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**SUBMISSION ON  
CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS)  
AMENDMENT BILL**

**PORTFOLIO COMMITTEE ON JUSTICE  
AND CONSTITUTIONAL DEVELOPMENT**

**15 August 2006**

**AIDS Law Project**

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**Introduction**

1. We would like to thank the Portfolio Committee on Justice and Constitutional Development for the opportunity to make a submission on the new draft version of the Sexual Offences Bill.
2. The AIDS Law Project (ALP) is a human rights research and advocacy organisation, which provides free legal advice and litigation services to advance the rights of people living with HIV/AIDS. It aims to use the law to ensure that people living with HIV/AIDS are able to access health care services, in particular HIV prevention and treatment services, to improve access to the legal system; to protect fundamental rights; and to combat HIV-related discrimination and human rights violations. The ALP has been involved in research on HIV, the law and human rights since 1993, and regularly provides clients with legal advice and assistance related to many of the issues raised in this submission. The ALP also has a history of engaging with the drafting of the Sexual Offences Bill. We have participated in the Sexual Offences Working Group, as well as collaborating with organisations such as the Women's Legal Centre lobbying Parliament against the inclusion of the harmful HIV-related behaviour clause.
3. As our organisation's mandate and area of expertise involves issues of HIV and human rights, this submission addresses only the HIV-related aspects of the Bill. We also believe that other aspects of the Bill have been adequately dealt with in the submission by other members of the Sexual Offences Bill Working Group.
4. The ALP cannot support the present draft of the Bill, as we are of the opinion that it contains provisions which are unconstitutional and which undermine the rights of survivors of rape and sexual assault. However, we are supportive of the fact that, unlike earlier drafts, the Bill does not include provisions creating specific crimes relating to the wilful transmission of HIV, which our organisation opposes, for reasons set out in our previous submissions to the Portfolio Committee on Socio-Economic Development<sup>1</sup>. We applaud the decision to remove these sections.

5. The arguments and recommendations in this submission are based on human rights considerations with an emphasis on women’s health and equality. Our submission focuses on the following two areas in the Bill:
  - Chapter 5 of the current Bill that deals with the “services for victims of sexual offences and compulsory HIV testing of sexual offenders”.
  - The definition of “pornography”.
  
6. In summary, we submit detailed arguments and recommendations under the following headings:
  - PCR HIV-tests
    - We argue for the provision, at state expense, of Polymerase Chain Reaction (PCR) HIV-testing for all survivors of sexual assault (including but not limited to rape).
    - Unlike other HIV tests, which have a window period of 3 weeks to 6 month, PCR tests can diagnose HIV within 11 days. PCR tests are now affordable, and can provide peace of mind and certainty to survivors who fear that they may have been exposed to HIV by rape or sexual assault.
    - PCR tests are now affordable, and are already being used in state health care facilities.
    - PCR tests should also be used if the provisions for the compulsory testing of alleged offenders are legislated.
  - A Comprehensive package of Care
    - We argue for the provision, at state expense, of a comprehensive package of care to all survivors of sexual assault.
  - Designated public health establishments
    - We argue for the removal of the requirement of designation for health care facilities to provide rape services, and the provisions of PEP services at all Health Care Facilities.
    - Facilities which are not currently equipped to provide PEP should be able to provide at least a 3 day “starter pack” and a referral to the nearest facility offering full PEP services.
  - Application for compulsory HIV testing of alleged offenders by survivors

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<sup>1</sup> See the National Working Group on the Sexual Offences Bill, Submission to the Parliamentary Joint Ad-hoc Committee on Socio-Economic Development, 30 October 2005.

- We raise concerns about the inclusion of such provisions in the absence of the provision of adequate counselling and support for survivors.
- We are also concerned that the provisions related to penalties for the misuse of the compulsory testing creates the potential for secondary victimisation of the rape survivor.
- We suggest that the provision of PCR tests to all survivors will provide the same peace of mind as would be obtained from testing the alleged perpetrator.
- Application for compulsory HIV testing of alleged offenders by a police official
  - We argue for removal of the sections that enable an official to apply for testing an alleged offender for HIV.
- Sexual and reproductive health education
  - We propose the reworking of the definition of pornography so that it does not inhibit sex education and life skills programmes.

