

Testing for HIV/AIDS: The constitutional standard

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1 INTRODUCTION

Effectively addressing the HIV pandemic in South Africa constitutes one of the greatest challenges facing our nascent democracy. The last ten years have witnessed a consistent and dramatic increase in the number of HIV infections. Though HIV/AIDS transcends the boundaries of race, gender, sexual orientation, religion, social class etc., it thrives in an environment of poverty, rapid urbanisation, violence and destabilisation.¹ Vulnerable sectors of South African society are particularly susceptible to infection and to having their constitutional rights abused, infringed or threatened on account of their HIV/AIDS status. The rising HIV statistics call for an holistic, well-targeted and effective response to curtail the spread of the infection as well as to address the plight of those affected or infected by HIV/AIDS in a way that is consistent with human rights and constitutional norms and standards.

This article seeks to explore some of the legal issues associated with testing for HIV/AIDS in South Africa. In so doing, it will begin by addressing the issue of testing for HIV/AIDS within the context of health rights in the South African constitution. It will accord some attention to the other constitutional rights of relevance in the testing for HIV/AIDS and provide an overview of some of the key policies and principles governing testing for HIV/AIDS in South Africa.

2 TESTING FOR HIV WITHIN THE CONFINES OF A CONSTITUTIONAL FRAMEWORK

Section 27(1)(a) of the Constitution² provides for a right of access to health care services, including reproductive health care services. Section 27(1)(b) obliges the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right. Though this provision bears some similarity to Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), one

1 Para. 1.3., Code of Good Practice: Key Aspects of HIV/AIDS and Employment, Government Gazette No. R 1298, December 2000.

2 Act 108 of 1996.

significant difference is that the South African Constitution refers to a right of access to “health care services” as opposed to a right to the highest attainable standard of physical and mental health.

The World Health Organisation has defined the term “health” as: “[A] state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”³ Whilst there is still uncertainty regarding the precise definition of the term “health care services” in the South African Constitution, it is clear that it includes both preventative as well as curative health care services.⁴ Hence the definition will include those health services aimed at prevention, diagnosis and treatment of conditions threatening the health of individuals. The State’s obligation to take reasonable legislative and other measures must accordingly be targeted at both preventative and curative health care services. In fact, article 12(2)(c) of the ICESCR recognises that prevention, treatment and control of epidemic, endemic, occupational and other diseases are one of the steps to be taken to realise the right to health. Section 16 of General Comment No. 14 of the Committee on Economic, Social and Cultural Rights⁵ further recognises the need for the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, including HIV/AIDS.

Section 27 of the Constitution also refers to a right of *access* to health care services as opposed to health care *per se*. A right of “access” to health care services imposes an obligation on the State to create an enabling environment by providing the necessary conditions for individuals to be able to access health care services. Hence, the State must make the necessary health care services accessible and available to everyone.

As noted above, the right of access to health care services is qualified by the term “progressive realisation”. The qualifier refers to health care services being realised on an ongoing basis as opposed to requiring immediate implementation. The UN Committee on Economic and Social Rights has interpreted the phrase “progressive realisation” to mean an obligation on the State “to move as effectively and expeditiously as possible to securing its ultimate goal.”⁶ The Committee has however noted that the phrase “should not be misinterpreted of depriving the obligation of all meaningful content.”⁷ It has further expressed that “any deliberately retrogressive measures will have to be fully justified.”⁸

3 *Basic Documents*, WHO 1988, at page 1-2.

4 Toebes B. “The Right to Health” in Eide et al *Economic, Social and Cultural Rights*, 2nd ed (2001) 174.

5 General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, adopted by the Committee on Economic, Social and Cultural Rights in May 2000. UN doc. E/C.12/2000/4.

6 General Comment No. 3, Para 9 *The Nature of States Parties’ Obligations (article 2(1)) of the International Covenant on Economic, Social and Cultural Rights*, (Fifth session, 1990), UN doc. E/1991/23.

7 General Comment No. 3, Para 9 *The Nature of States Parties’ Obligations (article 2(1)) of the International Covenant on Economic, Social and Cultural Rights*, (Fifth session, 1990), UN doc. E/1991/23.

8 General Comment No. 3, Para 9 *The Nature of States Parties’ Obligations (article 2(1)) of the International Covenant on Economic, Social and Cultural Rights*, (Fifth session, 1990), UN doc. E/1991/23.

The right of access to health care services is also qualified by “resource availability”. The qualifier refers to the fact that even where available resources are demonstrably inadequate, the State should still strive to ensure the widest possible enjoyment of the right under the prevailing resource constraints.⁹ In realising the right of access to health care services, it is important that the available resources are effectively and equitably utilised.

