

Submission by the AIDS Law Project
to the Commission on Gender
Equality on the
SEXUAL OFFENCES BILL



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About the AIDS Law Project

- ❑ The ALP is a human rights and advocacy organisation, which provides free advice and litigation services to advance the rights of people living with HIV.
- ❑ In line with our mandate and expertise, our submission deals only with HIV-related aspects of the Bill.
- ❑ We believe that other aspects of the Bill are adequately addressed in submissions by members of the Sexual Offences Bill Working Group.

PCR HIV tests

- ❑ There are two types of HIV tests:
 1. Antibody tests (e.g. ELISA and rapid tests): window period of 3 weeks to 6 months
 2. Tests for the HI virus itself (PCR test): average window period of 11 days
- ❑ PCR tests are now affordable and already used in state hospitals to diagnose HIV in infants under 18 months.
- ❑ The ALP argues that the Bill should provide for access to HIV PCR tests for all survivors of rape and sexual assault.

PCR tests cont.

- The benefit of providing access to PCR tests:
 - There is a “window period” between the time when a person contracts HIV and when tests can diagnose HIV
 - HIV is most infectious during the window period
 - If the perpetrator is HIV positive, the survivor will not automatically contract HIV
 - For peace of mind, the survivor needs to know whether she has contracted HIV from an assault as soon as possible

Comprehensive package of care

- ❑ The Bill should require the state to provide the following services to survivors:
 - ❑ PEP
 - ❑ Emergency contraception
 - ❑ Prophylaxis and treatment for STD's
 - ❑ In-depth and on-going counselling
- ❑ The importance of counselling:
 - ❑ Improves adherence to PEP
 - ❑ Allows the survivor to make informed decisions

Designated health facilities

- ❑ Sec 31 of the Bill:
 - ❑ Survivors must report rape to police or designated health facility to access PEP
 - ❑ PEP will only be available at designated facilities
- ❑ Problems:
 - ❑ PEP is emergency medical treatment and must be started within 72 hours of rape
 - ❑ There should be no bureaucratic barriers to accessing PEP, as this would violate the constitutional right to emergency medical treatment
- ❑ Recommendation:
 - ❑ Survivors should be able to report the assault at any health facility to access PEP
 - ❑ ALL medical facilities should provide PEP services
 - ❑ Facilities that cannot immediately provide PEP should provide 3-day starter packs and a referral to the nearest facility with full PEP services

Compulsory testing of alleged offenders at the instance of survivors

- ❑ In principle we support the right of survivors to ascertain the status of alleged offender.
- ❑ But proper counselling and information is vital to making a decision to request the testing of an offender and to understanding the implications of the test result.

Compulsory testing at the instance of survivors cont.

- ❑ Example of danger of providing compulsory testing without adequate counselling:
 - ❑ If the offender tests negative, the survivor may decide not to start PEP without understanding that the perpetrator may be in a window period (when HIV is most infectious).
- ❑ Without guarantees of proper counselling and support, we cannot support compulsory testing.
- ❑ If compulsory testing is introduced, PCR tests should be used (which will shorten, but not eliminate the window period).
- ❑ Penalties for malicious use of compulsory testing: serious risk of secondary victimisation of the survivor, given the low conviction rates in rape cases.

Compulsory testing at the instance of the police

- ❑ Serious violation of the offender's right to privacy.
- ❑ Aim of provision unclear: will not provide any evidence on whether the person knew their HIV status at the time of the alleged offence.
- ❑ Unlikely to be Constitutional and should be removed entirely

The definition of pornography and sex education

- ❑ High rates of pregnancy and HIV among South African teenagers: urgent need for safer sex education.
- ❑ Definition of pornography in the Bill: prohibits display of sexually explicit material to children under 18.
- ❑ May discourage safer sex education in homes, schools and other institutions.
- ❑ Recommendation: definition of pornography in Act should specifically exclude materials used for legitimate safer sex education.

In summary

- ❑ We cannot support the current draft of the Bill as it does not adequately protect the rights of rape survivors, and contains sections which are potentially unconstitutional.
- ❑ We do however support the fact that, unlike previous drafts, this Bill does not contain provisions creating special crimes related to the wilful transmission of HIV:
 - ❑ Unnecessary as already dealt with by Common Law
 - ❑ Likely to increase stigma towards people living with HIV

Thank you for the opportunity to make a submission on this very important piece of legislation!



A copy of our submission to the Parliamentary Portfolio Committee on Justice and Social Development is available on our website:

www.alp.org.za