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ANNEXURE A

THE SEXUAL OFFENCES BILL INTRODUCED BY THE SOUTH AFRICAN LAW COMMISSION IN DISCUSSION PAPER 85 OF 1999
(RELEVANT SECTIONS)

Preamble of the proposed Bill

Whereas the Bill of Rights in the Constitution of South Africa 1996 (Act 108 of 1996) enshrines the rights of all people in the Republic, including the right to equality and the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources...

♦ Chapter 1: Definitions

“child” means –

(a) for the purposes of Chapter 3, a person under the age of 16 years,¹ and,

(b) for the purposes of Chapter 5, a person under the age of 18 years.²

“coercive circumstances” include any circumstances where –

(a) there is an application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;

(b) there is any threat, whether verbal or through conduct, direct or indirect to cause any form of harm to any person or animal;

¹ Sexual offences against children.
² Commercial sexual exploitation of children.
(c) the complainant is under the age of twelve years;

(d) there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from indicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act.

(e) a person’s mental capacity is affected by -

(i) sleep;

(ii) any drug, intoxicating liquor or other substance;

(iii) mental or physical disability, whether temporary or permanent, or

(iv) any other condition, whether temporary or permanent to the extent that he or she is unable to appreciate the nature of an act of sexual penetration, or is unable to resist the commission of such an act, or is unable to indicate his or her unwillingness to participate in such an act.

(f) a person is unlawfully detained.

(g) a person believes that he or she is committing an act of sexual penetration with another person, or

(h) a person mistakes an act of sexual penetration which is being committed upon him or her for something other than an act of sexual penetration;

"mentally impaired person" means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, to the extent that he or she is unable to appreciate the nature of a sexual act, or is unable to resist the commission of such an act or is unable to communicate his or her unwillingness to participate in such an act;
“sexual act” means any indecent act and includes an act which causes –

(a) direct or indirect contact between the anus, breasts, penis or vagina of one person and any part of the body of another person, or

(b) exposure or display of the genital organs of one person to another person, and further includes an act of sexual penetration;

“sexual penetration” means any act which causes penetration to any extent whatsoever –

(a) by the penis of one person -

   (i) into the anus, ear, mouth, nose or vagina of another person or

   (ii) into any body orifice of an animal.

(b) by any object or part of the body of one person -

   (i) into the anus or vagina of another person, or

   (ii) into any body orifice of another person in a manner which simulates sexual intercourse, or

(c) by any part of the body of an animal -

   (i) into the anus or vagina of a person, or

   (ii) into any body orifice of a person in a manner which simulates sexual intercourse;

“vagina” means the whole of the female sexual organ and includes a surgically constructed vagina;
• **Chapter 2: General Sexual Offences**

**Rape**

2.(1) Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act is guilty of an offence.

(2) For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it takes place in any coercive circumstances.

(3) No marriage or other relationship shall be a defence against a charge under this section.

(4) No person shall be charged with or convicted of the common law offence of rape in respect of an act of sexual penetration after the commencement of this Act.

(5) Subject to the provisions of this Act, any reference to "rape" in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.

**Compelled Sexual Acts**

3.(1) Any person who intentionally compels another person-

(a) to engage in a sexual act with that person; or

(b) to engage in a sexual act with a third person; or

(c) to engage in a sexual act with himself or herself; is guilty of an offence.
(2) Any person who intentionally causes another person to engage in a sexual act with an animal is guilty of an offence.

Inducement to allow sexual act

4. Any person who intentionally induces another person by false pretence or fraudulent means to allow him or her to commit a sexual act with that other person is guilty of an offence.

Incest

6. From the date of promulgation of this act the definition of sexual penetration contained in this Act shall be applied mutatis mutandis for the purposes of the common law offence of incest.

Chapter 3: Sexual offences against children

Child molestation

7. (1) Any person who intentionally commits a sexual act with a child at least two years younger than him or her, shall be guilty of an offence.

(2) Any person who commits an act with the intent to invite or persuade a child at least two years younger than him or her, to allow any person to commit a sexual act with that child shall be guilty of an offence.

(3) Consent by a child to any sexual act shall not be a defence to a charge under this section.

