Nations Population Fund (UNFPA) and implemented by the Sex Work Education and Advocacy Taskforce (SWEAT) found that demand and supply of sex work remained constant across the World Cup period. The study data did not support fears of an increase of children or foreign migrant sex workers into the sex industry during the World Cup period. It did however, conclude that police contact with sex workers remained high and included police brutality, corruption and harassment.³³ As it is illegal to sell or buy sex, people who engage in this work are subject to exploitation and abuse, sometimes perpetrated by law enforcement officials.

In 2009 the SALRC issued a discussion paper on Adult Prostitution³⁴ which presents the issues broadly but does not give directive recommendations for South Africa's legal framework. Instead it gave 4 options in as far as the law and sex work are concerned:

1. Totally criminalize all aspects of sex work as criminal offences;
2. Partially criminalize aspects of sex work as criminal offences;
3. Legalize sex work within certain narrowly regulated conditions;
4. Non-criminalize (or decriminalize) sex work which will involve the removal of laws that criminalize sex work

In South Africa, SWEAT has been in the fore front in calling for the decriminalization of sex work; arguing that this would give sex workers an opportunity to better protect themselves against abuse, violence and other health threats. The organization works with sex workers on health and human rights issues.³⁵

³¹ <http://www.sanac.org.za>

³² Rispel L C. Et al (2001) *Transactional Sex among women in Soweto, South Africa, prevalence, risk factors and association with HIV infection*. Social Science and Medicine 59 (8)

³³ Marlise Richter, Matthew Chersich, Dudu Ndlovu, Gerrit Maritz, Marleen Temmerman & Sisonke Johannesburg, Rustenburg & Cape Town "Maybe it will be better once this World Cup has passed" http://www.migration.org.za/sites/default/files/sweat_report.pdf

³⁴ <http://wwwserver.law.wits.ac.za/salc/report/report.html>

³⁵ http://www.kit.nl/net/KIT_Publicaties_output/ShowFile2.aspx?e=1280



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3.4 Laws Relating to Injecting Drug Use

It is illegal to use, carry and deal in narcotic substances³⁶. However, injecting drug use is growing within South African communities³⁷. Harm Reduction International (HRI) estimates that there are nearly a quarter of a million people who inject drugs in the country³⁸. Adult HIV prevalence amongst people who use drugs is estimated at 12.4%³⁹. Injecting drug use could lead to a further increase in HIV prevalence if necessary measures to curb the practice are not taken into consideration.

3.5 Restrictions on people with HIV entering or staying in the country

Many countries around the world have rules and regulations that restrict non-nationals living with HIV from entering or staying in their country. Some even go as far as deporting travelers found to be HIV positive. South Africa does not have any such laws⁴⁰. For more information about travelling and restrictions regarding HIV positive people the link below will provide more information:

3.6 Positive Laws and Policies

Positive laws and policies create the environment in which necessary services can be easily and equitably accessed. Examples of positive laws and practices include laws that protect people living with HIV from discrimination, particularly discrimination on the grounds of actual or perceived HIV positive status. In South Africa these laws include:

- **Protection in relation to employment/access to employment**

All well as the Constitution which prohibits discrimination, and guarantees fair labour practices⁴¹, the Employment Equity Act⁴², prevents employees and job seekers from being discriminated against because of a disability or HIV status.

Chapter 2 provides as follows: **2. Chapter 2 - Prohibition of Unfair Discrimination**

2.1 No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds

³⁶ Drugs and Drug trafficking Act, no. 140 of 1992. South Africa.

³⁷ Plüddemann A, Parry CDH. *The Nature and Extend of Heroin Use In Cape Town: Part 2 - A community survey*. Medical Research Council; Cape Town: 2004.

³⁸ <http://www.ihra.net/sub-saharan-africa>. Accessed on 20/03/2012.

³⁹ <http://www.ihra.net/sub-saharan-africa>

⁴⁰ <http://www.hivtravel.org>

⁴¹ The Constitution of the Republic of South Africa Act, No 108, 1996. Chapter 2, sec 23(1)

⁴² Employment Equity Act, 55 of 1998



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including race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth.

