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

17 August 2006
Chloe Hardy and Marlise Richter
AIDS Law Project
011 356 4100
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.
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 HIV 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