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**SUBMISSION ON THE COMPULSORY HIV TESTING OF
ALLEGED SEXUAL OFFENDERS BILL**

**PORTFOLIO COMMITTEE ON JUSTICE
NATIONAL ASSEMBLY, PARLIAMENT**

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Introduction

1. The AIDS Law Project (ALP) is based at the Centre for Applied Legal Studies, a human rights research and advocacy institute at the University of the Witwatersrand. The ALP provides free legal advice and litigation services to advance the rights of people with HIV/AIDS. Its aim is to use the law to address unfair discrimination on the basis of HIV/AIDS status, to find redress for human rights violations and to ensure access to treatment.

2. The arguments and recommendations in this submission are based on a number of human rights and public health considerations. In particular we have focused on the following four areas:
 - the rights of the survivor of sexual assault;
 - the rights of the accused;
 - the impact of the draft bill on public health measures to limit spread of HIV; and
 - the impact of the bill on state services for survivors of sexual assault.These are not isolated concerns, being interrelated and having an impact on each other.

3. We wish to state at the outset that we find ourselves unable to endorse the bill in its current form. We do however support the view that legislation that allows survivors of sexual assault the right to ascertain the HIV status of alleged perpetrators may, in certain circumstances, be an important aspect of empowerment and choice, especially for women survivors of rape and sexual assault. We believe however that any such legislation needs to form part of a broader package of measures that addresses the needs of survivors of sexual violence in an integrated and holistic manner.

4. We also recognise that such legislation is likely to benefit a small number of people. For a number of reasons, more vulnerable groups of women and other survivors of sexual assault are unlikely to benefit from this law. In particular, it will not benefit the following survivors of sexual assault:

- Women who do not report rape and other forms of sexual assault, including women in coercive and abusive relationships who, for various reasons, do not define their experiences as rape;
- Women whose assailants are either not arrested or are arrested outside of the statutory period;
- Women who are already HIV positive;
- Women who have been subject to gang or group rape, where not all the perpetrators are in custody.

We also note that it is unlikely that such legislation will benefit large numbers of male survivors of sexual violence. The majority of men who survive sexual assault do not report their experiences because of the high level of shame and stigma attached to these crimes, and will thus be unable to access the provisions of such legislation. It is also not clear whether such legislation will benefit men in prisons who are subject to repeated sexual violence, unless it is linked to measures to protect survivors of sexual violence in prisons from further assault and they are able to access pos-exposure prophylaxis and related services.

5. Despite the small number of people likely to benefit from legislation allowing for the compulsory testing of alleged perpetrators, we believe that the right to apply for testing is an aspect of choice, enshrined particularly in the rights to freedom and security of the person (s 12 of the Constitution) and dignity (s 10), that some persons may wish to exercise.

Purpose of the submission

6. This submission therefore gives qualified support to the proposals contained in the South African Law Commission (SALC) report entitled “Fourth Interim Report on Aspects of the Law relating to AIDS” (Project 85)¹ in so far as they purport to affirm the choice of survivors of sexual assault to find out an alleged offender’s HIV status, while at the same time attempting to limit the infringement of the rights of the alleged offender. At

¹ See online <http://www.law.wits.ac.za/salc/report/report.html> .

the same time we do not support the current form of the Bill before Parliament. We recommend that:

- the issue of survivor's empowerment and choice is more appropriately dealt with as part of comprehensive legislation to address sexual offences;
- the practical realisation of this choice should be more fully integrated into public health services on HIV and the full range of state services for survivors of sexual assault.

7. The body of this submission examines the rationale and certain key provisions of the draft bill currently before the committee in order to highlight some of our concerns. Given the view that we have expressed above, we have not attempted a comprehensive analysis of the bill.

Comment on the SALC recommendations

8. The SALC states that “[c]ompulsory HIV testing of an arrested person should in principle be victim-initiated”.² This is to be welcomed, particularly in a country with high levels of sexual violence. The high incidence of such gendered crimes contrasts starkly with the vision set out in the Constitution, which proclaims South Africa to be a state founded on values such as human dignity, freedom, equality and non-sexism.³

9. The commitment to a society based on values of human dignity and equality clearly sees the full and equal participation of women within all spheres of South African society as lying at the heart of the new constitutional order. This is underscored by the express prohibition of unfair discrimination on grounds such as gender, sex, pregnancy and marital status and the recognition that positive measures “designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”.⁴ However, particularly important for

² Ibid at x (para 5).