Chapter 4: Sexual Offences against mentally impaired persons

9. (1) Any person who intentionally commits a sexual act with, or in the presence of a mentally impaired person shall be guilty of an offence.
(2) Any person who commits any act with the intent to invite or persuade a mentally impaired person to allow any person to commit a sexual act with that mentally impaired person shall be guilty of an offence.
ANNEXURE B

SEXUAL OFFENCES BILL INTRODUCED BY THE SOUTH AFRICAN LAW COMMISSION IN DISCUSSION PAPER 102 OF 2002
(RELEVANT CLAUSES)

Preamble of the proposed bill

WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), enshrines the rights of all people in the Republic of South Africa including the right to equality and the right to freedom and security of the person which incorporates the right to be free from all forms of violence from either public or private sources....

- Chapter 1: Definitions

"genital organs" include the whole or part of male and female genital organs and further include surgically constructed genital organs;

"indecent act" includes an act which causes-

(a) direct or indirect contact between the anus, breasts or genital organs of one person and any part of the body of another person,

(b) unjustified exposure or display of the genital organs of one person to another person, or

(c) exposure or display of any pornographic material to a person below the age of 18 years or to any person against his or her will

but does not include an act of sexual penetration or an act which is consistent with sound medical practices which is carried out for proper medical purposes;
"mentally impaired person" means a person affected by any mental impairment irrespective of its cause, whether temporary or permanent, to the extent that he or she is or was unable to appreciate the nature and consequences of an indecent act or an act of sexual penetration, or is or was unable to resist the commission of any such act, or is or was unable to communicate his or her unwillingness to participate in any such act;

"sexual offence" means any offence in terms of this Act, excluding the Schedule, and includes any common law sexual offence;

"sexual penetration" means any act which causes penetration to any extent whatsoever by-

(a) the genital organs of one person into the anus, mouth or genital organs of another person; or

(b) any object, including any part of the body of an animal, or part of the body of one person into the anus or genital organs of another person in a manner which simulates sexual intercourse but does not include an act which is consistent with sound medical practices which is carried out for proper medical purposes.

Rape

3.(1) Any person who intentionally and unlawfully commits an act of sexual penetration as defined in section 1 with another person, or who intentionally and unlawfully compels, induces or causes another person to commit such an act, is guilty of the offence of rape.

(2) For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it is committed-

(a) in any coercive circumstance;
(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable in law to appreciate the nature of an act of sexual penetration.

(3) Coercive circumstances, as referred to in subsection (2)(a), include any circumstances where-

(a) there is any use of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or any use of force which damages or destroys such person's movable or immovable property;

(b) there is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or to damage or destroy such person's movable or immovable property;

(c) there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that the person in respect of whom an act of sexual penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act; or

(d) a person is lawfully or unlawfully detained.

(4) False pretences or fraudulent means, as referred to in subsection (2)(b), include circumstances where a person in respect of whom an act of sexual penetration is being committed is led to believe that -

(a) he or she is committing an act of sexual penetration with a particular person who is in fact a different person;

(b) an act of sexual penetration is something other than such act; or
(c) an act of sexual penetration will be beneficial to his or her physical, psychological or spiritual health.

(5) The circumstances in which a person is incapable in law to appreciate the nature of an act of sexual penetration as referred to in subsection (2)(c) include circumstances where such person is -

(a) asleep;

(b) unconscious;

(c) under the influence of any medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgement is adversely affected; or

(d) a mentally impaired person as defined in section 1.

(6) For purposes of this Act a person is incapable in law to appreciate the nature of an act of sexual penetration if that person is below the age of 12 years.

(7) A marital or other relationship, previous or existing, shall not be a defence to a charge of rape.

(8) The common law relating to-

(a) the irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and

(b) the offence of rape, except where a person has been charged with, but not convicted of such offence prior to the commencement of this Act, is repealed.
(9) Subject to the provisions of this Act, any reference to "rape" in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.

(10) Nothing in this section may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge.

