

Access to Justice for Healthcare Violations: A GUIDANCE NOTE FOR COMPLAINTS BODIES

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INTRODUCTION

This Guidance Note aims to provide concrete recommendations to alternative complaints mechanisms on how to provide safe, accessible and effective remedies for vulnerable and key populations who experience health rights violations.

Alternative complaints mechanisms are, for the present purposes, understood as those processes identified to be able to receive and determine complaints relating to health care outside of formal court procedures.

These include:



Healthcare regulatory bodies, such as health professions councils and nursing councils



Decentralised complaints processes, such as complaints processes within ministries of health or health facility-based complaints mechanisms



National human rights commissions and ombudspersons

BACKGROUND

Under international, regional and national law all persons have basic human rights.

However, every day people across Africa experience violations of their rights in healthcare settings. This stigma and discrimination acts as a barrier to achieving public health goals. Human rights violations have a major impact on the health status of people who are denied health services, harassed and abused by healthcare providers, discouraging them from seeking health prevention, treatment, care and support.

All people have the rights to:

- Equality and freedom from discrimination.
- Dignity and privacy.
- Health, which includes the right to non-discrimination in access to health care services, the right to treatment only with voluntary, informed consent and the right to medical confidentiality.
- An effective remedy heard by a competent authority recognised in law, for violations of their rights.

These rights require that all persons are able to access health care services and complaints mechanisms without discrimination.

Research conducted by the Southern Africa Litigation Centre (SALC) confirms that certain vulnerable and key populations are highly vulnerable to rights violations when accessing healthcare in Africa. Various factors – personal, social, economic, legal, political, and cultural – make some populations particularly vulnerable to human rights violations and to health risks, such as HIV. These same factors also create barriers for them to access justice for health rights violations.

Violations experienced by vulnerable and key populations include:

- Denial of access to healthcare services altogether, as well as being refused specific healthcare services or being offered conditional access to services (for example, access to services only when accompanied by a sexual partner or access to treatment in return for sex).
- Inferior healthcare services, including unnecessary delays in receiving attention, preferential treatment to certain healthcare users and failure to conduct proper examinations.
- Verbal abuse from healthcare providers, such as abusive and derogatory language and being blamed for their health or HIV status.
- Sexual abuse and sexual coercion from healthcare providers.
- Infringements of their rights to informed consent and a general failure to provide adequate health information in relation to testing, diagnoses as well as medical treatment.
- Breaches of their rights to confidentiality with regard to their HIV status, health status, work, sexual orientation and/or gender identity. Access to safe, effective remedies is not only a human rights obligation, but also vital to protecting and promoting the health of all vulnerable and key populations.

This Guidance Note focuses on the following vulnerable and key populations: sex workers, gay men and men who have sex with men, transgender people, people who inject drugs and people with disabilities.

Who are key populations?

Key populations is a term that has arisen during the response to the HIV epidemic to identify groups who are more vulnerable or at risk of HIV infection due to their marginalized position in society and their lack of access to health care services.

In the context of HIV, gay men and other men who have sex with men, sex workers and their clients, transgender people, people who inject drugs and prisoners and other incarcerated people are the main key population groups. These populations often suffer from punitive laws or stigmatising policies, and they are among the most likely to be exposed to HIV.

What is vulnerability?

Vulnerable populations are groups of people who are particularly vulnerable to HIV infection in certain situations or contexts, such as adolescents (particularly adolescent girls), orphans, street children, people in closed settings (such as prisons or detention centres), people with disabilities and migrant and mobile workers. Each country should define the specific populations that are particularly vulnerable. UNAIDS identifies a range of personal, social, cultural, political, legal and economic factors that impact on vulnerability in the context of HIV, such as:

- Personal factors e.g. a lack of knowledge and skills on how to protect oneself, limited access to quality health care and other services due to distance, cost or time required to visit healthcare facilities.
- Economic factors e.g. unequal opportunities, unemployment or precarious employment and poverty that limit access to quality healthcare services.
- Restrictive social factors e.g. stigma, marginalisation, social exclusion, discrimination and human rights violations that disempower.

