

# POSITIVE OR NEGATIVE?

## Compulsory HIV testing of alleged sexual offenders

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Since 2003 the Portfolio Committee on Justice and Constitutional Development has deliberated on legislation providing for the compulsory HIV testing of accused sexual offenders. After having been approved by the National Assembly and submitted to the National Council of Provinces in May 2007, it seems likely that compulsory HIV testing of alleged sexual offenders will be enacted as part of the new sexual offences legislation. This article describes the development and content of the provisions on compulsory HIV testing and examines their practical utility against the background of the alleged offender's constitutional rights. It is argued that these provisions are unlikely to provide the relief sought by victims, and may result in an unconstitutional limitation of an accused's right to privacy.

**S**outh Africa is battling with an extremely high incidence of sexual offences. In the year 2005/2006 the South African Police Service (SAPS) received 54 926 reports of rape. (SAPS 2006) However, these figures do not reflect the true scope of the problem because sexual offences are highly under-reported. Besides the high number of rapes, South Africa is confronted with a very high prevalence of HIV/AIDS. The convergence of high numbers of both rape and HIV/AIDS creates a dangerous conjunction. In addition to various other traumatising effects, rape victims face the risk of being infected with HIV.

Penetrative forms of sexual assault bear a comparatively high risk of HIV transmission. Use of force and lack of lubrication, which are common features of sexual assault, often lead to tears and other micro-injuries in the genital organs, facilitating the transmission of sexually transmitted diseases like

HIV/AIDS. Women – disproportionately often victims of sexual assault – are more vulnerable to HIV transmission than men because of the physiological features of the vagina, the high viral load (infectiousness) of semen and the possibility of (other) unnoticed infections of their genital organs.

### The law reform process

Pressured by mounting public concern about the coupled high prevalence of sexual offences and HIV/AIDS, the Portfolio Committee on Justice and Constitutional Development (hereafter: Portfolio Committee) asked the South African Law Reform Commission (SALRC) in 1998 to examine the possible enactment of legislation for the compulsory HIV testing of alleged sexual offenders. The SALRC investigation concluded that there *is* in fact need for a statutory intervention for compulsory HIV testing of alleged sexual offenders at the instance or on behalf of the victim. As a result the

SALRC laid out a first draft of a Criminal Procedure Amendment Bill in the Fourth Interim Report on Aspects of the Law Relating to AIDS, which envisioned compulsory HIV testing of arrested persons for non-evidentiary purposes. (SALRC 2000:8)

In 2003 the Portfolio Committee began its deliberations on the provisions that subsequently became the Compulsory HIV Testing of Alleged Sexual Offenders Bill. This Bill entitled a victim of a sexual offence who may have been exposed to the body fluids of the alleged sexual offender to apply for a court order directing that the offender be tested for HIV/AIDS. The purpose of the legislation was to afford the victim of an alleged sexual offence a speedy process to find out whether s/he might have contracted HIV.<sup>1</sup>

In 2006, the Compulsory HIV Testing Bill was incorporated into the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (hereafter: Sexual Offences Bill). The provisions have since changed considerably. Since the inclusion, the provisions allow not only *victims* of sexual offences but also *investigating officers* to apply for a mandatory HIV test of the alleged offender. The latter may apply for testing of an alleged sexual or *any other* offender.<sup>2</sup>

#### **Victims' application**

Before the victim or a person acting on behalf of the victim can apply for a compulsory HIV test of an alleged sexual offender, the victim must lay a criminal charge with the SAPS. Another requirement for the application is that not more than 90 days have passed since the alleged commission of the offence. These requirements fulfilled, the victim may apply for the mandatory HIV test at the police station. Once the police have received the application they have to submit it to a magistrate as soon as is reasonably possible.

After considering the application, the magistrate must make an order for the alleged offender to be tested for HIV if s/he is satisfied that there is *prima facie* evidence that–

- A sexual offence has been committed against the victim by the alleged offender

- The victim may have been exposed to the body fluids of the alleged offender
- No more than 90 calendar days have lapsed from the date on which it is alleged that the offence in question took place

The magistrate must furthermore ensure that the alleged offender has not yet been tested for HIV on application by a police official.

#### **Detectives' application**

An investigating officer can apply for an HIV test of an accused if such a test would appear to be necessary for purposes of investigating or prosecuting an offence. It is important to note that an investigating officer may make the application for the investigation of *any* offence, not only sexual offences.