Compelled or induced indecent acts

4. Any person who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act as defined in section 1 with -

(a) the person compelling, inducing or causing the act;

(b) a third person;

(c) that other person himself or herself; or

(d) an object, including any part of the body of an animal, in circumstances where that other person-

(i) would otherwise not have consented to the commission of the indecent act; or

(ii) is incapable in law of appreciating the nature of an indecent act, including the circumstances set out in paragraphs (a) to (d) of section 3(5)

is guilty of the offence of having compelled, induced or caused a person to engage in an indecent act.

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Extension of common law incest

5. From the date of promulgation of this Act the definition of sexual penetration contained in section 1 of this Act applies to the common law offence of incest.

Acts of sexual penetration or indecent acts with consenting minors

6. (1) Any person who commits an act of sexual penetration as defined in section 1 with a child who is at least 12 years of age, but not yet 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed an act of sexual penetration with a minor.

(2) It is a defence to a charge under subsection (1) if-

(a) the accused was a person below the age of 16 years at the time of the alleged commission of the offence;

(b) the age of the accused did not exceed the age of such child by more than three years at the time of the alleged commission of the offence; or

(c) it is proved on a balance of probabilities that such child or the person in charge of such child deceived the accused into believing that such child was over the age of 16 years at the time of the alleged commission of the offence.

(3) The provisions of this section do not apply if-

(a) the accused is related to such child by blood or affinity; or

(b) such child lacked the intellectual development to appreciate the nature of an act of sexual penetration.
(4) Any person who commits an indecent act as defined in section 1 with a child below the age of 16 years is, notwithstanding the consent of that child to the commission of such an act, guilty of the offence of having committed an indecent act with a minor.

(5) The provisions of subsections (2) and (3) apply, with the changes required by the context, to a person charged under subsection (4), unless the child concerned was below the age of 12 years at the time of the alleged commission of the offence.

(6) A person may not be charged under this section if a valid or legally recognised marriage existed between that person and a child as referred to in this section, unless the child concerned was below the age of 12 years at the time when any offence in terms of this section was allegedly committed.

Indecent acts or acts of sexual penetration with mentally impaired persons

7.(1) Any person who intentionally commits an indecent act as defined in section 1 with a mentally impaired person, also defined in section 1, is guilty of the offence of having committed an indecent act with a mentally impaired person.

(2) It is a defence to a charge under subsection (1) or to a charge of rape under section 2 if-

(a) the mentally impaired person was over the age of 16 years at the time of the alleged commission of the offence and it is proved, on a balance of probabilities, that such mentally impaired person induced the commission of an indecent act or an act of sexual penetration; and

(b) it is proved, on a balance of probabilities, that the accused was unaware that the mentally impaired person who induced the
commission of an indecent act or act of sexual penetration was so impaired or was below the age of 16 years at the time of the alleged commission of the offence in question.

Acts of sexual penetration or indecent acts committed in presence of minors or mentally impaired persons

8. Any person who intentionally commits an act of sexual penetration or an indecent act as defined in section 1 with another in the presence of a person below the age of 16 years or a mentally impaired person as defined in section 1, is guilty of the offence of having committed such an act in the presence of a minor or a mentally impaired person, as the case may be.

Children competent to testify in criminal proceedings involving sexual offences

10.(1) No child below the age of 18 years, other than a child who for any reason does not have the capacity, verbal or otherwise, to respond to simple questions, shall be precluded from giving evidence in court in criminal proceedings involving the alleged commission of a sexual offence.

(2) The evidence given by a child referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit.

Vulnerable witnesses

13.(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the accused, who is to give evidence in that proceedings a vulnerable witness if such witness is –

(a) the complainant in the proceedings pending before the court; or
(b) below the age of 18 years and has witnessed the offence being tried.

(2) The court may, on its own initiative or on application by the prosecution or any witness who is to give evidence in proceedings referred to in subsection (1), and if that witness is below the age of 18 years, on application by that witness, if at least ten years of age, or his or her parent, guardian or a person in loco parentis, declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of—

(a) age;

(b) intellectual impairment;

(b) trauma;

(d) cultural differences; or

(e) the possibility of intimidation.

(3) The court may, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon any knowledgeable person to appear before and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures—

(a) allowing that witness to be accompanied by a support person as provided for in section 14;
(b) allowing that witness to give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977;

c) directing that the witness must give evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977;

c) directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;

e) prohibiting the publication of the identity of the complainant as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family;

(f) allowing electronically prerecorded evidence given by that witness; or

(g) any other measure which the court deems just and appropriate.