## Chapter 5

In this section we make the following three points:

- We support in principle the right of survivors of sexual assault to ascertain the status of the alleged offender;
  - We are of the view that this right can only be properly realised if certain conditions are met, such as limited incursion of the rights of the alleged offender, the provision of PCR HIV-tests, and the provision of a full package of support services for the survivor; and
  - We cannot support the provisions for compulsory testing in the absence of these guarantees being met.
7. We wish to refer the Portfolio Committee to the submission we made to it on the “Compulsory HIV Testing of Alleged Sexual Offenders Bill”<sup>2</sup> dated 6 February 2003, and which is attached to this Submission. In the former submission we set out a variety of reasons why, in principle, we support the view that legislation that allows survivors of sexual assault the right to ascertain the HIV status of alleged

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<sup>2</sup> B10-2003

perpetrators is an important aspect of empowerment and choice, especially for women survivors of rape and sexual assault.<sup>3</sup>

8. We note that the current Sexual Offences Bill makes no provision for psycho-social support for rape survivors, and does not commit the state to providing resources for such services. This is of great concern to us, as medical, psychological and social support for rape survivors is of vital importance in dealing with the trauma of rape and its aftermath. Without in-depth counselling to enable the survivor to understand the complexities of HIV transmission, including window periods and the risk associated with different types of exposure, it will be difficult for most survivors to make an informed choice about whether or not to apply for compulsory testing of the alleged offender, and to understand the implications of the test result, whether the alleged offender tests positive or negative for HIV. For example, if an alleged perpetrator tests HIV negative, a survivor who has not had access to proper counselling may make a decision to prematurely terminate PEP, without understanding that the perpetrator may be in a window period, with the result that the survivor may contract HIV.
  
9. Under appropriate circumstances, we support survivor-initiated testing in principle but we submit the following for the Committee's consideration:

*PCR HIV-tests*

10. At present, most state facilities use ELISA, Western Blot or rapid HIV tests, which test for the presence of HIV anti-bodies. There is one type of test, the Polymerase Chain Reaction (PCR), which tests for the presence of the virus RNA or DNA directly. The ELISA, Western Blot and rapid tests (all antibody tests) have window

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<sup>3</sup> In particular, we noted the following:

- “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.
- Secondly, it could, again in appropriate circumstances, enhance psychological integrity and ‘peace of mind’.

periods<sup>4</sup> of between 3 weeks and 6 months, while a PCR test can detect HIV on average within 11 days of exposure. Due to the long window period associated with antibody tests, rape survivors are subjected to the trauma of not knowing whether they have contracted HIV from the rape for several months.

11. In addition to this, recent medical research has shown that HIV is most infectious during the window period<sup>5</sup>, and as a result, given the risk of a perpetrator being in a window period, knowledge of the perpetrator's test result with an antibody test would not greatly assist the survivor in making choices with regard to PEP. Using a PCR test to ascertain the alleged perpetrator's status would reduce the window period, but not eliminate it entirely, and it is therefore not advisable for survivors to base a decision on whether or not to commence PEP on the basis of the alleged perpetrator's HIV test result. In other words, the benefit of the compulsory testing provisions would solely be to provide peace of mind and certainty to survivor. However, if PCR tests were made available to all survivors of rape and sexual assault, survivors could obtain this peace of mind by being able to ascertain, within 11 days of the assault, whether or not they have contracted HIV.

#### Recommendations:

- Change the current definition of HIV-test to the following: “means any validated, medically recognised and *most virally sensitive* test for determining the presence or absence of HIV infection in a person”. PCR tests should thus be made available to the survivor of sexual assault, at state expense<sup>6</sup>, within 12 days of the assault in order to ascertain whether she or he contracted HIV from the assault.
- PCR tests and not antibody HIV tests should be used to test alleged offenders, if the provisions for compulsory tested are included in the eventual Sexual Offences Act.

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- 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.”

<sup>4</sup> After someone is infected with HIV, it can take up to 3 months for it to show up in an HIV antibody test. This is because the body takes some time to develop antibodies to try and fight off the virus. An HIV anti-body test might check for the presence of HIV antibodies in your blood and might give a false negative result in the three-month period. These three months are commonly called “the window period”.

<sup>5</sup> Galvin, S.R. and Cohen, M.S. (2004) “The role of sexually transmitted diseases in HIV infection”, *Nature Reviews Microbiology*, 2 (1).

<sup>6</sup> PCR tests now cost on approximately R250.00 per test, making them affordable for use in the public sector. These tests are currently used to diagnose HIV in infants under the age of 18 months in all State hospitals.