It is submitted that appropriate testing for HIV/AIDS is a key strategy for prevention as well as a prerequisite for the exercise of the curative/treatment aspect of health care services. UNAIDS has recognised that voluntary counselling and testing for HIV/AIDS is a critical entry point for prevention and care of the infection.¹⁰ Voluntary testing refers to testing for HIV only with an individual’s knowledge and informed consent. An individual must give express consent in respect of an HIV test. Voluntary testing has numerous advantages. In particular, UNAIDS has highlighted that voluntary testing can facilitate the following outcomes of prevention or care:

- promote behavioural change (thereby reducing the number of further potential infections);
- prevent mother-to-child transmission of HIV;
- ensure the early management of opportunistic infections;
- ensure a supportive environment for people living with HIV/AIDS;
- result in the normalisation and destigmatisation of HIV/AIDS;
- ensure access to early medical care including antiretrovirals, preventative therapy and other opportunistic infections;
- ensure access to early health care, such as nutritional advice.¹¹

It is accordingly clear that appropriate testing for HIV/AIDS is a critical component of the right of access to health care services. On the one hand it potentially facilitates the prevention of further infections and on the other hand it can allow for the effective treatment and control of the infection.¹²

However, in order to ensure that testing for HIV/AIDS does indeed fulfil these objectives, it is vital that it occurs in an enabling environment and in a way that is appropriate, sensitive and effective. Of paramount importance in the testing for HIV/AIDS is the requirement that individuals feel safe and secure to voluntarily present themselves for testing. To ensure that these objectives are fulfilled, the approach to testing must also be informed by due regard for certain constitutional rights and principles.

9 General Comment No. 3, Para 11 *The Nature of States Parties’ Obligations (article 2(1)) of the International Covenant on Economic, Social and Cultural Rights*, (Fifth session, 1990), UN doc. E/1991/23.

10 Voluntary Counselling and Testing, UNAIDS Technical Update, May 2000, *Best Practice Collection*, 6.

11 Voluntary Counselling and Testing, UNAIDS Technical Update, May 2000, *Best Practice Collection*, 6.

12 The issue of whether such treatment should be provided at State expense falls beyond the ambit of the present article.

The Vienna Declaration of 1993 recognised that human rights are indivisible, interdependent and inter-related.¹³ This interrelationship between different rights is particularly clear in the context of HIV testing.

Testing for HIV/AIDS must ensure respect for the following rights:

- human dignity of individuals presenting for testing¹⁴;
- the right to equality and non-discrimination based on HIV status¹⁵;
- the right to freedom and security of the person, including the right to bodily and psychological integrity. The right to bodily integrity includes the right to security in and control over one's body and not to be subjected to medical or scientific experiments without an individual's informed consent.¹⁶
- the right to privacy which includes the right not to have the privacy of communications infringed.¹⁷ The right to privacy and confidentiality is of particular relevance with regard to a person's HIV status.

The issue of confidentiality in the context of HIV/AIDS was directly dealt with in the case of *Jansen van Vuuren and Another NNO v Kruger*,¹⁸ where the court reaffirmed the critical importance of confidentiality in the context of HIV testing. In order to ensure that testing for HIV/AIDS takes place in a way that is consistent with the right to human dignity, bodily and psychological integrity and privacy, it is vital that testing takes place on a voluntary basis, after receiving the informed consent of the individual concerned and in conjunction with pre- and post-test counselling. These prerequisites for testing for HIV further ensure that HIV testing can occur in an enabling environment within which individuals can access health care services for both the prevention and treatment of HIV/AIDS.

3 DOMESTIC FRAMEWORK FOR HIV TESTING

3.1 Policy guideline on testing

The HIV/AIDS policy guideline on "Testing for HIV"¹⁹ recognises the importance of HIV testing taking place in accordance with the constitutional

13 United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action. UN doc. A/CONF. 157/23, 12 July 1993, Part I, para 5.

14 S 10 of the Constitution states: "Everyone has inherent dignity and the right to have their dignity respected and protected."

15 S 9 of the Constitution provides for the right to equality and prohibits unfair discrimination. Though s 9(3) prohibits unfair discrimination on a number of listed grounds, this list does not expressly include HIV status as a prohibited ground of discrimination. However, s 6(1) of the Employment Equity Act, 55 of 1998 specifically mentions HIV status as a prohibited ground of discrimination. S 34(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, requires the Minister of Justice and Constitutional Development to give special consideration to the inclusion of HIV/AIDS as a prohibited ground of discrimination.