Additionally, HIV testing is prohibited unless a labour court deems it justifiable⁴³.

As well as the two pieces of legislation mentioned above, the Labour Relations Act (LRA) prevents employees from being discriminated against because on the grounds of having a disability (the definition of disability include HIV infection).

This protection has been invoked to prevent dismissal on the basis of HIV status⁴⁴. The South African Labour Court also held that HIV-positive employees did not have to disclose their status to prospective employers

- **Protection from risk of HIV infection at work**

Employers are responsible for ensuring that their employees are not at risk of HIV-infection at work. The act places a duty on employers to take all reasonable steps to ensure that the work place is safe and that employees are sufficiently trained to avoid risks⁴⁵. Employees have a right to compensation if they get infected in a workplace accident⁴⁶.

⁴³ Employment Equity Act, 55 of 1998. 2 (2.3)

⁴⁴ In 2008, in the case of S.A Security Forces Union vs Surgeon General AO, the High Court ruled against the South African National Defense Force's discriminatory policy of excluding HIV-positive persons from recruitment, external deployment and promotion in the military.

⁴⁵ The Occupational Health and Safety Act, No. 181 Of 1993 and Mine Health and Safety Act

⁴⁶ Compensation for Occupational Injuries and Diseases Act (COIDA)

4. Conclusion and Recommendations

4.1 Conclusion:

Post-apartheid South Africa has one of the most comprehensive bills of rights in the world, entrenched in the Constitution of the country⁴⁷. It includes an unqualified right to life. There are several protective laws for people living with HIV in South Africa and, in addition, sexual orientation is expressly mentioned as a ground upon which discrimination is forbidden. However, despite there being many protective laws and policies, these are not adequately promoted and enforced with the result that many people suffer discrimination and or abuse on account of, amongst other things, their sexual orientation and/or HIV status. The study found that three of the areas of law examined here are the subject of public scrutiny and debate:

- Lack of criminal sanctions for intentional or negligent transmission of HIV,
- legal prohibition against sex work and
- negative societal attitudes and low enforcement against hate crimes perpetrated against people of the same sex.

The report has highlights a couple of examples of incidents where the protections guaranteed in the laws have been invoked, however it was it is difficult to ascertain the extent to which people are aware of the protections or their willingness to seek protection.

In the case of people in same sex relationships, there was evidence presented that law enforcement officials were unwilling to enforce the law and in some cases were perpetrators of homophobia related crimes.

4.2 Recommendations:

The following recommendations follow from the findings of this study:

NAPWA and other networks of people living with HIV and key populations:

- Prioritize and lobby for support to implement programmes that raise awareness of rights among people living with HIV and key affected populations ;
- Conduct further research to understand the extent to which the punitive laws and

⁴⁷ Chapter 2: Constitution of South Africa (1996). Found at www.info.gov.za/documents/constitution/



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practices identified impact on the lives of people living with HIV and key populations and their ability to access HIV prevention, treatment care and support;

- Engage in and inform the debate on the review of or enactment of new laws and policies, backed by evidence that is based on the lived realities of people living with HIV and key populations.

Government and relevant government institutions should;

- Introduce measures to ensure that the rights guaranteed in the Constitution are protected and respected and the laws safeguarding these rights enforced;
- Institute a body with the specific task of monitoring data on homophobia related hate crimes, ensuring effective law enforcement and victim support and providing more resources towards apprehending the perpetrators of these crimes.
- Review all laws that might have the unintended consequences of increasing HIV risk and social exclusion and impeding access to HIV treatment, care and support. These include laws that prohibit sex work.
- Consult all relevant stakeholders, especially affected groups before enacting Consult widely (ensure inclusion of all affected groups) on the full implications of whether to enact / not enact, laws that would permit the imposition of criminal liability for conduct that carries with it low/negligible risk of HIV transmission.
- Take strong and effective measures to end all forms of police brutality against sex workers, people who use drugs, people in same sex relations and other vulnerable populations;
- Provide the resources to ensure that the protections guaranteed in the constitution are promoted and understood by all South Africans.

Notes



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