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Compulsory HIV testing of child sex offenders in the South African criminal justice system

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Abstract

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* established unique procedural mechanisms for the processing of sexual offence cases and for the protection of victims. One such procedure relates to compulsory HIV testing of an alleged offender on application by the victim or a police official. This article is a theoretical exploration of Chapter 5 of the *Sexual Offences Act*, and the *Children's Act 38 of 2005* as they pertain to HIV testing of children, juxtaposed against the *Child Justice Act 75 of 2008*. The submission concedes that Chapter 5 of the *Sexual Offences Act* is applicable to child offenders. The authors, however, argue that child offenders are procedurally *sui generis* in the criminal justice process and resultantly the prescripts of Chapter 5 of the *Sexual Offences Act* are at odds with the position of a child offender within the protections of the *Child Justice Act*, insofar as effective protection of the best interest standard is concerned.

1. Introduction

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*¹ introduced the concept of compulsory HIV² testing of alleged sex offenders into South African law. The rationale behind the inclusion was to reduce trauma to the victim and to assist survivors to make lifestyle and medical decisions, *viz.* possible exposure to HIV infection.³

The question arises as to whether these provisions are equally applicable in the case where the accused is a child offender? This query is of importance when one

1 Hereinafter the *Sexual Offences Act*. See, in particular, secs 30 to 39 thereof.

2 Human immunodeficiency virus.

3 Smythe & Pithey 2007:16-41. The victim is often exposed to secondary trauma in the criminal justice system when s/he is, for instance, not treated with respect or when the facts about the encounter are not taken down in private. The victim may also use the result in a civil claim instituted against the offender. The accused can also be motivated to make lifestyle changes upon receiving the result of a positive HIV test. See also Naidoo & Govender 2011:95-101.

considers that between 20 and 30 per cent of persons arrested for sexual offences are under the age of 18 years⁴ and, logically, a certain portion of those are infected with HIV/AIDS.⁵ It is trite that the incidence of sexual crimes in South Africa has reached alarming rates to such an extent that South Africa has been named as the country with the highest reported rates of rape globally.⁶ The analysis in this submission is thus apt when considered against the rate of sexual offences and the rate of HIV infection in South Africa.

This contribution explores the provisions of the *Sexual Offences Act* with specific reference to the application for compulsory HIV testing, the execution of the order granted for such compulsory testing, and the disclosure of the test results in the context of offenders under the age of 18 years. The applicability of these provisions to child offenders is analysed by considering the relevant provisions of the *Child Justice Act* 75 of 2008⁷ and the *Children's Act* 38 of 2005⁸ as far as they are relevant to HIV testing and the disclosure of HIV test results.⁹ Consideration is given to the practical implications of compulsory HIV testing in the context of child justice.

The investigation into compulsory HIV testing of child offenders in this contribution is limited to the South African context, since the focus of this contribution is specifically on the analyses of South African legislation and the challenges posed by the implementation of selected contradictory provisions.

4 See Child Justice Alliance, where it is indicated that 23 per cent of all those arrested in the East Metropolitan Area between 2000 and 2002 was under the age of 18 years. They point out that this is in line with global trends, where 20 to 30 per cent of those arrested for sexual crimes in the USA, Canada and the UK were under the age of 18 years. See also Smythe & Pithey 2007:1. Le-Roux Kemp (2013:201-239) states that, at 2008, 10.9 per cent of South Africans lived with HIV. The prevalence of HIV in persons between the age of 15 and 18 years is 16.9 per cent.

5 Dosio & Boer 2007:1. South Africa has the highest prevalence of people living with HIV/AIDS in the world. See also Bruhn (2011:181-216) who confirms that South Africa has the highest number of persons living with HIV/AIDS (according to this source, 12 per cent of the South African population) and that South Africa carries approximately a third of the global disease burden of HIV/AIDS.

6 See, in general, Law Reform Commission 1999; Law Reform Commission 2000.

7 Hereinafter the *Child Justice Act*.

8 Hereinafter the *Children's Act*.

9 This contribution will not consider the constitutional issues relating to compulsory HIV testing *per se*, as they could easily constitute a separate contribution.

2. Context and rationale for the inclusion of compulsory HIV testing provisions

In the *Sexual Offences Act*, the provisions for compulsory HIV testing are the result of an investigation by the Law Reform Commission¹⁰ after public concern was raised over the prevalence of sexual crimes in a country where the HIV/AIDS pandemic is rife. A need was identified to criminalise the harmful behaviour of those who are HIV positive, and to ensure the availability of services such as the provision of post-exposure prophylaxis¹¹ for victims of sexual crimes. Testing a victim of a sexual offence immediately following an incident of possible infection is not reliable, due to the window period of up to three months, in which time an HIV test on the victim will not be reliable, as the body could possibly not have produced enough antibodies to produce a reliable result.¹² Establishing the HIV status of the offender is more reliable in order to determine if the victim¹³ was exposed to the risk of infection while waiting out the window period, after which the victim can be tested.¹⁴

We now consider the specific requirements of an application for compulsory HIV testing of an alleged sexual offender.

10 Law Reform Commission 2000.

11 Hereinafter PEP. Smythe & Pithey 2007:16-1-16-2. According to sec. 28(2) of the Act, a victim will qualify for PEP if s/he reports the alleged offence within 72 hours of its occurrence. Smythe & Pithey criticise this as unreasonable and inconsistent with the 90-day period within which a victim may bring an application for compulsory HIV testing.