³ Section 1.

⁴ Sections (3), (4) and (2) of the Constitution respectively.

women's personal freedom is the right to freedom and security of the person (s 12) which includes the right to physical and psychological integrity. Sexual violence in the context of an enormous HIV/AIDS epidemic severely undermines women's freedom and security of her person and her equal participation in society.

10. We suggest that choice has the following elements:

- 10.1. Firstly, the right to determine the offender's status in appropriate circumstances can allow women to assert some control over their lives at a time when this has been violated by the assault. Here one should avoid a normative situation that focuses on determining the HIV status of an alleged offender, rather than enhancing women's choices about their lives. This would disempower survivors and potentially reinforce problematic notions of victimhood. Properly understood, exercising choice can assist the recovery of survivors and the process of regaining control over their lives and their bodies. It also means that survivors need to be counselled on the benefits of learning their own HIV status through HIV testing, as soon as possible after the sexual assault. All of this needs to take place within an appropriate institutional and normative setting.
- 10.2.** Secondly, it could, again in appropriate circumstances, enhance psychological integrity and 'peace of mind'.
- 10.3.** Thirdly, if there is a possibility of infection, then knowledge of the offender's status allows further choices to be made about treatment (PEP) and sexual and reproductive activities.

SALC recommendations are survivor-focused, based on survivor choice

11. The focus on the survivor is achieved in at least three ways.

- 11.1. First, the testing of an alleged offender can only be done at the request of the survivor, or by someone else acting on his or her behalf. Placing the choice of the survivor at the centre of the law is the correct approach.

11.2. Second, the survivor is not obliged to attend the legal proceedings in which a magistrate determines whether the application should be granted. This substantially limits the possibility that the process by which the alleged offender is forced to test for HIV may result in secondary victimisation of the survivor.

11.3. Third, the result of the HIV test is provided to the survivor as a sealed record. The choice of acquainting herself or himself with the test result thus still lies with the survivor.

Enabling survivors of sexual assault to make life decisions and choices

12. The Constitution guarantees to all persons the right to bodily and psychological integrity,⁵ as well as the right of access to health care services. It is in this context that the right of access to an alleged offender's HIV status must be assessed. While the extent of the substantive relief should not be exaggerated, it is our view that there are real benefits for some, of having knowledge of the alleged offender's HIV status.

13. A negative HIV test result does not conclusively prove that the survivor was not exposed to HIV infection, as some alleged offenders might be in the "window-period" during which the commonly used enzyme-linked HIV test will not detect antibodies to HIV infection. But, as our calculations show, there is an extremely low (0.7%) chance that an alleged offender, who tests negative, will in fact be in the "window period". Simply put, knowledge of the alleged offender's HIV test result will in the overwhelming majority of cases be knowledge of his actual HIV status.⁶

⁵ Section 11(2).

⁶ These calculations are based on an estimated 1 700 new infections every day in South Africa (see <http://hivinsite.ucsf.edu/InSite?page=cr09-sf-00-02#ref4>) and an average window period of three months. The Centers for Disease Control (CDC) says that "[a]ntibodies generally appear within three months after infection with HIV, but may take up to six months in some persons." (see http://www.sfaf.org/aids101/hiv_testing.html#window_period) Based on such estimates, approximately 155 000 (or 3.3%) of the 4.74 million people the Department of Health estimates to be living with HIV/AIDS will test negative for HIV. Thus, of the estimated 2.09 million men aged 15-49 in South Africa who are living with HIV/AIDS, approximately 69 000 (or 3.3%) will test negative for HIV.

14. It is undisputed that the vast majority of alleged offenders are not apprehended within a short period. In this context, very few survivors of sexual assault will be in a position to use the information regarding the alleged offender's HIV test result in making choices regarding the initiation of antiretroviral therapy (ART) as post-exposure prophylaxis (PEP) of HIV transmission. However, more survivors will be able to use such information in making choices as to whether or not they continue with therapy, given that PEP lasts for 28 days. A positive test result will confirm a survivor's choice to initiate and persist with PEP, while a negative result may be an important consideration for those survivors who are struggling to deal with the side effects of the medication or who, for various reasons, are unable to complete the course of medication.

