SUBMISSION TO THE DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT

DRAFT REGULATIONS IN TERMS OF THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT NO. 32 OF 2007

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Introduction

The Gender, Health & Justice Research Unit ("GHJRU") and the Women's Legal Centre ("WLC") welcome this opportunity to make submissions to the Department of Justice and Constitutional Development in relation to the draft Regulations in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("Sexual Offences Act"). Our submission relates to two aspects of the draft Regulations: PEP services and compulsory HIV testing of alleged sexual offenders.

The GHJRU is an interdisciplinary research unit located at the University of Cape Town's Faculty of Health Sciences (Division of Forensic Medicine and Toxicology). Faced with staggering levels of violence against women in South Africa, the GHJRU is dedicated to improving access to health and justice services for survivors of gender-based violence. The GHJRU uses interdisciplinary methods from various academic fields including law, the social sciences, and public health to contribute to policies and laws and to advocate for social justice.

The WLC is a non-profit law centre which seeks to advance the struggle for and the promotion and development of human rights for women, particularly Black women who suffer socio-economic disadvantage through the advancement of an inequality. The WLC and the GHJRU are part of the Consortium on Violence Against Women, which has made submissions to the Law Commission, the National Assembly and the National Council of Provinces in relation to the Sexual Offences Act.

Services for victims

Since it is imperative that victims of sexual violence have access to PEP, it is commendable that the Sexual Offences Act provides for this treatment at State expense. This access, however, is limited, given that victims are only eligible for

treatment if they lay a charge or report the incident at a designated health establishment.

Regulation 2 "Reporting of an Alleged Sexual Offence and Service for Victims"

Given that the Sexual Offences Act prioritises the interests of the criminal justice system over the victim's interest to access PEP as soon as possible, several problems have to be guarded against in the Regulations: (1) that a victim gets lost in the system between referrals; (2) time delays; and (3) secondary victimisation.

Regulation 2 (1) (b)

Regulation 2 (1) (b) requires the police officer or health care worker to assist the victim or interested person with the completion of Form 1 *if* they are unable to read the form. Although we generally welcome that the Regulations ask the police officer/medical practitioner to assist the applicant, Regulation 2 (1) (b) could be improved considerably by imposing a general duty for medical staff to assist the victim *unless* he or she does not wish to be assisted. A re-drafted version could read:

> The medical practitioner or nurse to whom the incident is reported, must assist the victim or interested person with the completion of the form, unless the victim or interested person does not wish any assistance. The medical practitioner or nurse shall not be liable for any damage or loss resulting from assistance given in good faith by that medical practitioner or nurse.

This would ensure that medical practitioners or health care workers will, in fact, comply with their duty to assist the victim in filling out the form.

Regulation 2 (2) (a)

Regulation 2 (2) (a) stipulates that police officials to whom the charge is made or the medical practitioner or nurse to whom the incident is reported, must inform the victim or interested person about available services by giving them a notice which corresponds with Form 2. The contents of the notice must only be explained to the victim if the victim or interested person is unable to read.

It appears insufficient to merely hand the victim a notice with information about the services that are available. The services should be explained to the victim by the police officer or medical pracitioner/nurse and *in addition*, the victim should receive Form 2, so that he or she can recapture the information at a later stage.

Furthermore, it is essential that the police officer or medical practitioner/nurse as well as the notice itself (see comments below) highlight the importance of starting PEP *as soon as possible*. Research suggests that PEP is most effective if it is started within 2 (!) hours after exposure. Victims must be made aware of this.

To prevent cases from getting lost between referrals, it is also necessary to create a duty particularly for police officers to inform victims of the importance of getting treated at a designated health establishment and helping the victim find and access the nearest health establishment on the list. Ideally, the police would also be required to arrange transport to the facility.

Accordingly, Regulation 2 (2) (a) should be amended to create:

- a duty for the police officer and medical staff to explain the contents of Form 2;
- a duty for the police officer and medical staff to highlight the importance of starting PEP *as soon as possible*;
- a duty for the police officer to inform the victim of the importance of seeking medical treatment at the nearest desginated hospital and possibly help arrange transport to that facility.