(5) If the court has declared a person below the age of 18 years a vulnerable witness, the court must, subject to the provisions of subsection (8), direct that an intermediary as referred to in subsection (4)(c) be appointed in respect of such witness unless there are exceptional circumstances justifying the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary.

(6) The court may direct that the protective measures referred to in paragraphs (b) to (e) of subsection (4) must be applied in respect of a vulnerable witness, irrespective of any other qualifying criteria that may be prescribed by the provisions of the Criminal Procedure Act, 1977, referred to in those paragraphs.
(7) In determining which of the protective measure or protective measures as referred to in subsection (4) should be applied to a witness, the court must be satisfied that such measure or measures is or are likely to improve the quality of evidence to be given by that witness, and must have regard to all the circumstances of the case, including –

(a) any views expressed by the witness, if ten years of age or older;

(b) views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) the need to protect the witness’s dignity and sense of safety and to protect the witness from further traumatisation; and

(d) the question whether the protective measure or protective measures is or are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(8) The court may at any time revoke or vary a direction given in terms of subsection (4) upon the request of the prosecution or the witness concerned: Provided that where a witness is below the age of 18 years, such revocation or variation may only be effected upon the request of that witness or his or her parent, guardian or a person in loco parentis and if that witness is at least ten years of age.

Appointment of support persons

14.(1) Whenever criminal proceedings involving the commission of any sexual offence are pending before any court and a witness, including the complainant, is to give evidence in such court, the court may at any time on its own initiative or upon request by –

(a) the prosecutor;
(b) such witness;

(c) the parent, guardian or person in loco parentis of such witness if that witness is below the age of 18 years;

(d) a social worker;

(e) a lay counsellor; or

(f) a medical officer
direct that such witness be accompanied by a support person of the witness’s choice when making statements to any person, being interviewed or giving evidence in court.

(2) The court may, notwithstanding a request in terms of this section, refuse the appointment of a support person of the witness’s choice if the court is of opinion that the appointment of such person as support person will not be in the interests of justice.

(3) A support person appointed in terms of this section may accompany and be seated next to the relevant witness while such witness is making statements to any person, being interviewed or giving evidence in court.

(4) The court may, if it deems it to be in the interests of justice and in the best interests of the witness, at any time revoke the appointment of a support person and may appoint another person in his or her place.

(3) Whenever a witness in respect of whom a support person has been appointed is to give evidence in court, such person shall affirm to the court prior to giving support that he or she will –

(a) assist the court to the best of his or her ability; and
(b) not in any manner interfere with the witness or the evidence being given.

(6) The State shall pay to a support person appointed in terms of this section a prescribed transport allowance for the duration of the period that such person is required to assist a witness giving evidence in court.

Disclosure of personal records

15.(1) Subject to the provisions of subsections (3) and (5), no personal record may be adduced as evidence in criminal proceedings involving the alleged commission of a sexual offence.

(2) For purposes of subsection (1) a personal record refers to a record of communications, written or oral, made by a person against whom a sexual offence was alleged to have been committed in confidence to a registered medical practitioner or registered counsellor and includes a record that existed prior to the alleged commission of a sexual offence against that person.

(3) A court may, upon application by any interested party, order disclosure of a personal record in full or in part in any manner that the court deems fit after it has considered any potential prejudice to the dignity, privacy and security of the person to whom the record relates, including the nature and extent of any harm that would be caused to such person and if it is satisfied that -

(a) the evidence contained in such record will, on its own or in conjunction with any other evidence, have substantial probative value to a fact in issue;

(b) no other evidence that has similar probative value to the fact in issue is available; and
the public interest outweighs the protection of the dignity, privacy and security of such person.

(4) The application referred to in subsection (3) must satisfy the court that -

(a) a personal record exists and is held by an identified record holder;

(b) such record contains information which is likely to be relevant to a fact in issue at the proceedings pending before the court or to the competence of a witness to give evidence;

(c) the grounds upon which the party making the application relies to establish that the contents of such record is likely to be relevant are sufficient to warrant consideration of disclosure; and

(d) granting the application will be in the interests of justice and in the interests of the person to whom such record relates.

