

**SOUTH AFRICA - SOGI LEGISLATION COUNTRY REPORT
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Please note: This document was prepared by law students and highlights publicly-accessible information about legislation available at the time it was prepared. It is not exhaustive, nor is it updated on a regular basis. The information provided here is not a substitute for legal advice or legal assistance, and the International Human Rights program at the University of Toronto Faculty of Law cannot provide such advice or assistance.

Summary

Discrimination (by both state and private actors) on grounds of sex, marital status, and sexual orientation is prohibited constitutionally (Section 9, [Bill of Rights](#)) and by the [Promotion of Equality and Prevention of Unfair Discrimination Act](#), 2000.

“Sex” as a prohibited ground of discrimination is defined to include “intersex” for the purposes of the [Promotion of Equality and Prevention of Unfair Discrimination Act](#) ([Judicial Matters Amendment Act](#), 2005).

In [National Coalition for Gay Equality v Minister of Justice](#) (1998), the Constitutional Court stated that “sexual orientation” as a prohibited ground of discrimination in the Constitution applies to protect bisexual and transgendered individuals from discrimination.

Discrimination on the basis of gender, sex, and sexual orientation is also barred in specific sectors: housing ([Rental Housing Act](#), 1999) and employment ([Employment Equity Act](#), 1998 and [Labour Relations Act](#), 1995).

In [Atkins v Datacentrix](#) (2009), the Labour Court found that the [Employment Equity Act](#)’s and [Labour Relations Act](#)’s prohibition against discrimination on the basis of gender or sex includes discrimination against transgendered individuals.

Same-sex sexual activity is legal in South Africa: laws criminalizing anal sex between consenting adult males were declared unconstitutional and invalid by the Constitutional Court in [National Coalition for Gay and Lesbian Equality v Minister of Justice](#) (October 9, 1998); female same-sex activity was never criminalized.

The age of consent is the same for same-sex and opposite-sex sexual activity ([Criminal Law \(Sexual Offences and Related Matters\) Amendment Act](#), 2007).

Same-sex couples can enter into marriages or civil partnerships ([Civil Union Act](#), 2006).

Same-sex couples can adopt children jointly, and the same-sex partner of a parent can adopt his or her partner's child ([Children's Act](#), 2005).

Equal protection against domestic violence is extended to individuals living in same-sex and opposite-sex domestic relationships ([Domestic Violence Act](#), 1998).

South African citizens and residents can sponsor same-sex partners, whether married or unmarried, for permanent residence ([Immigration Act](#), 2002).

Persecution on the basis of sexual orientation is recognized as a ground for asylum ([Refugees Act](#), 1998).

Certain individuals (those who have undergone surgical or medical sex reassignment, intersex individuals, and those whose sexual characteristics have evolved naturally) may change their sex as recorded in the population registry ([Alteration of Sex Description and Sex Status Act](#), 2003).

Legal Provisions

ANTI-DISCRIMINATION

[Constitution of the Republic of South Africa, Bill of Rights](#), 1996: Prohibits discrimination by both state and private parties on various grounds – including gender, sex, marital status, and sexual orientation – and establishes a positive state duty to enact legislation to prevent or prohibit unfair discrimination.

Section 9 (Equality):

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (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) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

<http://www.info.gov.za/documents/constitution/1996/96cons2.htm#9>

Note: In National Coalition for Gay Equality v Minister of Justice (1998), the Constitutional Court stated that “sexual orientation” as a prohibited ground of discrimination in the Constitution “applies equally to the orientation of persons who are bi-sexual, or transsexual” (paragraph 21).

Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA or the Equality Act), 2000: Prohibits unfair discrimination (on the grounds listed in the [Bill of Rights](#), including gender, sex, marital status, and sexual orientation), hate speech, and harassment by government and private actors, and establishes Equality Courts to hear complaints of discrimination, hate speech, and harassment.

Section 1(viii): “‘discrimination’ means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—(a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;”

Section 1(xxii): “‘prohibited grounds.’ are—(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;”

Section 1(xv): “‘marital status’” includes the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship;”

Section 1((xiii) “‘harassment’ means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to~ (a) sex, gender or sexual orientation;”

<http://www.info.gov.za/view/DownloadFileAction?id=68207>

Judicial Matters Amendment Act, 2005: Amends the [Promotion of Equality and Prevention of Unfair Discrimination Act](#) to explicitly include intersex in its definition of sex as a prohibited ground of discrimination.