Regulation 2 (2) (a) (iv)

Instead of merely setting out "the need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections", the Regulation should give guidance on the required comprehensive treatment of victims of sexual offences. The Regulation should reflect what is currently envisaged in the "Policy Guideline for Management of Transmision of Human Immunodeficiency Virus (HIV) and Sexually Transmitted Infections in Sexual Assault" and the "National Policy Guidelines for Victims of Sexual Offences" (Department of Health). In accordance with these policies the Regulations should ensure that the following services are offered to victims:

- emergency medical treatment at primary health centre (PHC) or referral to appropriate centre;
- prophylactic treatment against sexually transmitted diseases (PHC) should be given (with the consent of the victim);
- post-coital contraception should be given (with consent of victim); and
- counselling of the rape survivor, identification of support needs, and necessary referrals.

Despite the fact that these treatments are not prescribed in the Act, it seems necessary to comply with national policy and to emphasise the need for comprehensive management of victims of sexual violence in the Regulations.

FORM 1: "REPORTING OF AN ALLEGED SEXUAL OFFENCE AT A HEALTH ESTABLISHMENT"

General

First of all, it should be noted that each Province must ensure that all forms that are part of the Regulations will be provided in English as well as in the language that is predominantly spoken in the relevant Province.

According to Regulation 2 (1) (a) the victim will receive Form 1 when he or she reports the sexual offences. The objective of Form 1 is unclear and needs clarification. It *appears* that the Form is (a) an administrative/monitoring tool to record that a case has been reported in order to allow the victim to access PEP and/or (b) a form to assess whether the victim is eligible for PEP.

Furthermore, the Form should state explicitly that:

- it is *not* necessary to perform the medico-legal examination before administering PEP;
- PEP needs to be started *as soon as possible* after HIV exposure.

Thus, an additional note should be inserted after note 2:

> **Note 3: Initiation of PEP**
> The quick initiation of PEP is crucial. PEP must be started as soon as possible after the exposure to HIV/AIDS (ideally within two hours after the exposure) because the efficacy of the medication decreases with every hour. The medico-legal examination of the victim should be postponed until it has been established whether the victim is eligible for PEP/has received his or her first dose of PEP.

In addition, the following amendments should be taken into accout:

3. Particulars of Health Establishment
Since this information should be provided by the medical pracitioner/nurse, it should be moved to number '6. Declaration by Medical Practitioner or Nurse'.

4. Particulars of Incident
This provision should be more structured: a separate line for date, place, time etc. should be used. This is recommended to make the Form more user-friendly and because this information is vital to assess whether the victim is eligible for PEP.

For the “Description of Incident”, it is unclear what kind of description is requested from the victim (only the nature of the sexual offence?) and what the purpose of the description is at this place. This should be clarified.

5. Particulars of alleged offender

Form 1 should be kept as short as possible. Since the particulars of the offender are irrelevant at this stage, section 5 should be omitted from the Form.

FORM 2: “NOTICES OF SERVICES AVAILABLE TO VICTIM”

According to Regulation 2 (2) (a) the victim will also receive Form 2 which contains important information on HIV and PEP. However, a number of gaps remain in this Form. Particularly, the Form fails to make any reference to the window period. It is strongly requested that the Form be amended to include a separate provision which comprehensively explains the window period and the implications of the window period (both with regard to HIV testing generally as well as the outcome of the compulsory HIV test of the alleged offender particularly).

Insert new heading and answer: **What is the “window period”?**

Moreover, the following amendments should be considered:

What is HIV?

Add: There is currently no cure for HIV/AIDS.

Can I be exposed to HIV during a sexual offence?

“For example, if you have been raped vaginally or anally and the alleged offender's semen entered your body and he or she is infected with HIV, you may have been exposed to HIV.”

What is PEP?

