Submission on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill

Compulsory HIV testing of alleged sexual or other offenders

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Thank you very much for giving us the opportunity to make a written submission on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill 2006. We appreciate the Portfolio Committee's efforts on drafting new legislation on sexual offences and commend many of the proposed changes. With this submission, we would like to highlight the difficulties of compulsory HIV testing of alleged sexual and other offenders and recommend that such provisions be omitted from the Bill.

Introduction

The Bill provides for the victim of an alleged sexual offence or any interested person on behalf of the victim to make an application for a compulsory HIV test of the alleged offender. The same right can be exercised by an investigating officer who can apply for an HIV test of an alleged offender of a sexual or any other crime, if the testing would appear to be necessary for purposes of investigating or prosecuting such an offence.

The application has to be brought before a magistrate who must – under certain conditions – make an order for the alleged offender to be tested for HIV. The result of the test will be given to the victim and the investigating officer respectively and the alleged offender.

Although the provisions seem to pursue good intentions, the compulsory HIV testing of alleged sexual offenders faces numerous practical and legal concerns. The provisions serve no practical purpose and have severe constitutional implications.

Lack of practical utility

Objects

> ***S 37***
>
> ***The results of an HIV test may only be used in the following circumstances:***
>
> ***(a) To inform a victim or an interested person whether the alleged offender in the case in question is infected with HIV with the view to –***

(i) making informed personal decisions; or

(ii) using them as evidence in any ensuing civil proceedings as a result of the sexual offence in question; or

(b) to enable an investigating officer to gather information with the view to using them as evidence in criminal proceedings.

We argue that the victim does not benefit from the compulsory HIV testing of the alleged sexual offender and that the provisions are completely redundant for the police to investigate a crime.

Application by or on behalf of the victim

S 33

(1) (a) Within 60 days after the alleged commission of a sexual offence any victim or any interested person on behalf of a victim, may apply…

The current version of the Bill is unclear about the intentions of providing the victim with the test result of an alleged offender. In s 37 (a) (i) the Bill states that the test results may be used by the victim to make informed personal decisions without clarifying what such decisions could be.

Interpreting "personal decisions" as decisions about safer sex practises and about HIV post exposure prophylaxis (hereafter PEP), the provisions cause confusion about the urgency of such decisions. Also, s 37 (a) (i) misleadingly implies that the outcome of the test can assist the victim in making such decisions. In fact, the result of the HIV test is of no practical use for the victim. Due to the window period, during which an HIV infection cannot be detected[1], the alleged sexual offender might test HIV negative, although he is HIV positive. Thus, a negative test result is unable to help the victim with life decisions. It would be devastating and life threatening if the victim concluded to stop PEP or safer sex practises because of a negative test result of the alleged offender. Due to the uncertainty of the HIV status of the alleged offender, the victim must not be influenced by the test result. Unless the victim is HIV positive himself/herself, he/she needs to start PEP as soon as possible after the offence and has to carry on taking the medication despite any outcome of the HIV test.

Many discuss the emotional relief that an HIV negative test result means for the victim. But due to the window period an HIV negative test result cannot comfort the victim. The alleged offender might still be HIV positive and might have transmitted the virus to the complainant. On the other hand, an HIV positive test result does not *necessarily* mean that the virus was transmitted through the sexual offence. The risk of transmission depends on various preconditions like the type of the sexual conduct, injuries and the presence of blood, semen, and other sexually transmitted diseases. After all, the only reliable way for the victim to find out about his/her HIV status is to undergo testing himself/herself.

It remains unclear how the test result is supposed to assist the victim in civil proceedings as foreseen in s 37 (a) (ii) of the Bill. In our opinion, such an objective does not justify the constitutional infringements of the alleged perpetrator's rights in any event.[2]

[1] We are aware that certain blood test can detect HIV even during the window period. As these test are extremely expensive compared to the usual antibody tests, we assume that these hyper sensitive tests will not be used for the compulsory HIV tests of alleged sexual offenders.

[2] Please, see below for the (un-) constitutionality of the provisions on compulsory HIV testing.

Application by an investigating officer

> ***S 35***
>
> ***(1) An investigating officer may, subject to subsection (2) for purposes of investigating a sexual offence or offence apply in the prescribed form… for an order that the alleged offender be tested for HIV.***
>
> ***(2) An application contemplated in subsection (1) must –***
>
> ***…***
>
> ***(b) be made as soon as possible after a charge has been laid, and may be made before or after an arrest has been effected, or after conviction.***

Section 35 of the Bill allows the police to apply for an order for a compulsory HIV test of an alleged sexual or other offender. According to s 37 (b) the test might be needed for investigating or evidentiary purposes in criminal proceedings. Such provisions are unnecessary, because testing the blood of an alleged offender for such purposes is already covered by the CPA.