*Offences and penalties related to making an application for compulsory testing of an alleged offender with malicious intent*

12. Section 33 of the Bill provides for the application of an interested person for HIV testing of an alleged sexual offender, and Section 41 sets out the penalties and offences for abusing the previous section. While we understand the concern that the provisions of Section 33 (1) may be used maliciously to ascertain the HIV status of a person who has not committed a sexual offence, we are very concerned about the implications of Section 41. Research conducted by the South African Law Commission<sup>7</sup> has shown the extremely low conviction rates of rape:

This proportion of convictions in relation to the reported cases two years after the report is similar for different crime categories. There is a conviction in approximately one in ten reported cases of rape of a girl under 18 (9%) and in a similar proportion of reported murder cases (11%). Less than one in twenty perpetrators of reported adult rape (5%) or aggravated robbery (3%) are convicted. Three-quarters of cases involving murder, rape and robbery with aggravating circumstances have not even made it to court after two years.<sup>8</sup>

In these circumstances, Section 41 would allow a perpetrator who could not be convicted due to lack of evidence to lay a charge against a complainant who used the provisions of Section 33 (1) to ascertain his HIV status. This would further traumatise the survivor by drawing her into another lengthy court case, this time as the accused, forcing her to incur costs for legal representation, and preventing her from putting the original ordeal of rape behind her. The potential for Section 41 to be used by sexual offenders to further victimise a rape survivor is so great that we cannot support the inclusion of this provision.

Recommendation: The rights of the survivor to know her perpetrator's HIV status must be realisable without having to run the risk of further victimisation. Currently section 33(1) does not address our concerns of secondary victimisation and thus cannot be supported.

*Comprehensive package of Care*

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<sup>7</sup> Now the South African Law Reform Commission

<sup>8</sup> South African Law Commission Research Paper 18 "Conviction rates and other outcomes of crimes reported in eight South African police areas", Project 82, Available <http://www.law.wits.ac.za/salc/research/rp18.doc>

13. The current Bill provides for a rape survivor to receive PEP, and to be given “medical advice and assistance regarding the possibility of other sexually transmitted infections” (section 31(3)(ii)). It is very important that rape survivors are also offered emergency contraception to prevent pregnancy after rape and a broad-range anti-biotic that will prevent the risk of contracting other infections from the rape. We believe that the proposed legislation on sexual offences 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, and explicitly provides for a number of vital medical and social services.

Recommendation: Include a subsection under s.31(1)(a) that reads as follows: “be provided with emergency contraception where there is a risk of an unwanted pregnancy, access to medicines necessary for the prevention of other sexually transmitted infections, and on-going psycho-social support and counselling”.

*Designated public health establishments*

14. Section 31 of the current Bill makes the provision of PEP to the rape survivor subject to the reporting of the alleged sexual offence to a “designated health establishment” or the laying of a charge with the South African Police Services. We wish to stress that the medical treatment and care of a rape survivor should under no circumstances be conditional on the laying of a criminal charge by the survivor, as a number of survivors cannot or do not want to institute legal proceedings against a perpetrator in fear of further harm coming to herself. Nevertheless, we recognise that the Bill does not make such reporting a prerequisite for accessing the necessary health care services, allowing instead for the reporting to be made to a designated health establishment. This, however, is also problematic. In our view, the provision of PEP should not be contingent on reporting to a “designated health establishment”, because of the limited reach of designated facilities. There is no reason why reporting (for the purposes of PEP, not for criminal charges), if indeed a requirement, should not be permitted at any health establishment, whether public or private.
15. It is vital that the Bill makes provision for services for rape survivors in line with “emergency medical treatment” as set out in the South African Constitution,

legislation and jurisprudence. Section 27(3) of the Constitution<sup>9</sup> and section 5 of the National Health Act<sup>10</sup> make it clear that no-one may be refused “emergency medical treatment”. The Constitutional Court interpreted this right to emergency relief in the *Soobramoney* case as follows:

Section 27(3) itself is couched in negative terms - it is a right not to be refused emergency treatment. The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate medical attention ... should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment.<sup>10</sup> What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.<sup>11</sup>

16. Undoubtedly PEP constitutes emergency medical treatment, as it will reduce the risk of the rape survivor contracting HIV from the rape, which is nothing short of a “sudden catastrophe which calls for immediate medical attention”. It is our submission that all health care facilities in South Africa, whether public or private<sup>12</sup>, should provide PEP to survivors of rape and sexual assault, free of charge. Facilities that do not immediately have the capacity to provide full PEP services should provide a 3-day “PEP starter packs”, followed by a proper referral to the nearest facility providing full PEP services.
  