12 See Gender, Health and Justice Research Unit 2013. According to Smythe & Pithey (2007:16), the latest rapid tests used at public-health facilities in South Africa can, however, detect the relevant antibodies within four to six weeks, although it may take up to three months in rare cases for the antibodies to show. The Gender, Health and Justice Research Unit at the University of Cape Town pointed out in their submissions that the tests that can detect the antibodies this early are expensive and will probably not be used in public-health facilities envisaged for compulsory HIV testing.

13 Reference to the female gender shall include the male gender and *vice versa*, unless otherwise stated.

14 Smythe & Pithey 2007:16-5. See the submissions by the Gender, Health and Justice Research Unit at the University of Cape Town, where it is argued that the result from an HIV test is not necessarily conclusive, because transmission of HIV also depends on other factors such as, for example, the nature of the sexual act and the presence of blood or semen. They point out further that the possibility exists that the accused only contracted the virus shortly prior to the offence and that he may himself still be in the window period, in which event his tests will show negative. Smythe & Pithey 2007:16-42. Geyer (2011:8-9) points out that the risk of transmission is, however, particularly high during this window period.

3. Application for compulsory HIV testing in terms of the *Sexual Offences Act*

3.1 Introduction

The initial draft Bill of the eventual *Sexual Offences Act* made provision for applications for compulsory HIV testing of the accused, by the victim only.¹⁵ However, the *Act*, as it was eventually passed in parliament, entitles members of the South African Police Service¹⁶ to apply for compulsory HIV testing of an accused as part of the investigation into the crime, and for purposes of prosecution.¹⁷

A special definition of sexual offence applies for purposes of an application for compulsory HIV testing. For the latter purposes, a *sexual offence* refers only to those offences during the commission of which a victim could have been exposed to the bodily fluids of an alleged offender.¹⁸ For purposes of the *Act*, a *victim* is “any person alleging that a sexual offence has been perpetrated against him or her”.¹⁹ The fact that the victim was exposed to the bodily fluids of the alleged offender must be mentioned in the application for compulsory HIV testing.²⁰

15 Smythe & Pithey 2007:16-1, fn. 6. The Law Reform Commission’s first draft Bill on these issues was intended to amend sec. 37 of the *Criminal Procedure Act* and was only later incorporated into the *Criminal Law Amendment Act*.

16 Hereinafter SAPS.

17 Sec. 32 of the *Sexual Offences Act* provides for such an application to be made, while sec. 34 of the *Sexual Offences Act* explains that the results may be used as part of the evidence in a criminal trial. The test results may also be used in civil proceedings. See sec. 36 of the *Sexual Offences Act*. See also Smythe & Pithey (2007:16-56) who explain that the provision as to the use of the outcome of the application in civil proceedings rather belongs under the provisions dealing with the situation where an application for compulsory testing was brought by the victim rather than under the provisions dealing with the scenario where the application is brought by the police as is the case with sec. 36 of the *Sexual Offences Act*. Smythe & Pithey (2007:16-3) point out that, in the case where the police bring an application for compulsory HIV test, such application is not limited to an accused who is alleged of a sexual offence, but can be brought in respect of any accused person or a person already convicted of a crime. An application can also be brought for the disclosure of the test results in cases where such a test has already been done, but the victim is not in possession of the results. See sec. 30(1)(a)(ii) of the *Sexual Offences Act*.

18 Sec. 27 of the *Sexual Offences Act*. See also sec. 37 of the *Sexual Offences Act*. Smythe & Pithey (2007:16-4) explain that bodily fluids specifically include semen, vaginal fluid and blood, but exclude saliva, tears and perspiration.

19 Sec. 27 of the *Sexual Offences Act*.

20 Smythe & Pithey 2007:16-4.

3.2 Application by the victim

When a report of an alleged sexual offence is made to the police, the victim must be informed of the right to bring an application for the compulsory HIV testing of the alleged offender. Further, the victim must be informed that the application must be brought within 90 days of the alleged offence.²¹

Such an application may also be brought on behalf of the victim,²² in which case the victim must consent to such an application in writing.²³ Written consent is not required where the victim is under the age of 14 years,²⁴ mentally disabled,²⁵ or unconscious.²⁶

As previously mentioned, the *Sexual Offences Act* also provides for members of the SAPS to apply for compulsory HIV testing of an offender.

3.3 Application by a member of the South African Police Service

The initial focus of the *Act* was intended to provide support services for victims and to enable them to establish the HIV status of an offender.²⁷ However, the Portfolio Committee, upon considering the Criminal Law Amendment Bill, introduced provisions that allow for an investigating officer to apply for compulsory HIV testing of an offender in order to assist with the investigation into the alleged sexual offence.²⁸ The investigating officer may apply to a magistrate for the alleged offender to be tested for

21 Sec. 28(2) of the *Sexual Offences Act*. The Police will usually hand a document to the victim explaining the testing procedure. See Smythe & Pithey 2007:16-7.

22 Sec. 30(1)(a) of the *Sexual Offences Act*. See also McQuoid-Mason 2009:26-28.

23 Sec. 30(1)(b) of the *Sexual Offences Act*. See also McQuoid-Mason 2009:26-28.

24 Sec. 30(1)(b)(i) of the *Sexual Offences Act*.

25 Sec. 30(1)(b)(ii) of the *Sexual Offences Act*. Some concerns may be raised for dispensing with the consent of a mentally disabled person, as such a person may well have the capacity to consent despite his/her mental illness. Regulations to the *Mental Health Care Act 17/2002* suggest that persons with mental illnesses may consent to procedures other than mental health care treatment and rehabilitation services, provided they are deemed capable to do so. Where this is not the case, provision is made for someone to consent on their behalf.

