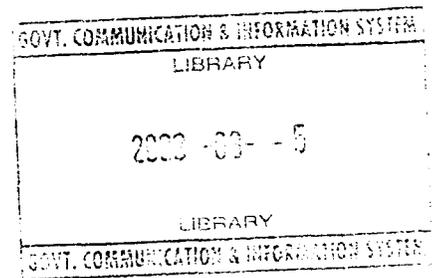


REPUBLIC OF SOUTH AFRICA

COMPULSORY HIV TESTING OF ALLEGED SEXUAL OFFENDERS BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill
published in Government Gazette No. 25029 of 21 February 2003)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)



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BILL

To provide for a speedy procedure by which a victim of an alleged sexual offence may apply for the compulsory HIV testing of the alleged offender; and for the disclosure of the test results to the victim and the alleged offender; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context indicates otherwise—
 - “application” means an application in terms of section 3(1); 5
 - “body fluids” means any body substance which may contain HIV but does not include saliva, tears or perspiration;
 - “body specimen” means any body sample which can be tested to determine the presence or absence of HIV infection;
 - “HIV” means the Human Immuno-deficiency Virus; 10
 - “HIV test” means any validated, and medically recognised test for determining the presence or absence of HIV infection in a person;
 - “interested person” means any person who has a material interest in the well-being of a victim, including a spouse, family member, care giver, friend, counsellor, medical practitioner, health service provider, social worker or teacher of such victim; 15
 - “investigating officer” means a member of the South African Police Service responsible for investigating an alleged sexual offence which relates to an application, or any member acting under his or her command;
 - “magistrate” includes an additional magistrate and an assistant magistrate; 20
 - “medical practitioner” means a person registered as a medical practitioner in terms of the Health Professions Act, 1974 (Act No. 56 of 1974);
 - “Minister” means the Cabinet member responsible for the administration of justice;
 - “nurse” means a person registered as a nurse in terms of the Nursing Act, 1978 25 (Act No. 50 of 1978);
 - “prescribed” means prescribed by regulation;
 - “sexual offence” means a sexual act committed against the will of the victim and in which the victim may have been exposed to body fluids of the alleged offender; and 30
 - “victim” means any person alleging that a sexual offence has been committed against him or her.

Notice to victim

2. When any alleged sexual offence is reported, or as soon thereafter as is reasonably practicable, the police official to whom the offence is reported or, if for any reason he or she is not able to do so, any other police official must—
 - (a) hand a notice containing the prescribed information regarding compulsory HIV testing of an alleged offender to the victim or to an interested person; and
 - (b) explain the contents of such notice.

Application for HIV testing of alleged offender

3. (1) (a) Within 50 days after the alleged commission of a sexual offence any victim, or any interested person on behalf of a victim, may apply to a magistrate in the prescribed form for an order that the alleged offender be tested for HIV.

(b) If the application is brought by an interested person, such application must be brought with the written consent of the victim, unless the victim is— 5

- (i) under the age of 14;
- (ii) mentally ill;
- (iii) unconscious;
- (iv) a person in respect of whom a curator has been appointed in terms of an order of court; or 10
- (v) a person whom the magistrate is satisfied is unable to provide the required consent.

(2) (a) Every application must—

- (i) set out the grounds on which it is alleged that a sexual offence was committed against the victim; 15
- (ii) if it is brought by an interested person, state the nature of the relationship between the interested person and the victim, and if the interested person is not the spouse or a family member of the victim, the reason why the application is being made by such interested person; 20
- (iii) state that less than 50 days have elapsed from the date on which it is alleged that the offence in question took place.

(b) The matters referred to in paragraph (a) must be verified by the victim or the interested person, as the case may be, by affidavit or solemn declaration.

(3) The application must be made as soon as possible after a charge has been laid, and may be made before or after an arrest has been effected. 25

(4) The application must be handed to the investigating officer, who must as soon as is reasonably practicable submit the application to a magistrate of the magisterial district in which the sexual offence is alleged to have occurred.

Consideration of application and issuing of order 30

4. (1) The magistrate must as soon as is reasonably practicable consider the application in chambers and may call for such additional evidence as he or she deems fit, including oral evidence or evidence by affidavit, which must form part of the record of the proceedings: Provided that for the purpose of such proceedings, no evidence may be adduced by or on behalf of the alleged offender, nor may the alleged offender or anyone on his or her behalf attend such proceedings. 35

(2) If the magistrate is satisfied that there is *prima facie* evidence that—

- (a) a sexual offence has been committed against the victim by the alleged offender;
- (b) the victim may have been exposed to the body fluids of the alleged offender; 40
and
- (c) no more than 50 calendar days have lapsed from the date on which it is alleged that the offence in question took place,

the magistrate must order—

- (i) the collection from the alleged offender of two body specimens; 45
- (ii) the performance on the body specimens of one or more HIV tests as are reasonably necessary to determine the presence or absence of HIV infection in the alleged offender; and
- (iii) the disclosure of the HIV test result so obtained to the victim or to the interested person, as the case may be, and to the alleged offender. 50

(3) An order referred to in subsection (2) must be made in the prescribed manner and handed to the investigating officer.