Section 16: “Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended –
(a) by the insertion in subsection (1) after the definition of “HIV/AIDS status” of the following definition: “ ‘intersex’ means a congenital sexual differentiation which is atypical, to whatever degree; and

(b) by the insertion in subsection (1) after the definition of “sector” of the following definition: “ ‘sex’ includes intersex;”.

<http://www.info.gov.za/view/DownloadFileAction?id=67875>

Rental Housing Act, 1999: Bars discrimination in rental housing on all grounds in the Constitution’s Equality Clause, including gender, sex, and sexual orientation.

Chapter 3, section 4(1): “In advertising a dwelling for purposes of leasing it. or in negotiating a lease with a prospective tenant. or during the term of a lease, a landlord may not unfairly discriminate against such prospective tenant or tenants, or the members of such tenant’s household or the bona fide visitors of such tenant, on one or more grounds, including race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth.”

<http://www.info.gov.za/view/DownloadFileAction?id=70618>

Employment Equity Act, 1998: Prohibits unfair discrimination in employment (including on grounds of gender, sex, and sexual orientation), and requires employers to promote equal opportunity in the workplace (the Act applies to all employers, workers, and job applicants excepting members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service).

Section 5: “Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.”

Section 6: “(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender*, sex*, 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.

(2) It is not unfair discrimination to – (a) take affirmative action measures consistent with the purpose of this act; or (b) distinguish, exclude, or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).”

<https://www.labour.gov.za/downloads/legislation/acts/employment-equity/Act%20-%20Employment%20Equity.pdf>

Note: In [Atkins v Datacentrix \(2009\)](#), the Labour Court found that the [Employment Equity Act](#)'s prohibition against discrimination on the basis of gender or sex includes discrimination against transgendered individuals (paragraph 19).

<http://www.saflii.org/za/cases/ZALC/2009/164.html>

[Labour Relations Act, 1995](#): Bars unfair dismissals, including those based on gender, sex, and sexual orientation (the Act applies to all employers, workers, trade unions, and workers organizations, excepting members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service).

Section 187(1): "A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 549 or, if the reason for the dismissal is- . . . (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender*, sex*, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;"

<http://www.workinfo.com/Act661995.htm>

Note: In [Atkins v Datacentrix \(2009\)](#), the Labour Court found that the [Employment Equity Act](#) and [Labour Relations Act](#)'s prohibition against discrimination on the basis of gender or sex includes discrimination against transgendered individuals (paragraph 19).

<http://www.saflii.org/za/cases/ZALC/2009/164.html>

SEXUAL ACTIVITY AND AGE OF CONSENT

[Criminal Law \(Sexual Offences and Related Matters\) Amendment Act, 2007](#): Codifies criminal law relating to sexual offences in gender- and orientation-neutral terms, and equalises the age of consent (16) for opposite-sex and same-sex relationships.

<http://www.info.gov.za/view/DownloadFileAction?id=77866>

PARTNERSHIP RECOGNITION AND BENEFITS

[Civil Union Act, 2006](#): Legalizes same-sex civil unions (registered as either marriages or civil partnerships) by defining "civil union" in gender-neutral terms (a civil union has the same legal consequences as a marriage under the [Marriage Act, 1961](#)).

Section 1: "civil union' means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others;"

Section 6: “A marriage officer, other than a marriage officer referred to in section 5*, may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union.”

*Note: Section 5 marriage officers are “ministers of religion and other persons attached to religious denominations or organisations” who have been designated as marriage officers by the Minister of Home Affairs under the [Civil Union Act](#). Therefore, the section 6 rule regarding objection to same-sex marriages refers only to public marriage officers (designated under the [Marriage Act, 1961](#)).

Section 13(1): “The legal consequences of a marriage contemplated in the [Marriage Act](#) apply, with such changes as may be required by the context, in a civil union.”