17. We strongly object to the provisions in the Bill that limit PEP to designated health care facilities, as this restriction would run the danger spelt out in the *Soobramoney* case of becoming “frustrated by reason of bureaucratic requirements or other formalities”. These provisions will inevitably limit the places that rape survivors would be able to access PEP within the crucial 72-hours time-frame after the rape or sexual assault. This is of considerable concern in rural areas, where travelling to a “designated” health care facility could be particularly time-consuming and problematic. PEP “starter packs” must be available at all facilities and the full package of care must immediately be made available at all tertiary and district hospitals. Community

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<sup>9</sup> “No one may be refused emergency medical treatment”

<sup>10</sup> “A health care provider, health worker or health establishment may not refuse a person emergency medical treatment.”

<sup>11</sup> *Soobramoney v Minister of Health, Kwa-Zulu Natal*, 1997 (12) BCLR 1696 (CC).

Health Centres should soon follow. All other facilities should have the right to self-select to provide these services in the short to medium term. It is vital that within a reasonable period these services are universally available.

Recommendations:

- Include provisions in the Bill that direct all health care facilities, whether public or private, to provide free “3-Day PEP Starter packs” and the necessary referrals. Referrals should be made to the nearest facility that can provide the full course of PEP as well as other medical treatment and psycho-social services if required;
- Remove the sections in the Bill that relate to the designation of health facilities; and
- Include provisions in the Bill that direct all district and provincial hospitals to offer a free of charge, full package of care to rape survivors, which includes psycho-social support and the full PEP regimen.

*Application for compulsory HIV testing of an alleged offender by a police official*

18. Part 3 of the Chapter 5 of the Bill empowers an “investigating officer” to make an application for an alleged offender to be tested for HIV. The Bill does not make it clear what the exact purpose of this new provision is, other than Section 37(b), which notes that such HIV-test results will assist an investigating officer “to gather information with the view of using them as evidence in criminal proceedings”. This is radical departure from the provisions in the “Compulsory HIV Testing of Alleged Sexual Offenders Bill” that provided in its Section 7 as follows:

“Inadmissibility of HIV test result as evidence in criminal or civil proceedings

The result of an HIV test performed on the body specimens of an alleged offender in terms of this Act is not admissible as evidence in criminal or civil proceedings.”

We note that Section 35 (1) refers to the “sexual offence or offence”, which suggests that the provisions will be used in cases other than those involving sexual offences. This

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<sup>12</sup> The state may be required to reimburse private facilities for this. It is vital that PEP is available at every facility and at no charge at point of delivery.

appears to suggest that the draft legislation is attempting to address issues of wilful transmission or negligent HIV-transmission<sup>13</sup> of HIV, as it is difficult to imagine any other criminal offence (besides sexual offences) in which the perpetrator's HIV status would be material. If this is the case, we submit that such evidence is tenuous, for the following reasons:

- In rape cases, testing the alleged perpetrator for HIV after his arrest will not in any way prove that he knew his HIV status at the time of the rape.
- In wilful transmission cases involving consensual sexual relationships, it will not prove either that the person in question knew his or her status at the time of the sexual relationship, or that the complainant in the matter contracted HIV from the accused, and not from a previous relationship. In order to successfully convict a person of wilful transmission, the state would have to prove: a) that the accused knew his or her HIV status before or during the sexual relationship, b) that the accused knew that he/she could infect the sexual partner and took no steps to inform his or her partner or practice safer sex; and c) that the accused in fact intended to infect the partner. The results of a compulsory HIV test, as envisaged by the Bill, will certainly not provide any of the required evidence.
- Due to the high levels of stigma in South African society, and the false but widely-held view that people with HIV/AIDS deliberately and maliciously try and infect others, the person subjected to compulsory testing could be open to discrimination and maltreatment from correctional service and judicial authorities if his HIV-status is recorded and disclosed to others.