Laws criminalising some of the actions of key populations do not negate the basic human rights of all citizens within a country.

Key populations still have rights.

Through SALC's research, follow-up engagement and training with affected populations, key population expert groups, non-governmental and community-based organisations and alternative complaints mechanisms, as well as 12 years' experience in providing legal support to civil society groups in southern Africa, it has been identified that these populations experience a number of limitations and fears in trying to access remedies for discrimination in healthcare.

The findings show that alternative complaints mechanisms have significant potential to provide justice for discrimination in healthcare - perhaps far more so than courts of law. Vulnerable and key populations report that the courts are inaccessible for various reasons ranging from fear and a lack of knowledge of rights, to the high costs, time delays, physical distances and expertise required to litigate.

In contrast, complaints processes within ministries of health or at healthcare facilities are better known, accessible and less formal. They can provide direct and immediate relief for poor treatment by a healthcare worker, as can health professions regulatory councils. Regulatory bodies and facility-level complaints processes are in a good position to provide information and feedback to monitor and improve healthcare services. National human rights commissions and ombudspersons provide safe and flexible processes, critical for promoting the participation of vulnerable and key populations. They are well suited to dealing with systemic human rights violations, leading to far-reaching changes in law, policy and practices.

These complaints bodies are urged to take steps, outlined below, to promote broader access to justice for the health rights of vulnerable and key populations.

RECOMMENDATIONS FOR PROVIDING SAFE AND ACCESSIBLE REDRESS

Based on SALC and other research findings, the following recommendations are made for ensuring that complaints mechanisms are safe and accessible to vulnerable and key populations:

-  1. Clear known rights, rules and processes
-  2. Provision for multiple entry points for making complaints
-  3. Provision for confidential and anonymous complaints or communications
-  4. Provision for third-party complaints or communications
-  5. Interim measures / mechanisms to protect complainants
-  6. Broader engagement with key populations and vulnerable populations

WHAT MAKES A GOOD COMPLAINTS PROCESS?

A complaints process can provide an effective remedy for persons who experience human rights violations in health care.

- *A complaint process can be considered available if it is accessible, easy to use and accommodates the different needs of users – this includes being physically accessible and safe for vulnerable and key populations.*
- *Efficacy is measured by its ability to provide an objective prospect of success, including through independence and accountability.*
- *Sufficiency is measured by its ability to deliver redress.*



1

CLEAR, KNOWN RIGHTS, RULES AND PROCESSES

Vulnerable and key populations don't usually know their rights and how to enforce them. Complaints mechanisms need to provide clear information – in ways that accommodate all vulnerable and key populations – on their health rights and how to remedy violations, such as how to lay a complaint, to whom, what is required, the process that will be followed, the protections available to them, the support that may be available during that process as well as the possible outcomes.



2

PROVISION FOR MULTIPLE ENTRY POINTS FOR MAKING COMPLAINTS

Research shows that illiteracy and the physical and financial inaccessibility of complaints mechanisms are barriers to reporting complaints. In order to ensure accessibility, complainants should be offered various ways to communicate their complaints – by telephone, in writing, or in person.

HOW WILL THIS PROMOTE ACCESS TO REMEDIES FOR VULNERABLE AND KEY POPULATIONS?

Vulnerable populations may not know how to lay a complaint or may be unable to do so themselves.

People with disabilities experience physical barriers to access complaints mechanisms.

People with visual or hearing impairments, populations living in distant rural areas, those living in poverty, those who are illiterate or those with limited access to telephonic communications may also find it impossible to access the necessary evidence and to report their complaints in the required format.

These measures will help populations to understand how to use remedies and allow them to report in the ways that suit them best.



3

PROVISION FOR CONFIDENTIAL AND ANONYMOUS COMPLAINTS OR COMMUNICATIONS

Confidential complaints allow complainants to have their personal, identifying information kept safe and not to be disclosed during the course of the complaint and not to be shared with anyone not directly involved in handling the matter.

Where complaints mechanisms require a complainant to appear in person to provide evidence, procedural rules can also provide for private, 'in-camera' evidence to be given to protect the identity of the complainant and create a private, safe physical environment to protect the confidentiality of a complainant.