(5) A court may, notwithstanding the provisions of subsection (3), order disclosure of a personal record if the person to whom the record relates consents to such disclosure or if a personal record has been prepared for purposes of any legal proceedings arising from the commission or alleged commission of a sexual offence.

(6) A court shall, upon receipt of a personal record after its disclosure, consider the contents of such record prior to granting access to that record to any party and may, upon furnishing reasons, grant or refuse access to that record.

Evidence of psycho-social effects of sexual offence

18.(1) Evidence of the psycho-social effects of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to –
(a) show that the sexual offence to which the charge relates is likely to have been committed

(i) towards or in connection with the complainant concerned;

(ii) under coercive circumstances as referred to in section 2;

(b) prove, for purposes of imposing an appropriate sentence, the extent of the harm suffered by that complainant.

(2) In determining the weight to be attached to evidence adduced in terms of subsection (1), the court shall have due regard to -

(a) the qualifications and practical experience of the person who has given such evidence in matters relating to sexual offences; and

(b) all other evidence given at the proceedings.

Evidence of period of delay between sexual offence and laying of complaint

19. In criminal proceedings at which an accused is charged with a sexual offence, the court shall not draw any inference only from the length of any delay between the alleged commission of a sexual offence and the laying of the complaint in connection with such offence.

Abolition of cautionary rule

20. Notwithstanding the provisions of the common law, any other law or any rule of practice, a court may not treat the evidence of a witness in criminal proceedings involving the alleged commission of a sexual offence pending before that court with caution merely because that witness is –

(a) the complainant in such proceedings;

(b) less than 18 years of age; or
(c) the only witness to the offence in question.

Provision of treatment

22.(1) If it has been established that a person has sustained physical or psychological injuries as the result of a sexual offence, such person shall, as soon as is practicable after the offence, receive the best possible medical care, treatment and counselling as may be required for such injuries.

(2) The State shall bear the cost of the medical care, treatment and counselling as referred to in subsection (1).

Sex offender orders

24.(1) A court may, upon application by a person referred to in subsection (2), grant an order prohibiting a person convicted of a sexual offence, notwithstanding the fact that the convicted person has lodged an appeal or instituted review proceedings regarding his or her conviction or sentence, from –

(a) acting in a way that is intended to cause serious harm to any particular person or members of the public;

(b) frequenting any specified location;

(c) establishing or attempting to establish contact with any specified person.

(2) An application referred to in subsection (1) shall be made on affidavit to the magistrate’s court in whose area of jurisdiction it is alleged that the convicted person is or was acting in a way referred to in that subsection, and may be brought by –

(a) a police official;
(b) a police reservist;

(c) a director or authorised employee of a non-governmental or community based organisation;

(d) any member or employee of a private security institution;

(e) a social worker;

(f) a medical officer; or

(g) an official designated by a local authority.

(3) Any person may request a person referred to in subsection (2) to bring an application as contemplated in this section and may, upon failure of such person to bring an application within 48 hours of the request without good reason, make such application to the court referred to in subsection (2).

(4) The court hearing the application for an order as contemplated in this section may only grant such order if it is satisfied that the person in respect of whom the order is sought has been convicted of a sexual offence and that the order is necessary for the purpose of protecting any particular person or members of the public from serious harm by the convicted person and may, if so satisfied, direct that the convicted person is prohibited from acting in any way which the court deems fit.

(5) An order contemplated in this section shall have effect for a period of at least five years from the date of the order or for such longer term as may be prescribed in the order, and may only be revoked by the court within a shorter period of time upon application by the person who first obtained the order or by the convicted person with the consent of the person who first obtained the order.
(6) A convicted person in respect of whom an order has been issued by a court as contemplated in this section, and who contravenes any prohibition or direction stipulated in such order, is guilty of an offence and shall be liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

Supervision of dangerous sexual offenders

25. (1) Whenever a dangerous sexual offender has been convicted of a sexual offence by a court to imprisonment without the option of a fine, the court may order, as part of the sentence, that when such offender is released either after completion of the term of imprisonment or on parole, the Department of Correctional Services shall ensure that the offender is placed under long term supervision by an appropriate person.