According to Regulation 2, the person receiving the complaint must explain to the victim that it is important to obtain PEP *within 72 hours*. This should be reflected in Form 2. Moreover, it needs to be highlighted that PEP should be started *as*

soon as possible after the exposure because its efficacy decreases over time. The following amendment of the provision is thus recommended:

> "It is therefore important that PEP be administered to you as soon as possible after the sexual offence *latest* within 72 hours after the alleged sexual offence took place. PEP is most effective if started within one to two hours after exposure to HIV. PEP does not work anymore if started more than 72 hours after exposure to the virus. It will therefore only be given to you within this time frame.
>
> ~~The~~ PEP is administered at ~~a~~ certain public health establishments ~~which has been designated by the Minister of Health~~. It is also done at State expense. A list of the designated health establishments within reasonable distance from the police station where the complaint is laid or from the public health establishment where the incident is reported, is attached to this notice. You will be given free medical advice surrounding ~~the administering of~~ PEP, prior to the administering thereof."

Can I put other people at risk of HIV infection because of my possible exposure to HIV?

The answer to this question should be amended to read:

> "You cannot transmit HIV through daily contact with other people. HIV is not transmitted through hugging, shaking hands, and sharing food, water or utensils. However, because HIV is, among others, transmitted through sexual intercourse, you may have become infected through the alleged sexual offence and may in turn infect ~~your~~ a sexual partner with whom you have sex after the sexual assault. You should practice safe sex until you have established with certainty that you have not been infected. If you are pregnant, there is a possibility that you could transmit HIV to your unborn child. If you are breast feeding there is also a possibility that your child may be at risk of contracting HIV infection. ***You must obtain expert advice from one of the service providers on the last page of this form to deal with the implications of the risk of infection for yourself, your sexual partner and others.***"

Other sexually transmitted infections

As noted earlier (see Regulation 2 (2) (a) above), it is essential that the Regulations give guidance on the comprehensive management of victims of sexual violence. Victims should therefore be fully informed of their risk for other sexually transmitted diseases so that they can request appropriate medical treatment.

How could I deal with my possible exposure to HIV during the alleged sexual offence?

The answer to this question in Form 2 suggests that the test result will give the victim peace of mind and will help him or her make medical and lifestyle decisions. Given that the test result cannot assist the victim in any of these matters[1] the provided answer should be completely re-drafted and inform the victim of the *unreliability* of the test result. It is strongly recommended that the window period be highlighted (once more) in the answer to this question. Furthermore, victims should be advised that it is necessary to undergo HIV testing themselves once their window period has passed.

If the Department wishes to keep the current version of the provision, the following paragraphs should be added to the answer after the last bullet point:

> However, the test result from a compulsory HIV test is not reliable because the alleged offender may be in the window period while he or she is tested for HIV/AIDS. This means that the test result may show that the alleged offender is negative although he or she is, in fact, HIV positive. You must therefore talk to an expert before you make any medical or lifestyle decisions based on the test result.

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[1] However, to help the victim make a decision about *starting* PEP the test result would have to be disclosed to the victim within 3 days (72 hours). It is very unlikely that an application for a compulsory HIV test can be processed and 'acted upon' within 72 hours (and besides it is important to start PEP *asap* after the exposure). For the test result to be relevant for the *continuation* of medical treatment the test result would have to be disclosed to the victim before the 28 day course of PEP has been completed. Even this time frame seems difficult to meet.
More importantly, due to the nature of the HIV test, the test result cannot assist victims on any of the listed grounds. Suggesting that the test result may give the victim peace of mind and enable decisions about PEP and safer sex is wrong, because the test result is unreliable since it does not reveal whether the alleged offender is in the window period. An HIV negative test result may therefore create a false sense of security and may lead to ill-informed decisions. Victims may stop PEP and/or safer sex practices and hence put their own health and that of others at risk for HIV infection.

Furthermore, please take into account that an HIV positive test result does not mean that the virus was necessarily transmitted to you during the sexual offence.

Please get tested for HIV yourself when you feel ready. In the meanwhile, please make sure that you practice safer sex.

Who will consider my application?

"The investigating officer will inform you of the outcome of your application."

Informing the victim of the outcome of the application is currently not provided for in the Regulations, unless Regulation 5 (5) (a) is meant to cover this. However, section 5 (5) (a) only stipulates that the investigating officer must hand the "said results" (= test results) to the victim/interested person.