15. In some cases, knowledge of the offender's status will enable survivors to make choices about their sexual and/or reproductive lives.

Enabling survivors of sexual assault to exercise their right to psychological integrity

16. Knowledge is also important for "peace of mind". Survivors who are HIV negative at the time of the sexual assault will, on average, have to wait at least three months to determine whether or not they have indeed been infected as a result of the assault. With knowledge of a negative test result, a survivor can be significantly confident that she or he has not been exposed to HIV infection.

17. In our view, when understood in the context of access to PEP and the statistics above, a negative test result would indeed provide some peace of mind. Nevertheless, knowledge of the alleged offender's HIV status may, in certain circumstances, lead to a false sense of security. In order to

Of an estimated 23 660 000 adults aged between 15 and 49 in South Africa (See <http://www.aidsandafrika.com/country.html>), there are at maximum 11 830 000 men. Given that there are 2.09 million of whom estimated to be living with HIV/AIDS, there are an estimated 9.74 million men who are HIV-negative. Thus, of the estimated 11 830 000 men

know her or his own status with accuracy, a survivor must be tested herself or himself, regardless of the alleged offender's HIV status and it is critical that she/he is supported in doing so.

Infringement of alleged offender's rights

18. While we believe that the deliberations regarding the SALC proposals should be survivor-centred, we would be failing in our work as a human rights organisation if we did not express our concerns regarding the rights of alleged offenders. As and until an alleged offender is convicted in a court of law, he remains simply that—an “alleged offender”, not a convicted rapist. Indeed, section 35(3)(h) of the Constitution recognises that every accused person has the right to be presumed innocent.

19. With this in mind, we believe that the proposals go some way to providing procedural safeguards to protect the rights of the alleged perpetrator. For example, the application for compulsory HIV testing has to be considered by a magistrate by means of “in camera” proceedings. In addition, the alleged offender retains his right “to apply to the High Court for review in the event that an order for compulsory testing is not properly granted in accordance with the prescribed requirements”.⁷

20. Further, sufficient prima facie evidence must exist to satisfy the following three requirements, as set out in section 4(3) of the draft bill:

- (i) a sexual offence has been committed against the victim by the arrested person;
- (ii) in the course of such offence the victim may have been exposed to the body fluids of the arrested person; and
- (iii) no more than 50 calendar days have lapsed from the date on which it is alleged that the offence in question took place.

21. Of crucial importance is section 9 of the Bill, which limits the communication of the granting of the order to the following persons:

aged between 15 and 49 in South Africa, an estimated 9.809 million would be expected to test HIV-negative. Of these, 69 000—or 0.7%—will in fact be living with HIV.

- The survivor, or anyone acting on her or his behalf;
- The alleged offender;
- The investigating officer; and
- Those who are required to execute the order.

22. Finally, the results of the test (which have to be contained in a sealed record) may only be made available to the survivor (or the person acting on her or his behalf) and the arrested person, with section 10 of the draft bill providing that the test results “shall not be admissible in evidence in criminal or civil proceedings” and section 11 containing penalties for the abuse of the legislation or if the survivor maliciously discloses the offender’s HIV result to others. Regulation 8 of the draft bill notes that the offender may not refuse to receive the HIV test result. Yet it is highly doubtful that the SALC envisioned the offender to be forced to take cognisance of his HIV status. We therefore assume that the offender can exercise the choice whether he would like to open the sealed records and inform himself of his test results. This however needs to be made clear in the Regulations.

23. As stated above, these the proposals go some way in providing procedural safeguards to protect the rights of the arrested person. In our view, however, they do not go far enough.

Broader policy considerations

24. We understand that many organisations are concerned about the potential harm that such a statutory intervention may bring. In general, common concerns deal with the following issues:

- Undermining existing public health measures dealing with HIV/AIDS, such as voluntary counselling and testing (VCT) and PEP, by diverting attention away from the real issues on HIV/AIDS and sexual violence;

⁷ SALC report at xi.

- Diverting human and financial resources away from other more crucial interventions; and
- The “slippery-slope” argument, which says that permitting the compulsory testing of alleged offenders opens up the door to dangerous coercive practices.