(4) The investigating officer must, as soon as is reasonably practicable after an application has been considered—

- (a) inform the victim or the interested person, as the case may be, of the outcome of the application; and 55
- (b) if an order has been granted in terms of subsection (3), inform the alleged offender thereof by handing to him or her a notice containing the information as prescribed and, if necessary, by explaining the contents of the notice.

Execution of order

5. (1) Any order made in terms of section 4 must be executed within 60 calendar days from the date on which it is alleged that the sexual offence in question took place, failing which the order lapses.

(2) As soon as an order referred to in section 4(3) has been handed to an investigating officer— 5

- (a) the investigating officer must request a medical practitioner or nurse to take two body specimens from the alleged offender, and the investigating officer must make the alleged offender available or cause such person to be made available for that purpose; 10
- (b) the medical practitioner or nurse concerned must take two body specimens from the alleged offender;
- (c) the investigating officer must deliver the body specimens to the head of a facility designated in terms of section 6 or to a person designated in writing by the head of such facility; 15
- (d) the head of the facility or the person referred to in paragraph (c) must—
 - (i) perform one or more HIV tests on the body specimens of the alleged offender as are reasonably necessary to determine the presence or absence of HIV infection in the alleged offender;
 - (ii) record the result of the HIV test in duplicate in the prescribed manner; 20
 - and
 - (iii) provide the investigating officer with duplicate sealed records of the test results;
- (e) the investigating officer must hand over to the victim or to the interested person, as the case may be, and to the alleged offender— 25
 - (i) the sealed record of the test results; and
 - (ii) a notice containing prescribed information on how to deal with the HIV test result, and if necessary explain the contents of the notice.

Place where HIV testing may take place

6. The testing of body specimens to determine the presence or absence of HIV infection in terms of this Act must be performed only at a facility designated for that purpose by the Minister, in consultation with the Minister of Health, by notice in the *Gazette*. 30

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

7. 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. 35

Register of applications and orders

8. The National Commissioner of the South African Police Service must keep a register of all applications made and all orders granted in terms of this Act, and he or she must enter in that register all such particulars in regard to such applications and orders as are prescribed. 40

Costs

9. The state is responsible for the costs relating to applications made, excluding applications contemplated in section 11(1)(a), and to the execution of orders granted, in terms of this Act. 45

Confidentiality

10. No person may disclose any information which relates to an application or the result of a test contemplated in this Act, except in so far as it may be necessary for the purposes of this Act.

Offences and penalties

11. (1) Any person who—
 (a) makes an application based on false allegations; or
 (b) discloses any information in contravention of section 10,
 is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding six months. 5
- (2) An alleged offender who, unreasonably and without good cause, refuses to allow the collection of body specimens is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

Regulations 10

12. (1) The Minister may make regulations regarding—
 (a) any form required to be prescribed in terms of this Act;
 (b) any matter required to be prescribed in terms of this Act; and
 (c) any other matter which it is necessary or expedient to prescribe in order to achieve the objects of this Act. 15
- (2) Any regulation made in terms of this section must be tabled in Parliament before publication thereof in the *Gazette*.

Short title and commencement

13. This Act is called the Compulsory HIV Testing of Alleged Sexual Offenders Act, 2003, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 20

MEMORANDUM ON THE OBJECTS OF THE COMPULSORY HIV TESTING OF ALLEGED SEXUAL OFFENDERS BILL, 2003

1. PURPOSE OF BILL

The purpose of the Bill is to provide a speedy and uncomplicated mechanism whereby the victim of a sexual offence can apply to have the alleged offender tested for HIV and to have information regarding the test results disclosed to the victim.

2. OBJECTS OF BILL

The Bill emanates from the South African Law Commission's fourth interim report on "Aspects of the Law relating to Aids" (Project 85). In its report, the Law Commission noted the vulnerability of women and children to being infected with HIV as a result of rape and other sexual offences. The Law Commission consequently concluded that there is a need for legislative intervention to provide for compulsory HIV testing of alleged offenders in sexual offence cases at the instance of the victim. The intervention is found to be necessary in the light of women's undoubted vulnerability in South Africa as a result of widespread of sexual violence amidst the increasing prevalence of a nationwide epidemic of HIV.

The Bill seeks to enable a victim of an alleged sexual offence to apply for compulsory HIV testing of an alleged offender so as to know speedily whether the victim might have contracted the virus. The benefit to alleged victims of this knowledge is not only immediately practical in that it enables them to make life decisions and choices for themselves and people around them, but it is also beneficial to their psychological state to have even a limited degree of certainty regarding their exposure to a life-threatening disease.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The South African Law Commission published a Discussion Paper which was widely distributed and which elicited comments from a variety of interested parties, including prominent non-governmental organisations concerned with human rights and HIV/Aids and with women's rights, respectively.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

It is difficult at this stage to quantify the financial implications relating to the implementation of the legislation. It is not known how many victims will make use of the procedures provided for by the legislation. However, it is foreseen that an amount of R260 000 will be required every year to fund direct financial implications of the legislation.

6. PARLIAMENTARY PROCEDURE

In the opinion of the Department of Justice and Constitutional Development and the State Law Advisers this Bill should be dealt with in terms of the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.