After considering the application, the magistrate must make an order if s/he is satisfied that there is *prima facie* evidence that–

- The alleged offence has been committed by the offender
- HIV testing would appear to be necessary for purposes of investigating or prosecuting the offence

The magistrate has to consider the application as soon as is reasonably practicable and may take into consideration evidence by or on behalf of the accused only if to do so will not give rise to any substantial delay. Discretion regarding the granting of applications is very limited ('the magistrate *must* make an order'). If an application is granted, the alleged offender will be notified by the police and must undergo an HIV test at a designated health facility; non-compliance with the court order constitutes an offence.

The outcome of the HIV test is disclosed to the victim, or the person acting on behalf of the victim, or to the investigating officer, as the case may be, and to the accused.

#### **Concerns about compulsory HIV testing**

During the drafting process, compulsory HIV testing of alleged sexual and other offenders was

commented on vigorously by criminal law experts, criminal justice personnel, human rights activists and victim advocacy groups. Those who supported the testing commented that it was necessary for the protection of victims' rights and that it balanced the rights of victims and those of suspects in an appropriate manner. Opponents of the legislation believed that the infringement of the alleged offender's constitutional right to privacy (s 14 of the Constitution) – among others – was unjustifiable and that compulsory HIV testing lacked practical utility.

#### *Concept of privacy*

The Constitution explicitly protects the right to privacy. Facts are considered private if the disclosure thereof will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence. A person's HIV status is medical information about an incurable disease. Due to the sexual transmission and the lack of a cure, HIV/AIDS – unlike other illnesses – is a condition related to sex, blood, death and disease. HIV status therefore needs to be considered an intimate affair that is protected under the constitutional right to privacy. This has recently been confirmed by the Constitutional Court in the judgment *NM and Others v Smith and Others* where Madala J held that 'private and confidential medical information contains highly sensitive and personal information'. The Court recognised that 'the disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure'.

*Forcing* an individual to undergo testing for such disease, and *disclosing* the subsequent test result without the individual's consent, severely collide with the constitutional pledge. The fact that the individual in this case is an alleged (sexual) offender does not make a difference. The alleged offender cannot be said to have forfeited his rights, having possibly committed a rape, because he is still an accused and not a convicted criminal.

#### *The limitation clause*

It is contested whether the limitation of the alleged offender's right to privacy is reasonable and

justifiable under the limitation clause of the Constitution (s 36 Constitution). To establish whether the restriction of a right is justifiable, the following factors need to be taken into account:

- The importance of the purpose of the limitation
- The nature and the extent of the limitation
- The relation between the limitation and the purpose
- Whether there are less restrictive means to achieve the purpose

The provisions on compulsory HIV testing would thus be justifiable if they had a significant purpose that outweighed the alleged offender's right to privacy.

#### *Justifiability of detectives' application*

According to the principles of the limitation clause, the major questions are:

- What is the *purpose* of the provisions allowing investigating officers to apply for a compulsory HIV test?
- Is this purpose achieved through the provisions?
- Is this purpose important enough to justify the limitation of the alleged offender's right to privacy?

The purpose of the envisaged provisions is to facilitate and enhance the investigation process of the police so as to enable the effective prosecution of criminals. The importance of thorough police investigations, including evidence collection, may not be underestimated. The ascertainment of bodily characteristics such as fingerprints and blood samples often forms an essential part of the investigation of a specific crime. Comprehensive police investigations are the basis for the successful prosecution of crimes. The prosecution does not have a strong case unless the police investigation has secured evidence that can be used in the court proceedings.

It could therefore be argued that effective policing, or more broadly, effective criminal proceedings, justify the limitation of the alleged offender's right to privacy. However, this argument fails. The envisaged provisions on compulsory HIV testing are not necessary to fulfil this purpose because it is, in fact,

already fulfilled by provisions of the Criminal Procedure Act No. 51 of 1977 (CPA). The CPA already provides for comprehensive police investigations and evidence collection through detailed provisions on blood tests. Section 37 of the CPA states that any police official may–

take such steps as he may deem necessary in order to ascertain whether the body of any person...has any mark, characteristic or distinguishing feature or shows any condition or appearance.

Under this provision of the CPA, the police may order a medical examiner to take a blood sample if this is necessary to obtain evidence. The legislation also provides for blood tests on convicted criminals. These can, however, only be ordered by the court before which the criminal proceedings are pending (s 37(3) (a) CPA).