26 Sec. 30(1)(b)(iii) of the *Sexual Offences Act*. A person, in respect of whom a curator has been appointed and someone whom the magistrate is satisfied is unable to provide the required consent, need not provide written consent as the victim. See also McQuoid-Mason 2009:26-28.

27 Smythe & Pithey 2007:16-24.

28 Smythe & Pithey 2007:16-24. A motivation behind this was because the *Criminal Law Amendment Act* prescribed minimum sentences for persons who infect another with HIV, knowing that s/he is so infected. The Portfolio Committee reckoned that the power of an investigating officer to apply for compulsory HIV testing will assist in the investigation and links in well with the minimum sentence provisions in the *Act*.

HIV²⁹ and/or alternatively that the results of the test be made available to the investigating officer.³⁰

An application brought by a police officer differs from that brought by a victim, in the sense that the application need not be brought within the initial 90-day period,³¹ and can be brought in respect of any other offence in respect whereof the offender's HIV status could be relevant for purposes of prosecution.³² The application is not limited to sexual offences.³³ An application for HIV testing may be brought any time after the charge has been laid until after conviction.³⁴ The application is lodged with the relevant magistrate for consideration.³⁵

3.4 Consideration of the application

The application for compulsory HIV testing is considered by a magistrate in chambers³⁶ and is thus a confidential procedure that protects the alleged offender's identity.³⁷ The magistrate may request to hear oral evidence or may request evidence in the form of an affidavit.³⁸ Such evidence, on behalf of the alleged offender, is only allowed if the magistrate is of the view that it will not substantially delay matters.³⁹

If the magistrate is satisfied that *prima facie* proof exists that a sexual offence has been committed against the victim by the accused and that the victim may have been exposed to bodily fluids of the accused, the magistrate is obliged to order the offender to undergo an HIV test.⁴⁰ The magistrate does not have discretion in this regard.⁴¹

29 Sec. 32(1)(a) of the *Sexual Offences Act*.

30 Sec. 32(1)(b) of the *Sexual Offences Act*.

31 Sec. 30(2) of the *Sexual Offences Act*. See also McQuoid-Mason 2009:26-28.

32 Sec. 27 of the *Sexual Offences Act*. See also Smythe & Pithey (2007:16-26) who point out that it is up to the courts to decide what type of offence is included in this broad definition of offences other than sexual offences, as the *Act* is not clear on what kind of offences this provision pertains to.

33 Sec. 27 of the *Sexual Offences Act*. See also Smythe & Pithey 2007:16-26.

34 Sec. 32(1) of the *Sexual Offences Act*. See also McQuoid-Mason 2009:26-28.

35 Sec. 30(1)(a) read with sec. 30(4) of the *Sexual Offences Act*. These applications are brought in the district court, whereas sexual offences are always heard in a Regional Court. Smythe & Pithey (2007:16-16) point out that this ensures that the magistrate who hears the actual criminal case will not be the same one who hears the application, as they are lodged in two different levels of the court structure.

36 Sec. 31(1) of the *Sexual Offences Act*.

37 Smythe & Pithey 2007:16-16.

38 Sec. 31 (1) of the *Sexual Offences Act*.

39 Sec. 31(2) of the *Sexual Offences Act*.

40 Sec. 31(3) of the *Sexual Offences Act*. The magistrate must also be satisfied that the application is brought within 90 days from the date that the alleged offence took place. See also McQuoid-Mason 2009:26-28.

41 As is indicated by the use of the word "must" in sec. 31(3) of the *Sexual Offences Act*. See also Smythe & Pithey 2007:16-21.

The result of the application is confidential and may only be disclosed to the victim or interested person as the case may be, the offender, the investigating officer and, if necessary, the prosecutor or any other person who will eventually need to know the results of the HIV tests for purposes of prosecution or civil proceedings, and the medical practitioner required to execute the order.⁴²

If the order is granted, the accused must subject him-/herself to an HIV test.

3.5 Execution of the order

The order entails that two specimens be obtained from the alleged accused and that HIV tests be conducted thereon⁴³ in accordance with the state's policy on HIV testing.⁴⁴

The investigating officer must make the alleged offender available to a medical practitioner in order to extract two body specimens from the alleged offender.⁴⁵ A warrant of arrest may be issued for the alleged offender if there is reason to believe that the alleged offender would seek to avoid compliance with the order for compulsory HIV testing.⁴⁶ Refusal by the accused to comply with the order to undergo HIV testing constitutes a criminal offence that is punishable with a fine or imprisonment of a period not exceeding 3 years.⁴⁷

The investigating officer must deliver the specimens to the head of a public-health establishment where the HIV tests must be performed and the results recorded in the prescribed manner.⁴⁸ A sealed copy thereof in duplicate must be provided to the investigating officer.⁴⁹

The question arises as to who may have access to the HIV test results.

42 Sec. 36 of the *Sexual Offences Act*. Smythe & Pithey (2007:16-55) point out that sec. 36 is aimed at protecting the personality interests of the alleged offender. See also McQuoid-Mason 2009:26-28.

43 Secs. 31(3)(c)(aa) and (bb) of the *Sexual Offences Act*.

44 Smythe & Pithey 2007:16-22.

45 Secs. 33(1)(a) and (b) of the *Sexual Offences Act*. See also McQuoid-Mason 2009:26-28.

46 Sec. 33(3) of the *Sexual Offences Act*. Concerns have been raised about the fact that the *Act* does not require the order for compulsory HIV testing to be served on the offender in line with standard practice in civil procedure and criminal matters, but merely requires the order to be handed to the accused. Smythe & Pithey (2007:16-33-16-34) use the example of a protection order issued in terms of the *Domestic Violence Act* that has to be served on a respondent and a summons that has to be served on an accused in a criminal matter.