What will happen once the magistrate has ordered that the alleged offender must be tested for HIV?

To make the language more accessible, please substitute "body specimens" with "blood samples":

> "The investigating officer will ensure that two ~~body specimens~~ blood samples are on the same occasion taken from the alleged offender and tested for HIV."

How will I be informed about the HIV test result?

Learning about one's exposure to or infection with HIV can be extremely traumatising, particularly in the context of a prior sexual assault. The (draft) National Policy on Testing for HIV (Department of Health) gives comprehensive guidelines on appropriate pre- and post-test counselling. It is of great concern that according to the Regulations the victim and the alleged offender will not receive any post-test counselling unless they are able to find a non-governmental service provider that offers post-test counselling free of charge.

May I disclose the alleged offender's HIV test result to other people?

"You may not disclose this information except to *those who need to know*. This will *include* such persons as your sexual partner, your medical doctor, or those persons who provide emotional support to you." (emphasis added)

Although it is commended that the victim may disclose the test result to his or her sexual partner, doctor and support persons, it must be noted that it is not entirely in line with the legislation, because the latter prohibits a disclosure of the test result to persons other than those mentioned in section 37 (1) of the Sexual Offences Act. This inconsistency should be corrected.

Furthermore, there is a lack of clarity regarding "who needs to know". This term is not defined in the definition provision of the Regulations. The perception of who "needs to know" may differ from applicant to applicant. It is, however, important to have legal clarity on this matter because the victim may be prosecuted or sued for disclosures that are not covered under the Regulations. To resolve this issue, the provision should read:

> "You may not disclose this information except to an "interested person" according to Note 2 of this Form."

The following paragraph of the answer reads:

"If you maliciously or grossly negligently disclose the alleged offender's HIV status, you may be convicted of an offence and sentenced to a fine or to imprisonment for a period not exceeding three years. You may also face a civil claim for damages."

This provision is intimidating and should be removed. One should bear in mind that the bulk of the users of this Form will have suffered at the hands of the offender and may already fear intimidation and harassment in relation to testifying in the criminal trial. Form 2 is envisioned as a general information sheet about services available to the victim. The Form should thus not over-emphasise the criminalisation of victims. Only if a victim chooses to apply for a compulsory HIV test should he or she be informed of the consequences of malicious or

negligent HIV-disclosures. It therefore seems sufficient to provide this information in Form 3 (see below).

If the provision is not removed, it should at least be re-phrased considerably to make it less intimidating. In addition, the terms “maliciously” and “grossly negligently” are legal terms which a layperson may not understand. Given that the victim may face prosecution and/or civil claims, the Form must clearly set out what kind of disclosures are prohibited.

Cut-off period for bringing an application

“A limited period of time is allowed for HIV testing of an alleged sex offender. You must apply for such testing within 90 days after the alleged sexual offence took place. It is therefore advised that if you decide to apply for having the alleged sex offender tested for HIV, you do it as soon as possible after the alleged offence. However, it is in your own best”

The last sentence of the paragraph is incomplete.

Service organisations which can provide counselling and support

It would be very helpful if - at least - telephonic contact details for the public facilities were listed in the provision.

Compulsory HIV testing

With regard to the Sexual Offences Act’s provisions on compulsory HIV testing, the Consortium on Violence Against Women in its previous submissions raised the following concerns:

- The HIV test result of the alleged sexual offender is useless for the victim. Medical decisions about anti-retroviral medication and personal decisions about safer sex cannot be based on the alleged offender’s HIV status because he or she may be in the window period when tested for HIV. It is

extremely problematic if victims stop taking PEP on the basis of a negative test as a result of the perpetrator being in the window period.

- Only between five and nine percent of reported rape cases result in conviction of the accused. The vast majority of alleged offenders walk free after the criminal proceedings. Under these circumstances, those who are acquitted and who were forced to undergo compulsory HIV testing may try to sue the victim for damages or have him/her prosecuted for requesting an HIV test with malicious intent.

Bearing the above in mind, we now comment on the specific provisions.