The Portfolio Committee briefly discussed the overlap between the envisaged provisions and section 37 of the CPA during its deliberations on the Sexual Offences Bill. At a meeting of the Committee in 2003 a representative of the SAPS pointed out that s 37 CPA *does* provide for investigating officers and magistrates to apply for a blood test of an alleged sexual offender, and that this blood test could include an HIV test. The SAPS representative stressed, however, that the provisions in the CPA were ‘not written with HIV/AIDS testing in mind’, and that magistrates were reluctant to issue such orders. (Parliamentary Monitoring Group 2003)

Whether s 37 CPA was written with HIV/AIDS testing in mind is irrelevant, though. In 1977, when the provision was drafted, HIV/AIDS was not an issue. This does not *per se* exclude HIV/AIDS tests from the provision; what matters is the *applicability* of the provision. Section 37 CPA is phrased broadly enough to cover a wide range of blood tests – tests to determine substance abuse, tests for genetic information (DNA), etc. The provision does not entail any indication that it is not applicable to established conditions like HIV status.

Thus, s 37 CPA covers testing an alleged offender for HIV if this is necessary to investigate a crime, to

lead evidence and for sentencing. As the CPA provides for HIV tests, the provisions in the Sexual Offences Bill are completely redundant. Hence, the provisions do not serve an important purpose and are not justifiable under the constitutional limitation clause.

#### Utility of HIV test results as evidence

The *utility* of HIV tests for criminal proceedings is a different question altogether. The test result does not necessarily facilitate the prosecution of sexual offences. The only offence where HIV status is an element of the crime and hence is relevant for sentencing are rape cases where the alleged offender committed the crime knowing that he was HIV positive (Schedule 2 Part 1 Criminal Law Amendment Act 1997). In these rape cases, the prosecutor has to prove that the alleged offender was HIV positive and *knew* his/her HIV status when committing the crime. The outcome of an HIV test weeks or even months after the offence neither provides evidence that the offender was infected with HIV at the time of the commission of the offence, nor that the offender had specific knowledge regarding his/her HIV status.

#### Justifiability of victims' application

Whether the provisions that allow victims of sexual offences to apply for an HIV test are justifiable under the limitation clause is based on the same test. The provisions must correspond with an important purpose and this purpose must outweigh the interests of the alleged offender. It therefore needs to be assessed:

- What the *purpose* of the provisions allowing rape victims to apply for a compulsory HIV test is
- Whether this purpose is achieved through the provisions
- Whether this purpose is important enough to justify the limitation of the alleged offender's right to privacy

In their *Fourth Interim Report on Aspects of the Law Relating to AIDS* the SALRC stated that the purpose

of the HIV test is to enable victims to 'make life decisions and choices for themselves and people around them' and that such tests are 'profoundly beneficial to their psychological state to have even a limited degree of certainty regarding their exposure to a life-threatening disease'. (SALRC 2000:175,312)

The latest version of the Sexual Offences Bill states that the test results are:

- to inform a victim or an interested person whether or not the alleged offender...is infected with HIV with the view to—
  - reducing secondary traumatisation empowering the victim to make informed medical, lifestyle and other personal decisions[.] (Section 34 (a) (i))

Presumably, 'medical, lifestyle and other personal decisions' refer mainly to the victim's choice about the use of post-exposure prophylaxis (PEP) and safer sex practices.

#### **Post exposure prophylaxis**

Post exposure prophylaxis is a 28-day programme of antiretroviral drugs, which may prevent the infection of HIV if taken within 72 hours of exposure to HIV.

Scientific evidence suggests that the medication needs to be taken within 6 hours of exposure to be effective.

Unfortunately, testing the alleged offender for HIV cannot help the victim make these decisions. The main obstacle is the 'window period'. During the first three to six weeks after the initial infection, an HIV positive person does not show HIV antibodies in the blood. The virus cannot be detected through HIV antibody tests, which are the tests primarily used in South African health care facilities.<sup>3</sup> The risk of transmission is, however, especially high during this period due to the high viral load at the onset of HIV infection.

This means that during the 'window period' the alleged sexual offender would test HIV negative,

although s/he could be HIV positive *and* highly infectious. It would be devastating if the victim were told that the alleged offender had a negative test result and on the basis of this information decided to stop taking PEP or practising safer sex - because, in fact, his/her risk of HIV infection might be extremely high.

Since a negative test result does not necessarily mean that the alleged offender *is* HIV negative, the test result neither provides clarity about the HIV status of the alleged offender, nor about the risk of infection for the victim and his/her sexual partner(s). As such, the test result does not achieve its purpose of empowering the victim to make informed medical and lifestyle decisions. On the contrary, the provisions may even be counter-productive in cases where victims misinterpret an HIV negative test result.