47 Sec. 38(2) of the *Sexual Offences Act*. See also McQuoid-Mason 2009:26-28.

48 Sec. 33(1)(d)(i) and (ii) of the *Sexual Offences Act*.

49 Sec. 33(1)(d)(iii) of the *Sexual Offences Act*. See also McQuoid-Mason 2009:26-28.

3.6 Disclosure of test results

The test results are confidential and may only be disclosed to the victim, offender, investigating officer, prosecutor (if necessary), and any other person who may need to know the result for purposes of civil proceedings or an order of court.⁵⁰ The purpose of disclosure of the results to the victim is to empower him/her to take lifestyle decisions based on the test results.⁵¹ Similarly, the accused may use the test results to take such decisions where the HIV status was previously unknown to the offender. Both parties may also use the results in civil proceedings against the other.⁵² The presiding officer may make any order that is deemed fit to protect the confidentiality of the results of the HIV test.⁵³

Where an application is brought for the disclosure of the HIV status of an offender when the tests have already been undertaken,⁵⁴ the victim may request that the results be made available to him/her, or to a prosecutor who may require the information for purposes of bail application,⁵⁵ or sentencing.⁵⁶ If the result is provided to the victim, it is handed to him/her in a sealed envelope with a notice on the confidentiality of the results and generally how to deal with them.⁵⁷

A register is kept with information on applications for HIV tests and the results thereof. Access to this register is limited.⁵⁸ If the prosecution or the victim withdraws the charges, the HIV specimen, or the results obtained before the date of withdrawal, must be destroyed.⁵⁹

50 Secs 31(3)(c) and 37 of the *Sexual Offences Act*. See also McQuoid-Mason 2009:26-28.

51 Smythe & Pithey 2007:16-41.

52 The victim may, for example, institute a civil damages claim against the accused in the event that it is found that she was indeed infected by the sexual assault committed by the accused. If the accused is, however, found not guilty, he may arguably institute a civil claim against her for damages.

53 Sec. 27(2) of the *Sexual Offences Act*. Smythe & Pithey 2007:16-1-16-58. S/ he may, for example, order that a certain part of the proceedings take place in camera.

54 Sec. 31(2)(b) of the *Sexual Offences Act*.

55 Sec. 60 (11) of the *Criminal Procedure Act 51/1977* stipulates that an accused will not be granted bail if s/he is charged with rape and s/he knew that s/he was HIV positive at the time of the act. Bail will only be granted if the accused can show that exceptional circumstances exist, which, in the interest of justice, permits his/her release. See also Smythe & Pithey 2007:16-27.

56 Sec. 51(3) of the *Criminal Law Amendment Act 105/1997* prescribes a minimum sentence of life imprisonment for an accused who committed rape, knowing that s/he was HIV positive at the time. The HIV status of the accused is thus relevant in order to comply with the minimum sentence requirements.

57 Sec. 33(1)(e)(i) of the *Sexual Offences Act*.

58 Sec. 35 of the *Sexual Offences Act*. See also McQuoid-Mason 2009:28.

59 Sec. 33(2) of the *Sexual Offences Act*. See also McQuoid-Mason 2009:27.

It is a criminal offence for anyone to maliciously, or in a grossly negligent manner, disclose the HIV status of an alleged offender.⁶⁰ In order to prosecute a person who is believed to have maliciously laid a charge or maliciously or negligently disclosed the alleged offender's HIV status, the consent of the Director of Public Prosecutions is necessary.⁶¹

4. Challenges arising from compulsory HIV testing

The legislative provisions relating to compulsory HIV testing raise concerns which, for the sake of completeness, are detailed hereunder.

Possible HIV infection falls within the sphere of personal health. A child offender or child victim of a sexual crime may require treatment in the form of antiretroviral medication, to which the child may consent independently if over the age of 12 years and of sufficient maturity in terms of the *Children's Act*.⁶²

It is not clear why the *Child Justice Act* sets 14 years as the age at which a victim may provide written consent to an application by a third party for HIV testing of an alleged offender. This situation is especially contradictory in view of the fact that a child's participation in decisions affecting personal health and treatment are emphasised by both the *Children's Act*⁶³ and the

60 Sec. 38(1)(b) of the *Sexual Offences Act*.

61 Sec. 38(1)(c) of the *Sexual Offences Act*. The reason for including this provision is the result of work by advocacy groups that highlighted the fact that, if alleged offenders are found not guilty, there is a high risk that they may file charges against the victim for bringing the rape case in the first place. Smythe & Pithey (2007:16-62) rightly point out that this provision, however, does not protect the victim against a civil claim being instituted by the offender against the victim for having to undergo the HIV test. Whether this will succeed is, to our mind, doubtful as the decision to prosecute was taken on an affidavit filed by the victim and the HIV tests were done by order of court, which is a justifiable infringement of the general rule that a person must consent to any medical treatment conducted on him/her.