General Concerns

Compulsory HIV testing requires an efficient and swift response from various role players in the health and criminal justice system. In various places, the Regulations emphasise that 'expert assistance' should be sought by the victim and/or the alleged offender (e.g. Form 2, Form 5, Form 9). Non-governmental organisations or facilities which provide services for victims of sexual violence and for people living with HIV/AIDS are bound to experience increased numbers of clients seeking their support. It is, however, unclear how privately funded NGOs can be expected to deal with increased workloads without being provided with additional funding. The Department of Social Services should therefore be required to compensate NGOs for their work in 'filling in the gaps' for public services such as compulsory HIV testing.

The South African Police Service (SAPS) will also struggle to implement the manifold duties that the Sexual Offences Actand the Regulations impose on them.[2] It is unclear how an already understaffed and under-resourced police

[2] The members of the police bear the greatest brunt at the implementation stage. They have to:
- Inform the victim of services available, including the option of applying for a compulsory HIV testing order
- Run between the police station and the magistrate's court to submit applications and collect orders
- Inform the applicant of the outcome of the application
- Inform the accused of the outcome of the application

service struggling to fight our high levels of crime and deliver 'regular' services is expected to comply with these additional duties, especially since most of these services must be delivered 'as soon as is reasonably practicable'. There is clearly a need for a reallocation of human, financial and infrastructural resources (for instance, extra cars).

Regulation 3 "Application by Victim or Interested Person for HIV testing of Alleged Offender"

Regulation 3 provides that an application contemplated in section 30 of the Sexual Offences Act must correspond substantially with Form 3 in Annexure "A". The Regulation further provides for the offender to be notified prior to the application being submitted to a magistrate.

The Sexual Offences Act, however, does not provide that notice should be given to the offender. Section 31 of the Sexual Offences Act states that when the magistrate receives the application and decides in chambers whether there is a need to hear additional evidence, which could include evidence on behalf of the alleged offender if it will not give rise to any substantial delay. It is thus the magistrate's discretion whether to allow evidence from the offender, and notice to the offender only becomes necessary at this stage and to those offenders that will be called upon to provide evidence.

It should further be noted that the application can be made after a charge is laid, but before the arrest of the offender. Bearing in mind the vulnerability of the victim in circumstances where the offender has not yet been arrested and the possibility of intimidation, it is submitted that notice to the offender before a

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- Make relevant persons available for giving evidence
- Make the alleged offender available for the HIV test, which may include making an application for a warrant of arrest if the accused fails to comply with the order
- Request a medical practitioner or nurse to take two blood samples of the alleged offender
- Deliver the blood samples to the head of the (designated) health establishment and request that an HIV test be performed
- Hand a sealed envelope with the test result to the applicant and to the accused.

magistrate has considered whether evidence from the offender will be allowed in unnecessary and inappropriate.

It is submitted that in relation to the use of the term “reasonably practicable” in this regulation, time periods should be stipulated. What is reasonably practicable to busy investigating officers is difficult to determine. The intention of the Act is to avoid delays and long waiting periods will negatively effect the victim who needs to make decisions relating to the HIV status of the offender, and may undermine the whole point of the application.

FORM 3: “APPLICATION FOR HIV TESTING OF ALLEGED OFFENDER BY VICTIM OR INTERESTED PERSON”

Note 1

Form 3 commences with a Regulation entitled “Misuse and abuse of this procedure” and reads:

“The procedure to establish an alleged offender’s status without obtaining his/her consent for HIV testing has been created strictly for the purpose of assisting victims of sexual offences. If you have not been a victim of a sexual offence, or act on behalf of someone who has not been the victim of a sexual offence, and abuse this procedure to establish another person’s HIV status with malicious intent, you may be prosecuted and convicted of an offence and sentenced to a fine or to imprisonment for a period not exceeding three years. You may also face a civil claim for damages.”

The fact that the victim might be prosecuted will deter victims from applying for the test. One should bear in mind that the bulk of the users of this Form will have suffered at the hands of the offender and are already facing the daunting and traumatic procedures involved in a criminal trial. The low conviction rate in sexual offences and the prospect of the accused, even if convicted being released into society after sentencing are realities that complainants in sexual offences cases face.