The other purpose of the provisions – affording the victim emotional relief – is doomed to fail for the exact same reason. The victim might take some comfort from an HIV negative test result, thinking that the chances of the offender being in the 'window period' are comparatively low. In reality there is a very real risk of the alleged offender being HIV positive and hence, a risk of the victim having been exposed to the virus.

Similarly, if the alleged offender tested HIV positive, this will be extremely distressing for the victim, even though the test result may not show that HIV was transmitted through the sexual assault. Due to its uncertainty, the test result cannot give the victim peace of mind. The only way to gain clarity and emotional relief is for the victim to undergo repeated HIV testing himself/herself.

This leaves the purpose of reducing secondary traumatisation. Compulsory HIV testing of the alleged rapist could emotionally empower the rape victim in the sense that s/he would, for a brief moment, gain power over the alleged perpetrator.

Victims of sexual offences have been brutalised and humiliated. It should also be noted that they have been neglected and victimised by the criminal justice system far too long. But are the proposed

provisions on compulsory HIV testing an appropriate answer to end the secondary traumatisation of rape victims? Probably not: the secondary victimisation of rape victims needs to be addressed more effectively through protective measures such as specialised sexual offences courts, as well as specific regulations on vulnerable witnesses and *in camera* hearings. HIV testing of the alleged offender is not an appropriate tool to fight secondary victimisation.

Overall, compulsory HIV testing of alleged sexual offenders is of no practical use for rape victims. The provisions fail to achieve the objects that were envisioned in the Sexual Offences Bill. In the absence of an important purpose, the limitation of the constitutional right to privacy is not justifiable under s 36 of the Constitution.

### Conclusion

The provisions on compulsory HIV testing are meant to provide assistance and support to investigating officers and victims of sexual offences. In fact, they are more detrimental than beneficial. With regard to applications by the police, the provisions are completely redundant, because the CPA already provides for blood tests, including HIV tests.

With regard to applications by rape victims, the provisions lack practical utility. As the 'window period' makes it impossible to obtain reliable test results, neither the HIV status of the alleged offender nor the risk of transmission for the victim can be established through testing the accused. Thus, the victim cannot rely on such testing for vital decisions concerning antiretroviral therapy and safer sex practices.

The lack of utility means that the provisions fail to serve an important purpose outweighing the alleged offender's right to privacy. Moreover, the provisions might create a false sense of security, which could actually backfire on rape victims and their sexual partner(s). It is therefore strongly suggested that the provisions on compulsory HIV testing should be omitted from the Sexual Offences Bill before the legislation is finally signed by the President.

### Acknowledgement

The findings of this article were drawn from a more comprehensive research report, 'HIV/AIDS and the right to privacy', which was prepared for the Canadian International Development Agency.

### References

- Constitutional Court, Case CCT 69/05. *NM and Others v Smith and Others*.
- Criminal Law (Sexual Offences) Amendment Bill (B50-2003).
- Memorandum on the Objects of the Compulsory HIV Testing of Alleged Sexual Offenders Bill (B10-2003).
- Minutes of the Parliamentary Monitoring Group of the Portfolio Committee meeting on 27 March 2003.
- SAPS Crime Statistics 2006. Available at [http://www.saps.gov.za/statistics/reports/crimestats/2006/\\_pdf/provinces/rsa\\_total.pdf](http://www.saps.gov.za/statistics/reports/crimestats/2006/_pdf/provinces/rsa_total.pdf). [accessed 12 April 2007]
- South African Law Reform Commission 2000. *Fourth Interim Report on Aspects of the Law Relating to AIDS*: viii.

### Endnotes

- 1 Memorandum on the Objects of the Compulsory HIV Testing of Alleged Sexual Offenders Bill (B10-2003).
- 2 The inclusion of investigating officers as applicants has been one of the major changes since the incorporation of the Compulsory HIV Testing Bill into the Criminal Law (Sexual Offences and Related Matters) Amendment Bill; another important modification has been the creation of provisions allowing the test result to be admissible as evidence in ensuing civil or criminal proceedings.
- 3 Certain blood tests can detect HIV even during the window period. As these tests are extremely expensive and highly sensitive compared to HIV antibody tests, the author assumes that these tests will not be used for large-scale testing such as compulsory HIV tests of alleged sexual offenders.