16 S 12 of the Constitution.

17 S 14(d) of the Constitution.

18 1993 (4) SA 842 (A).

19 *HIV/AIDS Policy Guideline: Testing for HIV, HIV/AIDS and STD Directorate*. Department of Health, August 2000.

guarantees of freedom and security of the person, the right to privacy and dignity. The principles of informed consent, voluntary testing and pre- and post-test counselling accordingly inform the principles enunciated in the policy.

3.1.1 Circumstances for HIV testing

The policy highlights the circumstances under which HIV testing may be conducted. These include:

- upon individual request, for diagnostic and treatment purposes, with the informed consent of that individual;
- on the recommendation of a medical doctor that such testing is clinically indicated, with the informed consent of the individual;
- as part of HIV testing for research purposes, with the informed consent of the individual and in accordance with national, legal and ethical provisions regarding research;
- as part of screening blood donations, with the informed consent of the individual and in accordance with statutory provisions regarding blood donations;
- as part of unlinked and anonymous testing for epidemiological purposes undertaken by the national, provincial or local health authority or an agency authorised by any of these bodies without informed consent, provided that HIV testing for epidemiological purposes is carried out in accordance with national, legal and ethical provisions regarding such testing;
- where an existing blood sample is available and an emergency situation necessitates testing the source patient's blood (e.g. when a health care worker has sustained a risk-bearing accident such as a needle-stick injury), HIV testing may be undertaken without informed consent but only after informing the source patient that the test will be performed, and providing for the protection of privacy. The information regarding the result may be disclosed to the health care worker concerned but must otherwise remain confidential and may only be disclosed to the source patient with his or her informed consent; or
- where statutory provision or other legal authorisation exists for testing without informed consent.²⁰

The policy further notes that routine testing of a person for HIV infection for the perceived purpose of protecting a health care worker from infection is impermissible regardless of consent.

3.1.2 Consent, confidentiality and counselling

The principles of informed consent, confidentiality and pre- and post-test counselling further underpin the policy. The policy notes that the information regarding the result of the test must remain fully confidential and

²⁰ Ibid. 4.

may, in the absence of an overriding legal or ethical duty, be disclosed only with the individual's fully informed consent.²¹

In the context of HIV/AIDS, the policy notes that testing with informed consent means that the individual has been made aware of and understands the implications of the test. The policy defines consent as the giving of express agreement to HIV testing in a situation devoid of coercion, in which the individual should feel equally free to grant or withhold consent. It recommends that written consent should be obtained where possible.²²

Although the policy stipulates that pre-test counselling should occur before an HIV test is undertaken, it obliges counsellors and health professionals to respect an individual's right to refuse such pre-test counselling. It defines pre-test counselling as a confidential dialogue with a suitably qualified person, such as a doctor, nurse or trained HIV counsellor, undertaken as a means of passing on information and gaining consent. It recommends that a doctor, nurse or trained HIV counsellor should also ensure that post-test counselling takes place as part of a process of informing an individual of an HIV test result. The policy makes provision for referrals to appropriate facilities in the event of facilities lacking the capacity to provide counselling services.²³

3.2 Employment Equity Act

The Employment Equity Act²⁴ applies to all employers except the South African National Defence Force, National Intelligence Agency and Secret Service. "HIV status" is included in the list of grounds on which "[n]o person may unfairly discriminate, directly or indirectly, against an employee, or an applicant for employment in any employment policy or practice".²⁵ The Act specifically prohibits HIV testing (such as pre-employment testing) unless authorisation is obtained from the Labour Court.²⁶

3.3 Code of Good Practice on Key Aspects of HIV/AIDS and Employment

The Code of Good Practice on Key Aspects of HIV/AIDS²⁷ has as its primary objective the setting of guidelines for employers and trade unions so as to ensure that individuals with HIV are not unfairly discriminated against in the workplace. The following policy principles underpin the Code:

- The promotion of equality and non-discrimination;
- The creation of a supportive work environment;
- The protection of human rights and dignity.²⁸

21 Ibid. 5

22 *HIV/AIDS Policy Guideline: Testing for HIV, HIV/AIDS and STD Directorate*, Department of Health, August 2000: 5.