19. According to Section 40, entitled “Confidentiality of HIV results obtained”, the alleged offender's results may only be communicated to the investigating officer if he or she requested it. Troublingly, there are no safeguards for the on-going confidentiality of the HIV results other than Sub-section 2, which simply leaves it to the presiding officer's discretion to make an order that will keep the alleged offender's HIV results confidential. In addition, the current formulation of Section 35 foresees that any relevant investigating officer may apply for the HIV testing of any offender, as Sections 35(1), 35(2)(a) and 35(3)(a) provide for “a sexual offence or

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<sup>13</sup> According to the Preamble of the Bill it will “[provide] law enforcement agencies with new investigative tools when investigating sexual offences or other offences involving the HIV status of the perpetrator”

offence”. It is thus foreseeable that the provisions that give investigating officers the opportunity to obtain alleged offenders’ HIV status could be abused, while there are not enough safeguards in place to ensure that the offender’s results remain confidential.

**Recommendation:** Due to a number of wide-ranging difficulties with this section, remove Part 3 from the Bill and all other sections that give investigating officers the opportunity to apply for an HIV test of the alleged sexual offender. It is unlikely that the section will pass constitutional muster and no amount of redrafting is likely to remedy the situation.

### **Sexual and reproductive health education**

20. We are concerned about the implications that the sections of the dealing with pornography may have for safer sex education. South Africa has unacceptably high rates of teenage pregnancy and HIV infection amongst teenagers and children. The Reproductive Health Research Unit of Wits University conducted one of the largest national surveys amongst children and youth in South Africa and interviewed more than 11 904 young people. Its findings provide an important insight into the lives of young people. The study found that:

- 8% of sexually experienced youth reported having sex at 14 years or younger. Youth in rural informal areas were significantly more likely to report that they had sex at an early age in comparison to youth living in formal urban areas.
- 49% of sexually experienced women reported ever having been pregnant;
- 66% of the women who reported having been pregnant, said that they did not want to be;
- Of women who reported having sex in the last 12 months before the interview, 57% reported using a method of pregnancy prevention.<sup>14</sup>

21. From the above survey, it is clear that children are having sex at a young age and that there are a high number of unintended pregnancies. Its research findings point towards the fact that HIV prevention messages are either not working, or are not working well enough and that children are engaging in unprotected and therefore

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<sup>14</sup> Pettifor A.E, Rees H.V, Steffenson A, Hlongwa-Madikizela L, MacFail C, Vermaak K, Kleinsmidt I *HIV and Sexual Behaviour among South Africans: a national survey of 15-24 year olds* Johannesburg: Reproductive Health Research Unit, University of the Witwatersrand, 2004.

risky sexual behaviour, which increases their risk contracting HIV. It is vital that all children receive “life skills training” which should include sex education, and in particular how to prevent HIV and pregnancy. Parents and teachers should be encouraged to discuss sex openly with children, and to draw on a variety of educational materials and illustrations.

22. Section 22 under Chapter 3 entitled “Exposure or display of or causing exposure or display of pornography to child”, read together with the definition of pornography provided under Chapter 1 of the Bill, can give rise to a situation where an educator or parent may be charged with an offence for providing safer sex education to children. Effective safer sex educational materials will inevitably need to show images or descriptions of people “engaged in a sexual act” or materials that will fall into the category “sexual conduct” such as “masturbation”, “male genital organs in the a state of arousal or stimulation”, stimulation of the female breast and “display of genital organs” as provided in the definition of “pornography” and “sexual conduct” in the Bill.
23. While it could be argued that this section allows for the lawful exposure of children to such materials, these provisions do not go far enough to provide peace of mind to parents and educators. The law needs to provide clarity and certainty, especially if its breach results in criminal sanctions. We cannot expect health educators or counsellors to execute their jobs and be comfortable providing sex and life skills education with the vague defence that what they were doing was not unlawful.
24. The Bill defines a child as “a person below the age of 18 years”, and thus effectively prohibits the dissemination of safer sex education to a group of people who are at a tremendously high risk of contracting HIV.
25. This is clearly not the intention of the Bill, but it could have the effect of discouraging legitimate sex education in homes and schools.

Recommendation: Narrow the definition of pornography as well as revising the formulation of Section 22 to exclude safer sex materials and educational initiatives.

**Conclusion**

26. In conclusion, in this submission we have argued that the Bill needs to address the most pressing concerns of rape survivors, which includes the assurance of comprehensive medical and support services after rape and sexual assault. We wish to reiterate that under appropriate circumstances, we support survivor-initiated testing in principle. However, we submit that the Bill in its current form does not provide the services and support necessary for survivors to make an informed choice about whether or not to apply for compulsory testing of the perpetrator. We are also concerned that a number of sections will fail to pass constitutional muster.
27. We thank you again for the opportunity to make a submission on these important issues. Please do not hesitate to contact us if you have any queries.

Yours sincerely

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