<http://www.info.gov.za/view/DownloadFileAction?id=67843>

[Domestic Violence Act, 1998](#): Provides protection to all people living in “domestic relationships”, defined by the Act to include “a relationship between a complainant and a respondent” if “they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other ...” (Section 1(vii))

<http://www.info.gov.za/view/DownloadFileAction?id=70651>

ADOPTION AND PARENTING

[Children's Act, 2005](#): Permits joint adoption by same-sex partners in a “permanent domestic life-partnership” or “other persons [...] forming a permanent family unit,” and adoption by the same-sex partner of a child’s parent.

Section 231(1): “A child may be adopted-

- (a) jointly by- (i) a husband and wife; (ii) partners in a permanent domestic life-partnership*; or (iii) other persons sharing a common household and forming a permanent family unit;
- (b) by a widower, widow, divorced or unmarried person;
- (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner* is the parent of the child;
- (d) by the biological father of a child born out of wedlock; or
- (e) by the foster parent of the child.”

<http://www.education.gov.za/LinkClick.aspx?fileticket=XMF%2FuqNr52U%3D&tabid=271&mid=1140>

Note: The use of the term “permanent domestic life-partnership” – while not explicitly including same-sex partners – was used in the Act to address the Constitutional Court’s finding that the limitation of joint adoption to opposite-sex married couples in previous legislation was unconstitutional (Du Toit and Another v Minister of Welfare and Population Development and Others (2002))

IMMIGRATION AND REFUGEE LAW

Immigration Act, 2002: Permits South African citizens and residents to sponsor same-sex partners for permanent residence.

Section 1(xxxvii): “‘spouse’ means a person who is party to a marriage, or a customary union, or to a permanent homosexual or heterosexual relationship which calls for cohabitation and mutual financial and emotional support, and is proven by a prescribed affidavit substantiated by a notarial contract and ‘spousal relationship’ has a corresponding meaning;”

Section 26: “Subject to section 25, the Department shall issue a permanent residence permit to a foreigner who- [. . .] (b) is the spouse of a citizen or resident, provided that- (i) the Department is satisfied that a good faith spousal relationship exists; and (b) each permit is issued on condition that it shall lapse if at any time within three years from its application the good faith spousal relationship no longer subsists, save for the case of death;”

<http://www.info.gov.za/view/DownloadFileAction?id=68047>

Refugees Act, 1998: Recognizes “membership of a particular social group” as one of the grounds of persecution making individuals eligible to apply for refugee status and be protected from expulsion; “social group” is defined as including a group of persons of particular gender, sexual orientation, disability, class or caste.

Section 1: (xxi) “social group” includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste;

Section 2: “Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group;”

Section 3: "Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it;"

<http://www.info.gov.za/view/DownloadFileAction?id=70666>

GENDER CHANGE RECOGNITION LAW

Alteration of Sex Description and Sex Status Act, 2003: Allows certain people (individuals who have undergone surgical or medical sex reassignment, intersex individuals, and individuals whose sexual characteristics have evolved naturally) to change their sex marker as recorded in the population registry.

Section 2: "(1) Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.

(2) An application contemplated in subsection (1) must- (a) be accompanied by the birth certificate of the applicant; (b) in the case of a person whose sexual characteristics have been altered by surgical or medical treatment resulting in gender reassignment, be accompanied by reports stating the nature and results of any procedures carried out and any treatment applied prepared by the medical practitioners who carried out the procedures and applied the treatment or by a medical practitioner with experience in the carrying out of such procedures and the application of such treatment; (c) in every case in which sexual characteristics have been altered resulting in gender reassignment, be accompanied by a report prepared by a medical practitioner other than the one contemplated in paragraph (b) who has medically examined the applicant in order to establish his or her sexual characteristics; (d) in the case of a person who is intersexed, be accompanied by- (1) a report prepared by a medical practitioner corroborating that the applicant is intersexed; and (ii) a report prepared by a qualified psychologist or social worker corroborating that the applicant is living and has lived stably and satisfactorily for an unbroken period of at least two years, in the gender role corresponding to the sex description under which he or she seeks to be registered."

Section 3: "(2) A person whose sex description has been altered, is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration.

(3) Rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration.”

<http://www.info.gov.za/view/DownloadFileAction?id=68026>