62 Sec. 129 of the *Children's Act* 38/2005 provides that children over the age of 12 years may consent independently to medical treatment, provided they are of sufficient maturity to understand the risks and benefits associated with a particular form of treatment. Sec. 130 of the *Children's Act* 38/2005 provides for children of 12 years to consent independently to an HIV test. A child under the age of 12 years may do so, if s/he is of sufficient maturity to understand the risks and benefits of such a test. See also Smythe & Pithey (2007:16-9) who point out that the age indication of 14 years is not consistent with other consent requirements in the *Children's Act*. The age limit of 14 years might have been taken from the *Child Care Act*, which stipulated that a child under the age of 14 years could not consent to medical treatment, the child had to be 14 years old to consent to medical treatment under that legislation and could only consent to an operation once s/he reached the age of 18 years.

63 Sec. 10 of the *Children's Act* states: "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

National Health Act.⁶⁴ It appears that the autonomy of children between the ages of 12 and 14 is placed at risk by these contradictory age requirements in legislation.

A second concern relates to the provision of evidence at a hearing in chambers of an application for testing. In essence, the *Sexual Offences Act* creates a situation, in which the victim, but not the accused, is permitted to give evidence. This could possibly constitute a violation of the accused's right to a fair trial.⁶⁵ The question as to whether this application forms part of the trial of the accused has to be considered before concluding that this provision possibly violates the accused's rights to a fair trial. Concerns have also been raised that this provision might be in violation of the *audi alterim partem* rule.⁶⁶

In addition, it is a criminal offence for a person to lay a charge with the malicious intent to bring an application to ascertain the HIV status of another person.⁶⁷ It has been argued that this provision might deter rape victims from laying charges out of fear of prosecution. Such a provision is also superfluous, since a person who maliciously lays a charge based on false information may be prosecuted for intentionally making a false allegation or perjury.⁶⁸

Ethical considerations in compelling a medical practitioner to take blood samples for purposes of the HIV test without the patient (the alleged offender's) consent⁶⁹ have been raised as a concern. Medical treatment without consent constitutes assault, unless it is justified by a ground of justification. The alleged offender is indeed a patient and, therefore, a healthcare user in terms of the *National Health Act* that entitles him/her to all the rights ascribed to a healthcare user, including the right to give informed consent to any medical procedure.⁷⁰ The rights ascribed to the alleged offender as a healthcare user in terms of the *National Health Act*

64 Sec. 8 of the *National Health Act* 61/2003 states: "A user has the right to participate in any decision affecting his or her personal health and treatment."

65 Smythe & Pithey 2007:16-17.

66 Smythe & Pithey 2007:16-16-16-17 and further at 16-30.

67 Sec. 38(1) of the *Sexual Offences Act*. This offence is punishable with a fine or imprisonment not exceeding three years. See also McQuoid-Mason 2009:28.

68 Smythe & Pithey 2007:16-60.

69 Sec. 33(1)(b) of the *Sexual Offences Act* states that the medical practitioner must take two specimens from the body of the alleged offender and hand them to the investigating officer. There is no room for discretion in this instance. Concern could be raised about the fact that the medical practitioner is not provided an option to choose whether s/he wants to treat this particular patient or not. It is submitted, however, that the contract between the medical practitioner and the facility where s/he is employed will regulate the parameters within which and to whom medical services have to be rendered. Should the medical practitioner refuse to take the sample, it would, in fact, constitute a breach of his employment contract if s/he were required to perform these tests in terms of his/her employment contract.

70 Sec. 7 of the *National Health Act* 61/2003.

are, however, not absolute. In fact, the *Act* itself provides for exceptions to the rule that informed consent to medical treatment must be given in all instances. It states: "A health service may not be provided to a user without his informed consent unless: the provision of a health service without informed consent is authorised in terms of any law or court order."⁷¹

The entire concept of compulsory HIV testing results in a situation where the alleged offender could possibly argue that his/her right to privacy, dignity and bodily integrity has been infringed by having to undergo the compulsory HIV tests, even though special procedures have been put in place to ensure the confidentiality of the application for compulsory testing and the test results.⁷² A person's bodily integrity is infringed if blood is tested for HIV without his/her informed consent or against his/her will,⁷³ unless there is a ground of justification for doing so. If the magistrate grants an order for the alleged offender to undergo HIV testing in terms of the *Sexual Offences Act*, such infringement on the rights of the accused is justified by this court order.⁷⁴ The ground of justification eliminates the element of unlawfulness. These rights have to be weighed up against the victims' rights to bodily integrity and dignity which have, no doubt, been infringed in the event of a sexual assault.⁷⁵ HIV testing of the accused person without his/her informed consent can, therefore, be justified where such treatment is authorised by an order of court, as the case would be where compulsory HIV testing is ordered by a magistrate in terms of the *Sexual Offences Act*.⁷⁶

With regard to the victim and accused, concerns have been raised over the absence of post-test HIV counselling when the results are merely handed to the victim and the accused and they are left to deal with them as they deem fit.⁷⁷

We now consider the general position with regard to HIV testing of children.

71 Sec. 7(1)(c) of the *National Health Act* 61/2003.

72 McQuoid-Mason 2009:26.

73 McQuoid-Mason 2009:26. See also, in general, *C v Minister of Correctional Services* 1996 (4) SA 292 (T) where it was found that a prisoner's rights were violated by not obtaining informed consent for the HIV test.

74 Sec. 7(1)(c) of the *National Health Act* 61/2003.

75 Smythe & Pithey 2007:16-45-16-47. See, in particular, this source at 16-47, where the authors opine that compulsory HIV testing is possibly unconstitutional, since the HIV test results are not reliable and infringing the offender's rights to obtain it, does not serve the purpose which the legislature intended and is, therefore, unconstitutional.

76 Sec. 7(1)(c) of the *National Health Act* 68/2003 makes provision for treatment without consent where such treatment is authorised in terms of any law or court order.