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 characteristic or distinguishing feature or shows any condition or appearance. Sections 37 (1) (c), (2) (a) CPA allow the police to order the taking of a blood sample of the alleged offender to perform an HIV test for identification purposes or to obtain evidence. Thus, the object of s 37 (b) of the discussion document is already met by the CPA. The relevant provisions of the Bill are completely redundant.

Section 35 (2) (b) lies out that the application can also be made after a conviction. It is open to interpretation what the intentions behind this provision are. If the Bill wanted to enable the court to consider the test result in sentencing, this would be unlawful. An offender may not be punished for being HIV positive where the HIV status is not an element of the crime. In instances where the HIV status *is* an element of the crime for example in rape cases where the alleged offender committed the crime knowing that he was HIV positive, the compulsory HIV test is still of no assistance. In such cases, the prosecutor has to prove not only that the alleged offender was HIV positive when he/she committed the crime, but also that the alleged offender *knew* of his HIV status. The outcome of an HIV test weeks or even months after an alleged offence neither provides evidence that the alleged offender was HIV positive at the time of the alleged offence nor that he/she acted intentionally with regard to his/her HIV status.

Constitutional Implications

The provisions on coercive HIV testing affect fundamental constitutional rights of the alleged offender. It is disputable whether the provisions are constitutional.

One concern is the corruption of the presumption of innocence which is guaranteed in s 35 (3) (h) Constitution. The argument is that requiring a person to undergo a coerced HIV test somehow implies guilt. Contrary to this argument it needs to be noted that reading the presumption of innocence literally would invalidate all pre-trial procedures such as bail and pre-trial detention. The presumption of innocence is a procedural requirement which allows an alleged offender to do nothing until the prosecution has met its burden to produce evidence and effect persuasion. It does not relieve a defendant from investigating measures like reasonable

search and seizure. For the purpose of investigating a crime the provisions on compulsory HIV testing do not interfere with the right to be presumed innocent.

Another apprehension is the violation of the alleged offender's right to freedom and security of the person (s 12 Constitution) and his right to privacy (s 14 Constitution). According to s 36 Constitution, rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable. The importance of the purpose of the limitation and the nature and the extent of the limitation are relevant factors for establishing whether a limitation is justifiable or not (s 36 (1) (b), (c) Constitution).

Notwithstanding s 37 CPA, it seems difficult to justify the limitations of the constitutional rights in the case of an application provided for by the Bill. A coerced HIV test of the alleged offender on the grounds of s 37 CPA is argued to be constitutional, because the ascertainment of the bodily features often forms an essential part of the investigation of a specific crime and might be needed as evidence in a criminal trial. This argument is inappropriate for an HIV test on application by the victim. Neither does the limitation of the alleged offender's rights serve any purpose or legally relevant interest of the victim. As argued above, the victim does not benefit from the HIV test in any way. Therefore, the limitations of the alleged offender's constitutional rights are not justifiable.

Conclusion

Finally, compulsory HIV testing of an alleged offender assists neither the victim nor the police. The provisions also imply severe limitations of the alleged offender's constitutional rights. The implementation of the provisions will lead to a significant waste of personal and financial resources. The police have to fulfil most of the obligations in the process of obtaining the order and the test result which means a considerable increase of workload. It needs to be taken into account that the police are already heavily under staffed and under resourced. The implementation of the Bill will detract from the resources which are currently used to investigate and prosecute sexual offences. Therefore, we would like to call for the complete removal of the provisions on compulsory HIV testing.

Recommendations

If the Portfolio Committee wishes to pursue compulsory HIV testing of alleged sexual and other offenders despite all concerns, we would like to recommend further amendments for the relevant provisions.

Objects of the compulsory HIV testing

Section 37 only states the use of the test results for the victim and the investigating officer. We assume that s 37 also represents the objects of the Bill and argue that there is no practical utility for the compulsory testing of alleged sexual offenders. It has to be taken into account, that the person, who is coerced to do an HIV test, is an alleged offender, not a convicted criminal. An infringement of an alleged offender's rights to such a large extent has to be reasonably justified. Therefore, the Bill needs to clearly define the objects of the compulsory HIV testing.

Application by an investigating officer

The provisions on the application by a police officer are completely redundant because the CPA already covers the execution of HIV tests for investigating purposes. All provisions relating to an application by an investigating officer should therefore be omitted and amended respectively.