Anonymous complaints allow the complainant to complain without providing personal information, or to provide personal information that is purposefully unlinked to the complaint itself.



4

PROVISION FOR THIRD-PARTY COMPLAINTS OR COMMUNICATIONS

Complaints mechanisms should allow for an interested third party (e.g. a friend, family member, partner, community member or community support organisation) to lay a complaint on behalf of a healthcare user who may be unwilling (due to fears for their confidentiality or safety) or unable to lay a direct complaint themselves.



5

INTERIM MEASURES TO PROTECT COMPLAINANTS

Where fear of harm acts as a barrier to access to complaints mechanisms, interim measures can protect populations from harmful consequences that may arise during a complaint. Interim measures can be put in place as soon as a complaint is made, pending the outcome of the full investigation and decision. Interim measures may include:

- Decisions relating to the confidentiality of personal, identifying information provided by a complainant during the course of an investigation.
- Orders barring contact between the complainant and the relevant healthcare provider alleged to be responsible for the human rights violation, if there is a risk of harm or denial of medical care to the complainant.
- Orders making it an offence to interfere with the duties of a complaints body, to prevent withholding of information, or to prevent the denial of healthcare services.
- Orders providing interim relief and interim remedies (e.g. access to urgent healthcare services) pending the outcome of a final decision.

HOW WILL THIS HELP PROMOTE SAFETY OF KEY POPULATIONS IN ACCESSING REMEDIES?

Vulnerable and key populations are often afraid that by making public complaints, their personal information about their health status, their sexual orientation and gender identity, their work or drug use may be revealed during the process.

They fear the possible social, economic and legal repercussions of breaches of confidential information, including stigma, discrimination, secondary victimisation, violence, and police action.

- *People living with HIV may be afraid that their HIV status will be made public, exposing them to stigma and discrimination within their families and communities.*

- *Sex workers are also fearful of families finding out about their sex work.*
- *Gay men and men who have sex with men and transgender people may fear violence and social and economic marginalisation if their sexual orientation or gender identities are disclosed.*
- *Sex workers, gay men and men who have sex with men, transgender people and people who use drugs also fear police action. They fear that they may be arrested due to criminal laws applied to some sex work-related activities, laws criminalising consensual same-sex sexual acts and drug use. They fear being subjected to harassment, violence and abuse by law enforcement officials who are in many cases themselves the perpetrators of violence.*
- *People with disabilities and other vulnerable populations recounted fears of retribution and future denial of services from healthcare workers, particularly where there are limited available and accessible healthcare facilities. Their feelings of disempowerment create fear of challenging actions.*
- *Populations also express fear of reprisals from healthcare workers that limit their future access to health care.*

These measures will help to reduce the fears associated with laying a complaint and protect vulnerable and key populations from harm.



6

BROADER ENGAGEMENT WITH KEY AND VULNERABLE POPULATIONS AND HEALTHCARE WORKERS

Over and above the practical measures complaints mechanisms can take to simplify and strengthen their procedures, broader efforts to engage with key populations and vulnerable populations are critical. This may include working with CBOs and NGOs to:

- Create awareness of the mechanisms and how they may be used.
- Understand experiences and common health rights violations of healthcare users.
- Identify priority concerns for accessing justice and how they may be managed within the complaints process.
- Ensure constant feedback and evaluation of successes and challenges with access to complaints mechanisms.
- Build evidence on the need for broader action beyond resolving complaints, such as strengthening education and training on the rights of vulnerable and key populations for key stakeholders (Key and vulnerable populations, alternative complaints bodies, healthcare workers) in the short term, including through mainstreaming in training curriculum in the long term; challenging discriminatory attitudes, reviewing ethical and professional codes of conduct and providing impetus to advocacy for the reform of punitive and discriminatory laws.
- Promote ongoing dialogue between populations and complaints mechanisms, to strengthen understanding of mutual concerns and to build relationships of trust.

For further information and resources, please refer to:

Access to Justice for Healthcare Violations: BACKGROUND DOCUMENT

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**This Guidance Note is a publication of the Southern Africa Litigation Centre. It was written by Catherine Grant.*