77 Smythe & Pithey 2007:16-36-16-37.

5. Testing children for HIV in terms of the Children's Act

5.1 Introduction

The *Children's Act* provides for the HIV testing of a child in certain circumstances.⁷⁸ The departure point in terms of consent to these tests is that the child must consent thereto him-/herself.⁷⁹ A children's court may, however, be approached in the event that consent is unreasonably withheld.⁸⁰

We now explore the consent provisions to HIV testing, as they may be relevant in the context where a child is suspected of having infected another person with HIV.

5.2 Consent to HIV testing of children

The *Children's Act* states that no child may be tested for HIV unless it is in his/her best interest, and the necessary consent must be obtained.⁸¹

A child may consent to an HIV test from the age of 12 years.⁸² A child under the age of 12 years, who is of sufficient maturity to understand the risks, benefits and consequences of such a test, may likewise consent to an HIV test.⁸³ The *Act*, however, provides that a children's court may grant consent to an HIV test on a child⁸⁴ where such a child unreasonably refuses consent to an HIV test.⁸⁵

78 Secs 130 and 131 of the *Children's Act*.

79 Sec. 130(1)(a) of the *Children's Act* states that an HIV test may only be performed if it is in the best interests of the child and if the necessary consent was obtained. Sec. 130(2)(a)(i) of the *Children's Act* states that a child of 12 years may consent to an HIV test. Sec. 130(2)(a)(ii) of the *Children's Act* states that a child under the age of 12 years may consent to an HIV test, provided that the person is of sufficient maturity to understand the benefits, risks and social implications of the test.

80 Sec. 130(2)(f)(i) of the *Children's Act*.

81 Sec. 130(1)(a) of the *Children's Act*.

82 Sec. 130(2)(a) of the *Children's Act*. Note that no further requirements in respect of maturity are set in this instance; the age is sufficient.

83 Sec. 130(2)(a)(ii) of the *Children's Act*. If the child is under the age of 12 years and not yet mature enough in this respect, a parent will have to consent. See sec. 130(2)(b) of the *Children's Act*.

84 Who is either under the age of 12 years, but of sufficient maturity as set out above, or is 12 years of age.

85 Sec. 130(f)(i) of the *Children's Act*. Sec. 130(f)(ii) of the *Children's Act* provides that the Children's Court may grant this consent where the parents of the child unreasonably refuse consent.

It is clear that a 12-year-old child may independently consent to an HIV test in terms of the *Children's Act*.⁸⁶ This by implication means that the child also has the right to refuse to undergo such a test.

5.3 Disclosure of the HIV status of a child

The fact that a child is HIV positive may only be disclosed with the consent of the child, provided the child is at least 12 years of age.⁸⁷ If such consent is unreasonably withheld, a children's court may order such disclosure if it is in the best interest of the child.⁸⁸

The HIV status of a child may be disclosed without the necessary consent, where the person making such disclosure is obliged to do so in terms of the *Children's Act* or any other law.⁸⁹ Any other law no doubt includes the *Sexual Offences Act*. This Act places such a duty of disclosure on certain court officials and their actions are justified by the duties placed on them by the Act.

Such disclosure without the child's consent is also permissible for the purposes of legal proceedings or in terms of an order of court.⁹⁰ It must be noted that the Act does not specify that it must be an order made in terms of the *Children's Act* by, for example, a children's court. The order can, therefore, be any court order issued by any court including a court order for compulsory HIV testing of a sexual offender in terms of the *Sexual Offences Act*.⁹¹ Disclosure will thus be justified in the context of criminal justice.

The *National Health Act* states that information about a person's health may only be disclosed with that person's consent.⁹² This Act also provides that information may be disclosed if so ordered by a court.⁹³ The provisions of the *National Health Act* thus support those in the *Children's Act*. Where a victim applies for the compulsory HIV testing of an offender and for the results to be made available to him/her, it is so ordered by a court order, which is an exception to the rule that no information about a healthcare user may be made available without consent.

86 Sec. 130 of the *Children's Act*.

87 Sec. 133(2)(a) of the *Children's Act*.

88 Sec. 133(2)(e) of the *Children's Act*.

89 Sec. 133(1)(a) of the *Children's Act*.

90 Sec. 133(1)(a) of the *Children's Act*.

91 Sec. 31 of the *Sexual Offences Act*. The Department of justice acknowledged that the *Sexual Offences Act* is applicable to child sexual offenders with regard to compulsory HIV testing. See Department of Justice and Constitutional Development Child Justice Act 75/2008 National Policy Framework (Department of Justice and Constitutional Development May 2010) http://www.justice.gov.za/vg/cj/2010_NPF_ChildJustice_tabled21may.pdf (accessed on 1 April 2015).

92 Sec. 14 of the *National Health Act* 61/2003. See also, in general, Madiba & Vawda (2010:82-32) where focus is placed on the potential violation of the rights of the alleged sex offender.

93 Sec 14 of the *National Health Act* 61/2003.

Compulsory testing of a child sexual offender and the disclosure of the results must, however, be viewed within the context of the *Child Justice Act*.

The *Child Justice Act* regulates the interaction of the child offender with the criminal justice system. The offenders subject to this *Act* include child sex offenders.⁹⁴ The *Child Justice Act* provides for the appointment of an inter-sectorial committee to develop a draft national policy framework that must include guidelines for the establishment of an information management system to enable effective monitoring and tracking of children through the criminal justice system and to provide qualitative and quantitative data relating to, *inter alia*, sexual offences committed by children.⁹⁵

The *Act* places focus on rehabilitation and reintegration into society, sentiments which were echoed in the Sexual Offences Bill first drafted by the Law Commission,⁹⁶ which eventually resulted in the *Sexual Offences Act*.

