



A DECADE OF DEMOCRACY

**What have we
achieved in the
struggle for lesbian
and gay rights?**



The **EQUALITY** Project

HOW HAVE WE SCORED?

The Constitution

The birth of democracy was the beginning of a new era for lesbian and gay people in South Africa. The Constitution, formulated in 1996, recognises equality for all people before the law, and the right to equal protection and benefit of the law. The Equality Clause, Section 9 in the Bill of Rights, prohibits discrimination on the grounds of sexual orientation by the State and all other persons.

Our oppressive past left many laws in place which actively discriminate against lesbian and gay people. However, since 1994, Parliament has passed more than 30 laws that include protection and recognition for lesbian, gay, bisexual, transgender and intersex people. The South African courts have also passed important judgments that secure equality before the law for lesbian and gay people.

The section that follows will explain the most significant legal reforms that have taken place since 1994, and what these reforms mean for lesbian and gay people.

Decriminalising sex between men

1998: *National Coalition for Gay and Lesbian Equality and others versus the Minister of Justice and others (The Sodomy case):*

In the past, sex between men was criminalised. The Sexual Offences Act of 1957 made it an offence for men to engage in sexual acts with other men. Also, under the Criminal Procedure Act, any person authorised to arrest a 'sodomy suspect' could kill that person if they attempted to run away. In 1998, the Constitutional Court overturned the common-law offence of sodomy and other laws that criminalised sodomy.

This means that all laws which criminalise consensual sodomy were found to violate our equality, privacy and dignity. Therefore, the criminalisation of sex between men has been removed from our law books.

Recognition of lesbian and gay relationships

1998: *Langemaat versus Minister of Safety and Security:* The High Court ordered that a State Medical Scheme recognise the same sex relationship of its member and extend spousal benefits to her lesbian partner.

1999: *Martin versus Beka Provident Fund :* The Pension Funds Adjudicator ordered that a same sex life partnership be recognised and receive the same benefits from private pension funds as a married couple.

2002: *The Lesbian and Gay Equality Project and Others versus the Minister of Finance:* The High Court established the right to equal benefits from pension funds for the same sex partners of state employees.

The following legislation also recognises same sex partnerships and ensures equal treatment of gay and lesbian people:

- *Labour Relations Act (1995)*
- *Basic Conditions of Employment Act (1997)*
- *Employment Equity Act (1998)*
- *Promotion of Equality and Prevention of Unfair Discrimination (2000)*
- *Public Services Regulations (2001)*

These legal reforms mean that lesbian and gay relationships are now recognised as mutually dependent and

hold equal value in law for benefit schemes such as pension funds and medical aids.

Protection and recognition of our partnerships and families

1998: National Coalition for Gay and Lesbian Equality and Others versus Minister of Home Affairs and others:

The Constitutional Court ordered that same sex life partnerships be recognised in granting residence permits to the foreign partners of South African citizens and permanent residents.

2002: Du Toit and De Vos versus Minister of Social Welfare (The Equality Project was a 'friend of the court'): The High Court ordered the insertion of words into the Child Care Act and the Guardianship Act so that lesbian and gay couples can be joint legal parents of a minor adopted child.

2003: J & B versus Minister of Home Affairs:

The Constitutional Court passed judgment in favour of two lesbians in a life partnership where partner B had given birth to twins conceived through artificial insemination using donor sperm to fertilise the ovum of partner J (the fertilised ovum then being placed in partner B's body). Partner B was registered as the birth mother of the twins, and partner J wished to be registered as the co-parent of the twins. Portions of the Children's Status Act were declared invalid and words were read in so that lesbian couples could be registered parents of children conceived through artificial insemination.

The following legislation also supports the recognition of same sex families and relationships:

Housing Act (1997)

Maintenance Act (1998)



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Domestic Violence Act (1998)

The Courts and Parliament have recognised permanent same sex life partnerships as having equal rights to those of married people. These reforms give legal protection to same sex couples with regard to the status of our partnerships, adoption and parenthood.

WHAT STILL NEEDS TO BE DONE?

The law reforms that have taken place since 1994 have had a great impact on the lives of many lesbian and gay people in South Africa. However, there are other changes to our laws which need to take place in order for lesbian and gay people to be fully equal before the law.

Equal access to marriage and family protection

Common law definition of marriage

In South African law marriage is still defined as "a voluntary union between one man and one woman to the exclusion of all others".

This definition means that lesbian and gay people still do not have the equal right to marry a partner of their choice, and it violates our right to equality, dignity and privacy. We are denied the right to formalise our relationships in the eyes of families, society and the law. This prevents us from claiming the protections, benefits and obligations of marriage. The common law definition of marriage needs to include marriage between people of the same sex.

The Marriage Act: Even if the common law definition of marriages changes, it does not mean that we will be able to get married to our partners. The Marriages Act needs to be changed so that the words 'husband' and 'wife' are substituted with the term 'spouse'. This will

enable us to have our marriages solemnised and registered.

Family law: Many of us have children from previous marriages or relationships. Some choose to have children in same sex partnerships. Family law in South Africa needs to be developed so that lesbian and gay families are equal to heterosexual families.

Equal age of consent and a broader definition of rape

The Sexual Offences Act: The age for sexual consent remains unequal for lesbian and gay people. Currently the age of consent stands at 16 years for heterosexuals and 19 years for homosexuals. This is unfair discrimination and affects the legal status of our relationships as well as the exercise of our other rights.

At present the legal definition of 'rape' is defined as non-consensual penetration of a vagina by a penis. Other forms of rape including men who rape men, or women who rape women would be charged only as "indecent assault", a crime which carries a lower penalty. In this way lesbian and gay people are not protected against certain forms of sexual violence.

Even though there have been changes to our laws, lesbian and gay people are still experiencing discrimination in the home, the community and the workplace. After a decade of democracy we still need to improve on the score card and be sure that all forms of social and legal discrimination against lesbian and gay people are eradicated. Only then can we celebrate our freedom.

For further information contact:

The Equality Project Legal Advice Centre

Tel: 011 487 3810

Fax: 011 648 4204

Email: legal2@equality.org.za

Web: www.equality.org.za