However, it seems necessary to inform victims of the risks of applying for a compulsory HIV test. Despite this fact, it is unnecessary to put this provision as the *first* paragraph that comes to the victim's attention when reading the Form. The clause should therefore be moved. Furthermore, the provision needs to be re-worded. The term "malicious intent" is a legal term that a layperson may not understand. Given that the victim may face prosecution and/or civil claims, the Form must clearly set out the kind of conduct that victims may be prosecuted for.

Form 3 should also set out the consequences of unauthorised disclosures of the HIV test result if the relevant provisino has been removed from Form 2 – as has been suggested above. It is important to phrase the "offences" provision carefully to prevent unnessary intimidation and distress of victims of sexual offences.

1. "Application"

It is further pointed out that Form 3 provides for notice being provided to the alleged offender that an application for the compulsory HIV testing of him or her will be submitted to a magistrate. As per our submissions above, we submit that the notice requirement should be removed.

5. "Particulars of Alleged Sexual Offence and Possible Exposure to Offender's Body Fluids"

Provision 5 (c) (ii) should be omitted from the Regulations because it is inconsistent with the Act. The requirement for a compulsory HIV test is that the victim has laid a charge at the SAPS. The fact that the offence has (or has not) been reported to a designated health establishment is irrelevant for an application for a compulsory HIV test. Hence, the provision should read:

> 5. (c) The alleged offence has been reported to the South African Police Service.

Regulation 4 "Consideration of Application and Evidence"

This regulation makes provision for the obtaining of the evidence which a magistrate might require in addition to the original form, should s/he so decide after considering the application. The regulation provides for the investigating officer to inform the parties and obtain the affidavits via the Clerk of Court. It is envisaged that the magistrate would set a date and time for hearing and the investigating officer would secure the attendance of the necessary parties at the hearing.

Regulation 4(2)(b) states that where further evidence is required by affidavit, the investigating officer must obtain the required affidavit/s from the person/s as identified by the magistrate as soon as is 'reasonably practicable'. As argued above, it is submitted that this leaves finalization of the application open to delay and that the regulation should rather stipulate that the Magistrate can order the time periods in which the affidavit should be filed with the Court.

Regulation 5 "Order by the Magistrate for HIV Testing in Terms of Section 31 of the Act"

Regulation 5 (5) (a) deals with the outcome of the application, hence, whether or not the magistrate made an order for a compulsory HIV test. The provision should be re-phrased because it speaks of "the said results" which could be confused with the results of the HIV test. It is therefore suggested that the provision be amended to state:

> "If an order contemplated in section 31(3)(ii) of the Act has been granted, the investigating officer must thereupon hand a copy of the order to the victim or interested person as soon as is ~~reasonably practicable~~, together with a notice which must correspond substantially with Form 9 in Annexure A."

Once again the use of “reasonably practicable” leaves room for delay and it is submitted that the magistrate should be given the discretion to order time frames by when the test should be done and by when the results should be delivered.

Regulation 5 provides for the offender to be informed via a notice which is set out as Form 5 in Annexure “A”.

FORM 5: “NOTICE TO OFFENDER REGARDING ORDER FOR HIV TESTING”

Given that there is no separate form that will be given to the alleged offender when an investigating officer applies for the test, the first (flow-text) paragraph of Form 5 should be amended to include police officers:

“The purpose of this notice is to provide you with information about an order of court which has been obtained to have you tested for HIV without your consent, and for your HIV status to be disclosed to your alleged victim or an interested person acting on behalf of the alleged victim or to an investigating officer, and, where applicable, to the prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings.”

What is HIV?

Add the following sentence: There is currently no cure for HIV/AIDS.

Why should I be tested for HIV?

Section 27/clause 32 of the Act (unclear which one is referred to) should be spelled out in a footnote so that the alleged offender can read what is stipulated in the provision.

Who has granted the order that I be tested for HIV?

It is recommended that the relevant section of the Act be spelled out in a footnote.

How will I be tested for HIV?

To make the Form more user-friendly “body specimens” should be substituted with “blood samples”.