When considering whether compulsory HIV testing should apply where the offender is under the age of 18 years, the simple answer is that there is no reason why it should not. The impact on the victim is still the same; the aim of conducting the tests, *viz.* to determine if the victim has been exposed to HIV, remains the same.

The *Child Justice Act National Policy Framework* acknowledges that the provisions of the *Sexual Offences Act* are applicable to children:

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) is relevant in terms of the child who has allegedly committed a sexual offence. There are three aspects of the *Act* which may impact on child offenders. The first aspect concerns the case of children between the ages of 12 and 16 who commit consensual sexual acts. The prosecution of such an offence now requires written authorisation by the National Director of Public Prosecutions. The second aspect is concerned with the application for HIV testing of a child allegedly having committed a sexual offence. The third aspect concerns the inclusion into the National Register of Sexual Offences of children who have been convicted of a sexual offence.⁹⁷

The framework does not, however, address how these issues must be approached in practice. Where a child is accused of committing a sexual offence, it is likely that s/he will refuse to undergo an HIV test. It could be argued that such a refusal, given the circumstances, would be deemed unreasonable and a children's court may be approached for consent, as set out above.

94 Artz & Smythe (eds) 2008:164.

95 Sec. 96 (1)(x) of the *Child Justice Act*.

96 Artz & Smythe (eds) 2008:164.

97 Department of Justice and Constitutional Development 2010:35.

It is not necessary to speculate if a child's refusal to consent to an HIV test in the criminal justice setting will be deemed to be unreasonable or not. The *Children's Act* provides that no child shall be tested for HIV except when:

- i. it is in his/her best interest and with the necessary consent,⁹⁸ or
- ii. it is necessary in order to establish whether any other person may have contracted HIV due to contact with any substance from the child's body, that may transmit HIV, provided the test has been authorised by a court.⁹⁹

Provision is made in the *Sexual Offences Act* for such an order of court authorising an HIV test. Consent of a child to HIV testing could be considered irrelevant in the criminal justice setting, if the provisions of the *Sexual Offences Act* are strictly applied to a child – the *Act* does not give the alleged offender an opportunity to consent to HIV testing; an order is merely made for testing.

Children accused of committing sexual offences are entitled to the rights set out in the *Children's Act* pertaining to HIV testing. They do not lose the right to participate in decisions about their health and treatment as provided for in the *Children's Act* and the *National Health Act* simply because they are accused of a crime. These rights cannot, however, be considered in isolation, as they have to be weighed against the rights of the victim, who may him-/herself also be a child.

One must not lose sight of the possibility that the HIV test may also be in the best interests of the child sexual offender, so that s/he too can take informed decisions about his/her own personal health and treatment, since s/he, if HIV positive, will similarly have to take antiretroviral drugs and give consent to such treatment in terms of the *Children's Act*.

Our question, in the remainder of this submission, centres on whether child sexual offenders should be treated differently from adult offenders when compulsory HIV testing is at issue.

6. The Child Justice Act

The *Child Justice Act* is a representation of the international development of children's rights within the field of criminal justice and forms part of a body of South African legislation designed to protect the best interests of the child in any interaction with the law.

98 Sec. 130(1)(a) of the *Children's Act*.

99 Sec. 130(1)(b) of the *Children's Act*. Separate provision has been made in sec. 130(1)(b)(i) of the *Children's Act* to provide for HIV testing where a health worker, for example, came into contact with the blood of a child during a procedure. It is, therefore, safe to deduce that the provision in this subsection is aimed at events outside the medical setting and could possibly include a sexual offence as defined in the *Sexual Offences Act*.

Children who commit crime are a legal anomaly, because they breach the basic tenet that children are acted upon; they do not act. The majority of child-oriented or inclusive legislation, the *Sexual Offences Act* included, is designed from a position of vulnerability, viz. the child must be protected from the deeds or acts of others. If, for example, one considers the *Sexual Offences Act* in isolation, it is roughly divided into parts pertaining to sexual offences against adults, children and mentally disabled persons. In other words, the *Act* does not categorise children who commit sexual crimes. The *Sexual Offences Act* preserves the tenet that children are acted against as victims of their vulnerability. Likewise, the *Children's Act* concerns itself with childhood as a state of victimhood, even though the original intention of the *Act*, at the Bill phase at least, was to provide a single legislative instrument designed to incorporate children who act, children who are acted against, and children who are caught in the crossfire of the actions of others. The *Child Justice Act* requires a different mindset. It views children as offenders, but also asks that a child be seen as vulnerable and subject to the children's rights clause. This presents an interesting dichotomy in the application of external criminal justice legislation to child offenders, and the compulsory HIV testing provisions of the *Sexual Offences Act* raise only one such concern.