(2) For purposes of subsection (1) a dangerous sexual offender includes an offender who has –

(a) more than one conviction for a sexual offence;

(b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or

(c) been convicted of a sexual offence against a minor and long term supervision means supervision of a rehabilitative nature for a period of not less than five years.

(4) If the consent of the Director of Public Prosecutions to institute prosecution has been obtained as referred to in subsection (3), prosecution may be instituted in any appropriate court within such Director's jurisdiction.
Penalties

28. Any person who is convicted of an offence in terms of this Act, must be sentenced in accordance with the provisions of Chapter 3 of the Sentencing Framework Act, Act No. xx of 20xx.
ANNEXURE C

THE PROPOSED AMENDMENT TO SECTION 37 OF THE CRIMINAL
PROCEDURE ACT 51 OF 1977

The proposed Criminal Procedure Amendment Bill provisions reads as follows:

* The Criminal Procedure Amendment Bill³

Amendment of Section 37 of Act 51 of 1977, as amended by Section 1(a), (b) and (c) of Act 64 of 1982.

1. Section 37 of the Criminal Procedure Act, 1977 (hereinafter referred to as the principal act) is hereby amended by the insertion in the principal Act after Section 37 of the following section:

Compulsory testing of arrested persons for non-evidentiary purposes

37A(1) Any person who alleges that he or she has been the victim of any sexual offence in which exposure of the bodily fluids of the arrested person may have occurred, may at the earliest possible opportunity after laying a charge and before or after an arrest is effected, apply to a magistrate orally or in writing for an order that the person arrested on the charge or on suspicion of having of having committed the offence in question be tested for HIV or any other life-threatening sexually transmissible disease.⁴

³ As introduced by the South African Law Commission in Discussion Paper 84 on lx.
⁴ The victim's test for HIV/AIDS may be negative due to the window period and it would be more easily ascertainable as to whether the victim has been infected, by performing blood tests on the accused due the greater likelihood that the latter may have passed the window period phase.
(2) If the alleged victim is incapacitated or is a minor, any person with legal standing may apply on his or her behalf for an order in terms of subsection (1).

(3) The magistrate of the district in which the offence is alleged to have occurred or in which the victim resides has jurisdiction to grant the order, and shall as soon as is reasonably practicable consider the application.

(4) The magistrate, if satisfied from information on oath that prima facie evidence exists that an offence as described in subsection (1) has been committed, shall order any designated local authority to test the person or persons arrested and to inform the magistrate of the result.

(5) Any police officer may take such steps as may be reasonably necessary to carry out the order.

(6) The proceedings shall be held in camera and the magistrate shall not communicate the fact that an order has been granted or the result of the test or tests to any person other than -

   (a) the victim of the alleged offence or the person acting on his or her behalf and

   (b) the arrested person.

(7) No order granted under this section shall be carried out more than four months after the date upon which it is alleged that the offence in question took place.

(8) The Minister of Health and Justice may promulgate policy on the testing methods and procedures to be used for purposes of this section.
(8) "Test" in this section means any medically recognized test for determining the presence of HIV or any other life threatening sexually transmissible disease.
ANNEXURE D

THE CRIMINAL PROCEDURE ACT 51 OF 1977
(RELEVANT CLAUSES)

37(1) Any police official may –

(a) take the finger-prints, palm – prints or foot –prints or may cause to be taken –

(i) of a person arrested upon any charge;

(ii) of any such person released on bail or on warning under section 72;

(c) take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraphs (a)(i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that no police official shall take any blood sample of the person concerned.

37(2)(a) Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.
37(3) Any court before which criminal proceedings are pending may –

(a) in any case in which a police official is not empowered under subsection (10 to take finger-prints, palm-prints or footprints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain whether the body of an accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance;

(b) order that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings.
**ANNEXURE E**

**PRE-IMPLEMENTATION: TABLE 5 OF SALC DISCUSSION PAPER**

91 APPENDIX C

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<tr>
<th>CRIME</th>
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*See on 32 in this regard.*
ANNEXURE F

POST IMPLEMENTATION: SENTENCES IMPOSED EXPRESSED AS A PERCENTAGE

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* Equated as a life sentence.