23 Ibid. 6.

24 Act 55 of 1998.

25 S 6(1), Employment Equity Act.

26 S 7(2), Employment Equity Act.

27 Issued in terms of s 54(1)(a) of the Employment Equity Act.

28 Item 1.6.

The Code applies to all employers and employees and encourages them to use the Code to develop, implement and refine their HIV/AIDS policies and programmes to suit the needs of their workplace. However, a severe shortcoming of the Code is that it does not impose any legal obligations in addition to those in the legislation. Failure to observe the Code does not itself render an employer liable in any proceedings, except where the Code refers to obligations set out in law.²⁹

The Code further recognises the right to privacy in respect of HIV/AIDS status. Accordingly, it stipulates that there is no general legal duty on an employee to disclose his or her HIV status to their employer or to other employees.³⁰ It further recognises that where an employee chooses to voluntarily disclose his or her HIV status to the employer or to other employees, this information may not be disclosed to others without the employee's express written consent. Where written consent is not possible, steps must be taken to confirm that the employee wishes to disclose his or her status.³¹

It further states that no employer may require an employee or an applicant for employment to undertake an HIV test in order to ascertain that employee's HIV status. As provided for in the Employment Equity Act, employers may approach the Labour Court to obtain authorisation for testing.³²

The Code further sets out certain circumstances in which authorised³³ or permissible³⁴ testing may take place in the employment context.

4 ILLUSTRATIVE INSTANCES OF COMPULSORY HIV TESTING

In spite of the aforementioned policy framework in respect of voluntary HIV testing, there are still instances where proposed or existing policies or practices amount to a system of compulsory HIV testing. This article does not seek to comprehensively review all existing or proposed policies, legislation or practices, but merely highlights two examples of compulsory HIV testing.

4.1 South African Law Commission Discussion Paper on Compulsory HIV Testing of Persons Arrested in Sexual Offence Cases³⁵

At the request of the Justice Portfolio Committee, the South African Law Commission was tasked with investigating the possible creation of a statutory offence aimed at compulsory testing of sexual offenders for HIV.

29 Item 4.3.

30 Item 5.3.10.

31 Item 7.2.2.

32 Item 7.1.1.

33 Item 7.1.4.

34 Item 7.1.5.

35 Discussion Paper. 84 of 1999.

The Discussion Paper's preliminary conclusion is that there should be compulsory HIV testing of persons charged or suspected of having committed a sexual offence during which HIV may have been transmitted. It also supports the right of alleged victims of such offences to be informed of the HIV test results. According to the Law Commission, its preliminary view is based on a balancing of the rights of the victims of sexual violence against an arrested suspect's rights of privacy and bodily integrity. It concludes that there is a compelling argument for curtailing the latter's rights in order to enable his accuser to know his HIV status.

4.2 Compulsory pre-employment testing

The widely-heralded Constitutional Court case of *Hoffmann v South African Airways*³⁶ dealt with pre-employment testing of the applicant who, on account of his HIV status, was refused employment as a cabin attendant by South African Airways. The Constitutional Court held that SAA had clearly discriminated against the applicant on the basis of his HIV status and had accordingly violated section 9 of the Constitution. Unfortunately, though, the Constitutional Court declined to express an opinion on SAA's policy of compulsory pre-employment testing for HIV/AIDS and thereafter refusing employment if the infection has progressed to such a stage that the person has become unsuitable for employment as a cabin attendant.³⁷ Nevertheless, SAA's policy of pre-employment testing represents an example of compulsory testing.

5 CONCLUSION

Treatment and prevention are key components of the right of access to health care services. Appropriate testing for HIV/AIDS is an important strategy in preventing further infections as well as a prerequisite for the effective treatment of the illness. It is accordingly vital that testing for HIV/AIDS takes place in a safe, appropriate and enabling environment. To this end, it is critical that the principles of voluntary testing, confidentiality and pre- and post-test counselling inform the policies for HIV testing. South Africa's adoption of its national policy guideline on HIV testing marks a laudable initiative that embraces these fundamental principles. However, the real challenge that still lies ahead is the effective implementation of the policy.

Sources

"Voluntary Counselling and Testing" *Best Practice Collection*, 6 (UNAIDS Technical Update, May 2000)

Basic Documents (WHO 1988) 1-2

Code of Good Practice: Key Aspects of HIV/AIDS and Employment (Government Gazette No. R 1298, December 2000)

³⁶ 2000 (11) BCLR 1211 (CC). See pp 237 below.

³⁷ Para 18.

General Comment No. 14 *The Right to the Highest Attainable Standard of Health* (adopted by the Committee on Economic, Social and Cultural Rights in May 2000) UN doc. E/C.12/2000/4

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Toebe B "The Right to Health" in Eide et al *Economic, Social and Cultural Rights*, 2nd ed (2001) 174

United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, UN doc. A/CONF. 157/23, 12 July 1993, Part I, para 5