25. The first two concerns can be addressed in large measure by ensuring that the SALC proposals form part of a broader package of survivor-focused legislative interventions, rather than the subject of a separate piece of legislation. In our view, such provisions would be more appropriately located in the Sexual Offences Act, alongside provisions regulating the provision of other HIV/AIDS-related interventions. By placing the issue of compulsory testing of alleged offenders in a broader context which focuses on the rights of the survivor (without sacrificing the rights of the alleged perpetrator), the proposals may in fact allow for the integration and strengthening of existing public health measures dealing with HIV/AIDS.

26. In large part, significant resources will only be expended if there is a great demand for the compulsory testing of alleged offenders. Where there is no demand, resources will not be expended. In our view, great demand would justify the allocation of resources. Regardless of demand, however, certain resources will have to be allocated, such as those necessary for the training of counsellors. In our view, however, such training would merely be a small addition to that already being provided in relation to other HIV/AIDS interventions, such as VCT and PEP.

27. In our view, the “slippery-slope” argument can be overstated. The basis of our qualified support for the proposals is that the compulsory testing of alleged offenders does not take place in a vacuum, but rather a context informed by high levels of sexual violence wherein survivors must be put in the position where they are best able to make choices that affect their physical, mental and reproductive health. The context is further informed by the understanding that a failure to provide for such choices and to allow

survivors to exercise their rights to bodily and psychological integrity and rights of access to health care services further entrenches gender inequality.

28. Significantly, the alleged offender is tested (and his right to privacy and bodily integrity violated) not as a precursor to any further violation of his rights, but to protect the rights of the survivor. With this in mind, the compulsory testing of alleged offenders cannot open the door to dangerous coercive practices such as the compulsory testing of pregnant women for purposes of the prevention of mother-to-child transmission of HIV (PMTCT) and the express criminalisation of harmful HIV-related behaviour. In both these cases, the testing is for the purpose of further violating the rights of the person who is tested. We oppose such forms of compulsory testing and believe them to be unconstitutional.

The bill

29. Given the position taken by the ALP, that legislation should appropriately form part of the Sexual Offences legislation, we do not intend to deal extensively with the provisions contained in the current draft. We do wish however to highlight some of our concerns since they reinforce the arguments made elsewhere in this submission.

30. The bill has chosen to use the language of victimhood by consistently referring to the survivor of sexual assault as a “victim”. It would be appropriate to amend this terminology to refer to the people who have been sexually assaulted as “survivors”.

Section 5(2)

31. This section does not make provision for the alleged offender to undergo pre-test counselling – it merely states that once the order has been granted, medical staff are authorised to remove blood samples for testing from alleged offenders. It is our view that any law should provide for pre-test counselling for the alleged offender, in order to obtain the informed consent of the offender, where this is possible; only where he refuses to

undergo counselling or where he declines to give consent after counselling, should the samples be taken without his consent. Such an approach will minimise the infringement of the rights of an alleged perpetrator. The same principle should apply to post-test counselling. The current bill makes no provision for the alleged perpetrator to receive post-test counselling. Such counselling should be made available to an alleged perpetrator, particularly in circumstances where he has given his consent to the test.

Section 5(3)

32. The investigating officer is authorised to hand over the sealed record to the survivor or interested party, along with a notice. No provision is made for the survivor to receive any counselling or information in addition to that contained in the notice. A positive test result delivered to a survivor, without the provision of appropriate information and support, could have serious implications for his or her mental and physical well-being.

33. We recommend that the police should be obliged to advise the survivor that she or he should seek counselling, regardless of the result of the test, and specific information should be provided to survivors concerning the availability of counselling and other support services.

Conclusions

34. We thank you for this opportunity to make representations. As already stated, our qualified support for the SALC proposals is based on our understanding that the proposed changes to the law recognise the importance of balancing the rights of survivors of sexual assault to choose whether or not to learn the alleged offender's HIV status, with the rights of the offender. In our view, a statutory provision that both adequately balances such considerations and forms an integral part of a broader package of survivor-focused legislative interventions is not only constitutionally defensible but also desirable from a policy and public health perspective. The Bill does not yet achieve this. Accordingly, we

recommend that Parliament not address the Bill in its current form, but refer it back to the relevant Department so that:

- the issue of survivor's empowerment and choice is more appropriately dealt with as part of comprehensive legislation to address sexual offences;
- the practical realisation of this choice should be more fully integrated into public health services on HIV and the full range of state services for survivors of sexual assault.

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