

# **Amendments to the draft Regulations of the Criminal Law (Sexual Offences and Related Matters) Amendment Act**

The Gender Health and Justice Research Unit (GHJRU) and the Women's Legal Centre (WLC) recently submitted suggestions to the Portfolio Committee on Justice & Constitutional Development concerning the draft Regulations of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 (Sexual Offences Act). Both organizations are pleased that many of their suggestions have been accepted and revisions have been made to the draft Regulations. This brief provides an overview of the amendments proposed by the GHJRU and the WLC that were incorporated into the final version of the Regulations.

## ***Background***

A number of the suggestions made to improve the draft Regulations focus on a new compulsory HIV testing service for sexual offence victims featured in the Sexual Offences Act. This service will allow victims of sexual offences and investigating officers to apply to have an alleged offender undergo compulsory HIV testing. The GHJRU and the WLC have repeatedly pointed out that while the intentions of the compulsory HIV testing service are good, major problems exist in both its effects and implementation.<sup>1</sup> All of these concerns were made clear in previous submissions to

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<sup>1</sup>Roehrs, Stefanie. "Positive or Negative?: Compulsory HIV Testing of Alleged Sexual Offender." SA Crime Quarterly 20 (2007): 31-36.

Roehrs, Dr. Stefanie. "Implementing the Unfeasible: Compulsory HIV Testing for Alleged Sexual Offenders." SA Crime Quarterly 22 (2007): 27-32.

Law Reform Examiner. Gender, Health, and Justice Research Unit. Cape Town, 2008. 1-8.

the Portfolio Committee on Justice & Constitutional Development and highlighted again in the suggestions for the improvement of the draft Regulations.

Other suggestions made concerned post-exposure prophylaxis (PEP), which is an anti-retroviral medication that may prevent HIV infection if taken within 72 hours of exposure to HIV.

***Information provided to rape victims – the “notice of available services”***

One of the suggestions made by the GHJRU and the WLC was to include information about the window period<sup>2</sup> and its implications on the form detailing the services available to victims. This form is given to victims when they report the sexual offence to a medical practitioner or nurse or when they lay a charge concerning the sexual offence to a police official. The original version of this form did not include even one word or phrase about the window period. The GHJRU and the WLC believe that this information is extremely important because it may help victims realistically interpret the results of their alleged offenders HIV test. This suggestion was accepted and the following information was included in the revised version of the available services form:

“The test result from a compulsory HIV test **may not be reliable** because the alleged sexual offender may be in the window period while he or she is tested for HIV. This means that the result **may show**

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<sup>2</sup> Window period- the first three to six weeks after a person has been infected with HIV when the virus cannot be detected by an HIV antibody test. This causes an HIV positive person to test negative for HIV.

**that the alleged offender is negative although he or she is, in fact, HIV positive.” (Regulation 2 (2))**

Also included was a statement encouraging the victims, themselves, to get tested for HIV in order to emphasize that the HIV test results of their alleged offenders do not necessarily reflect their own status.

Another addition to the “available services form” is a section stressing the importance of using PEP as soon after the sexual offence has taken place as possible. The urgency of starting PEP was not stressed in the original form. The GHJRU and the WLC suggested that this be highlighted in order to encourage victims to obtain **PEP as soon as possible** but **latest** within 72 hours after the attack.

A further recommendation was to include information about the risk of other sexually transmitted infections on the notice of services available to victims. This information would help victims seek the appropriate medical care. This suggestion was accepted by the Department of Justice and Constitutional Development and a section about other sexually transmitted infections is now included in the revised version of the notice of services available to the victim.

### ***More than just a notice***

Another change made concerns **how** the victim is informed of the services available to them, including PEP and compulsory HIV testing. The draft Regulations stated that this information could be passed to the victims in the form of a notice given to them by a police official, medical practitioner, or nurse. The GHJRU and the

WLC believed that this was inadequate and that the information should additionally be verbally explained to the victim. The suggestion was accepted and the Regulations now stipulate that the information about available services should be given to the victim “verbally and by way of notice.”

### ***Misuse of compulsory HIV testing service***

Furthermore a proposed amendment to a section featured on both the notice of services available to the victim and the victim’s application for compulsory HIV testing was accepted. This provision detailed the consequences of the misuse of the compulsory HIV testing service, including criminal proceedings and civil litigation. The GHJRU and the WLC fear that such information may lead to the criminalization of victims and may intimidate victims, deterring them from reporting sexual offences. The GHJRU and the WLC therefore argued that this information should be either completely omitted from the notice of available services or at least should not be placed at the beginning of the victim’s application form for compulsory HIV testing. In the final draft of the Regulations, this section has been omitted from both forms.

### ***Ambiguous time frames***

Other changes made to the Regulations are the time frames included in the document. In the draft Regulations, the ambiguous time frame “as soon as is reasonably practicable” was used. The GHJRU and the WLC suggested that specific time frames be stipulated in order to avoid delays. The Regulations now either state specific time frames or state that particular action must be taken in “the time frame stipulated by the magistrate”.

### ***Discrepancy between the Act and the Regulations***

The GHJRU and the WLC also noted a discrepancy that existed between the draft Regulations and the Sexual Offences Act that has since been corrected as a result of their submission. The draft Regulations stated that the victim may disclose the alleged offender's HIV test results to his/her sexual partner, doctor, and support persons. This was contradictory to section 37 (1) of the Sexual Offences Act, which sets out that the HIV test results can only be disclosed to:

- the victim or interested person
- the alleged offender
- the investigating officer
- a prosecutor and any other person who needs to know the test results for purposes of any civil proceedings or an order of court.

The revised Regulations are now in concurrence with the Sexual Offences Act on this issue.

### ***Conclusion***

Although the GHJRU and the WLC believe that the Regulations still have room for improvement, the organisations are happy that a number of the suggestions made have been accepted and believe that these changes will have a positive impact on service delivery for rape victims who utilise these new services.