"The investigating officer will take you to a registered medical practitioner or nurse who will on the same occasion take two ~~body specimens~~ blood samples from you. The investigating officer will take the properly identified specimens to a designated public health establishment where they will be tested for HIV."

Will the test result be disclosed to other people?

This provision requires that the alleged offender be informed of the following:

"*any person who misuses or abuses the procedure to obtain information about your HIV status may be prosecuted and convicted of an offence and sentenced to a fine or to imprisonment not exceeding three years. You may also bring a civil claim for damages against such person".*

Section 38 of the Sexual Offences Act deals with the liability on the part of people who make false claims:

"any person who, with **malicious intent** lays a charge with the South African Police Service in respect of an alleged sexual offence and makes an application in terms of Section 30(1), with the intention of ascertaining the HIV status of any person, is guilty of an offence and is liable on conviction to a fine or to imprisonment to a period not exceeding three years." (emphasis added)

It is noted that this Regulation makes no reference to a civil claim for damages. It is submitted that reference to civil damages in the form should be removed as it might lead to secondary victimisation, intimidation and harassment of the victim. Further the clause in the form relating to misuse and abuse of the compulsory testing procedure should be amended to point out that the test for the offence is malicious intent, as it does not currently do so.

Service organisations which can provide counselling and support

It is recommended that Form 5 give the telephonic contact details for the listed public facilities/organisations.

Regulation 7 "Taking of prescribed specimens"

Regulation 7 (2) stipulates that the investigating officer must take the "necessary steps" to carry out the orders granted in terms of sections 31(3) or 32(3) of the Sexual Offences Act. It remains open to interpretation what the "necessary steps" to carry out the orders are. It is, for instance, unclear whether the police officer must make the alleged offender available (i.e. take him/her to the medical facility) for the blood sample to be taken or whether the alleged offender will merely be *notified* that he or she has to present at the relevant health establishment on the relevant day.

We submit that if the Regulations remain abstract, these issues will have to be adressed in the subsequent National Instructions.

Regulation 9

Regulation 9 currently reads:

"The National Commissioner of the South African Police Service must issue national instructions to ensure—

(*a*) that investigating officers treat the record of the test results as confidential;

(*b*) the safekeeping of the record of the test results; and

(*c*) the prevention of unauthorised access to the record of the test results."

The scope of this provision should be broadened. First of all, Regulation 9 does not cover all the areas that were envisionsed in section 66 (1) of the Sexual Offences Act, which stipulates that the National Commissioner of the SAPS must issue National Instructions in order to achieve the objects of the Sexual Offences Act and that these must include but are not limited to:

- the manner in which the reporting of an alleged sexual offence is to be dealt with by police officials;

- the manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued;
- the circumstances in which and the relevant sexual offence or offence in respect of which a police official may apply for the HIV testing of an alleged offender as contemplated in section 33;
- the manner in which police officials must execute court orders for compulsory HIV testing contemplated in section 33 in order to ensure the security, integrity and reliability of the testing processes and test results;
- the manner in which police officials must deal with the outcome of applications made and granted in terms of section 31 or 32 in order to ensure confidentiality; and
- the manner in which police officials must hand over to the victim or to the interested person, as the case may be, and to the alleged offender the test results.

It is recommended that Regulation 9 be amended to cover each of the issues set out in section 66 of the Sexual Offences Act or at least the ones that relate to compulsory HIV testing (highlighted in blue). Currently, the provision only covers the confidentiality and partly bullet point number 4.

Bearing in mind that National Instructions must be developed "to achieve the objects of this Act", particularly "those objects which have a bearing on complainants of [sexual] offences" (section 66 (1) (a) of the Sexual Offences Act), the scope of Regulation 9 should furthermore be broadened to include:

- the manner in which police officials must inform the victim or interested person of the available services (PEP and compulsory HIV testing);
- the manner in which the police must assist the victim or interested person to obtain the available services.

Since section 66 (1) (b) of the Act sets out that the National Commissioner of the SAPS must develop training courses on the National Instructions, it is important to cover all relevant issues in the list for National Instructions that need to be developed.