Offences and penalties

> ***S 41***
>
> ***(1) (a) Any person who with malicious intent –***
>
> ***(i) lays a charge with the South African Police Service in respect of an alleged sexual offence; or***
>
> ***(ii) makes an application in terms of section 33 (1)***
>
> ***with the intention of ascertaining the HIV status of the alleged offender is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years.***
>
> ***(b) Any person who intentionally discloses the results of any HIV tests in contravention of section 40, is guilty of an offence and is liable to a fine or to imprisonment for a period not exceeding three years.***[3]

The prosecution of sexual offences meets various practical obstacles. Research indicates that sexual offences are highly underreported and that only 9% of *reported* rape cases for example result in conviction of the accused.[4] This means that after the criminal proceedings the vast majority of alleged offenders walk free due to failure in successfully prosecuting such cases or due to withdrawal from the complainants who often feel they cannot endure the criminal proceedings.

These facts give reason to believe that alleged offenders especially those who had to undergo compulsory HIV testing and who were not convicted will try to sue the complainant for damages or to have the complainant prosecuted under s 41 (1) (a) of the Bill. Section 41 (1) (a) states that a person laying a charge in respect of a sexual offence or requesting an HIV test of an accused with malicious intent is guilty of a criminal offence. This provision might not only prevent victims of sexual offences from reporting but will also lead to the criminalisation of complainants of sexual offences. Once again the blame is shifted from the offender to the victim. To prevent further victimisation of complainants of sexual offences, we strongly request that s 41 (1) be omitted from the Bill.

Section 41 (1) (b) orders that the victim must not intentionally let anybody know of the outcome of the HIV test of the alleged offender. Consequently, the victim faces penalties by telling his/her life partner about the test result. This is unacceptable. The victim finds him-/herself in a state of shock and trauma after the sexual offence. It is vital for the victim's psychological wellbeing to be able to speak about the sexual offence itself as well as its consequences and risks. The trauma of the victim can be reduced significantly by talking to support persons such as the victim's life partner, friends, relatives and counsellors. Needless to say that it is also essential for the health of the victim's partner to find out about the outcome of the HIV test. Another reason for disclosure could be that the victim does not understand the written result due to illiteracy or language differences and therefore asks another person to read the note to

[3] S 40 (1) states that the result of the HIV test may only be communicated to the victim, the interested person or the police official depending on who made the application and to the alleged offender.
[4] Rape Crisis…

him/her. We strongly recommend to differ between a disclosure by the victim and other persons and to demand "malicious intent" for the disclosure by the victim.

Accordingly, s 41 (1) (b) should read –

> The complainant, who with malicious intent, or any other person, who intentionally discloses the results of any HIV tests in contravention of section 40, is guilty…

Safety of the victim

> ***S 33***
>
> ***(1) (a) Within 60 days after the alleged commission of a sexual offence any victim or any interested person on behalf of a victim, may apply…***
>
> ***…***
>
> ***(3) The application must be made as soon as possible after a charge has been laid, and may be made before or after an arrest has been effected.***

The application for an HIV test of the alleged offender and accordingly the HIV test itself can be made as soon as a charge has been laid, latest 60 days after the alleged sexual offence (s 33 (1) (a), (3)). Neither a warrant nor custody of the alleged offender is a precondition.
This part of the discussion paper is problematic on two accounts. First, it is unclear how the police are supposed to find an alleged offender within this time frame to have him tested for HIV. Second, the Bill fails to provide for the personal safety and security of the victim. From the moment the alleged offender is asked to do the HIV test, the victim's safety is severely at risk. If the alleged offender is not in custody, he might react by harassing, intimidating or even harming the victim for initiating the compulsory HIV testing. The Bill does not provide for any protective measures to secure the victim from such threats.

We suggest either implying options to grant protection orders similar to those foreseen by the Domestic Violence Act No. 116 of 1998 or broadening the application of s 36 of the Bill. Section 36 only provides for the issuing of a warrant of arrest if the offender avoids compliance with the court order to undergo testing. It is recommended that s 36 also applies if there is reason to believe that the alleged offender might harm the complainant.

Accordingly, s 36 should read –

> Notwithstanding … the magistrate may … issue a warrant for the arrest of the alleged offender if there is reason to believe that such offender may avoid compliance with such order or … **or there is reason to believe that such offender may intimidate, harass or harm the complainant of the alleged sexual offence in any way**.

Use of results of HIV tests

Sections 37 (a) (ii), (b) allow to use the test result as evidence in civil and criminal proceedings. With regard to police investigations, s 37 CPA already provides for the result of blood tests to be used in criminal proceedings. It is unclear how s 37 of the Bill differs from the relevant provisions of the CPA.

In our opinion, the use of the test result in civil proceedings means a violation of the alleged offender's right to privacy (s 14 Constitution). We suggest to remove s 37 (a) (ii), (b) from the Bill.

We welcome the opportunity to make this submission to the Portfolio Committee and hope that our recommendations can contribute to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Bill 2006.