Without debating the meaning and content of the best interests of a child, it is trite that it is the point of departure in all matters concerning a child. This was confirmed in the *Constitution*, the *Children's Act* and, more recently, in the matter of *J v National Director of Public Prosecution*.¹⁰⁰ Within the *Child Justice Act*, the best interest standard is reflected in the overall approach of the *Act*, but the *Act* is not blind to the crime situation in South Africa, or the fact that the best interest standard is subject to limitation within the bounds of the limitation clause. This limitation has been categorically confirmed by the courts in numerous cases and reiterated in *J v National Director of Public Prosecutions*. In *J v National Director of Public Prosecution*, a case dealing with the application of the *Sexual Offences Act* to child offenders, the court remarked¹⁰¹ that "... different considerations may apply to adults as opposed to children. Nevertheless, adults and children are on the same footing insofar as the *Sexual Offences Act* prohibits an overly broad array of sexual conduct ...". Whilst this position is trite, the court confirmed¹⁰² that, insofar as the adjectival aspects of the *Act* are concerned, "... different considerations apply to child and adult offenders.". The court in this matter set the bar for the substantive aspects of the *Act*, but concedes that, as far as the implementation of the practical aspects of the *Act* is concerned, there is a difference between adult and child offenders. Working from this premise, the interrelation of the *Child Justice Act* and Chapter 5 of the *Sexual Offences Act* presents similar challenges, which, we submit, have not been adequately addressed by the legislature.

100 *J v National Director of Public Prosecution* 2014 (2) SACR 1 (CC).

101 *J v National Director of Public Prosecution*:par. 29.

102 *J v National Director of Public Prosecution*:par. 31.

This submission does not concern itself with whether a child offender can be tested for HIV within the bounds of the *Sexual Offences Act*, since that position is confirmed in the National Framework for the Child Justice Act. This submission concerns itself rather with the practical implications of testing, which implications are not detailed within the same document. Although there are numerous concerns regarding the practical implications of Chapter 5 of the *Sexual Offences Act* on child offenders, we concentrate in this instance on a limited selection of the implications thereof for child offenders.

6.1 The application of compulsory HIV testing legislation to child offenders

Secs 4 and 7 of the *Child Justice Act* stipulate, first, that a child under the age of 10 years cannot be arrested, prosecuted or charged as a result of his criminal conduct. This position confirms that a child under the age of 10 years has no criminal capacity to act and, therefore, has no criminal liability. Sec. 9, however, extends protection to these children in that it allows a probation officer to make various recommendations to assist a child who shows tendencies towards criminality. No charges can be brought against these children. When juxtaposed with the *Sexual Offences Act*, logically these children cannot be tested for HIV, because, as the *Sexual Offences Act* stipulates, in sec. 32(2)(b), an application can only be considered after a charge and before or after arrest. This clearly has implications for any victim of a child below the age of 10 years. While we would all like to believe that a child under the age of 10 years is not a sexual threat, the fact of the matter is that children under the age of 10 years have been known to be hypersexual and may form a threat to others, more specifically, other children.¹⁰³ For these victims, even where the act of penetrative rape has not occurred, any exposure to the bodily fluids of the perpetrator may have dire consequences. These victims are not protected, because of the bar against involving children under the age of 10 years in the criminal process. Sec. 130(1)(b) of the *Children's Act* may provide some kind of relief to the victim, but this infringes the notion that a child under the age of 10 years has no liability for his actions, and raises consent issues and issues of unfair discrimination in so far as it relates to adult perpetrators.

A similar concern can be raised in terms of the *doli incapax* presumption applicable to child offenders between the ages of 10 and 14 years. These offenders are considered *incapax* until such time as the prosecution proves otherwise beyond reasonable doubt. In deciding whether to seek prosecution against such children, the prosecutor is entitled to take

103 See, for example, <http://www.belfasttelegraph.co.uk/news/uk/under-10s-committing-sex-crimes-30954158.html> (accessed on 7 April 2015); <http://www.mirror.co.uk/news/uk-news/rapist-aged-four-among-800-5081613> (accessed on 7 April 2015); <http://www.iol.co.za/news/south-africa/more-younger-children-are-having-sex-survey-1.247777> (accessed on 7 April 2015); Strobe *et al.* 2013:45-47.

various factors into consideration, and to wit the impact of the offence on the victim and the nature and seriousness of the offence, among others. Bearing in mind that this consideration is a pre-trial process, one can view the difficulty from two perspectives. First, and similar to the first mentioned concern regarding children under the age of 10 years, what is the result for the victim where the prosecutor decides not to bring charges against the child offender? Similar concerns, as first discussed, come into play. Secondly, if one takes the view that these children should be subjected to the same procedure as adults, what is the effect of a positive finding for HIV, on both the consideration of prosecution, and to what degree is this information relevant at the preliminary inquiry? Considering that the prosecution is permitted to take the nature of the crime and the victim into consideration, what effect does a positive HIV result have on the process and the ultimate determination of capacity? In extension, may a positive HIV result be used as a factor for diversion?

Another consideration, perhaps connected to capacity, is the hearing of oral evidence by a magistrate considering an application for HIV testing of a child accused of a sexual offence. In terms of sec. 31(1) of the *Sexual Offences Act*, a magistrate considering an application made by a victim in terms of sec. 30, may hear oral evidence, or evidence by way of affidavit, from the child accused, which forms part of the record. The evidence may be given by the accused, or by another on his behalf, and the hearing may exclude the victim, when the court considers it in the best interests of the victim to exclude participation. This obviously raises, concerns for victim participation, but must be viewed in light of the fact that the application is interlocutory. We will thus not concern ourselves with this point, except to query whether any evidence given forms part of the record for preliminary inquiry purposes, and whether the result of any HIV test will form part of the probation officer's assessment report. The point that does warrant concern is the participation of the offender in the application. Where the court hears evidence from the offender, no provision is made for capacity concerns. If we work from the premise that the offender has capacity, then the point does not warrant further investigation. If, however, we question the child's capacity to understand right from wrong, and act in accordance with that appreciation, then any evidence given at the application stage must be tested, whether given orally or by affidavit, for which the *Sexual Offences Act* does not make allowance. Further, what good does the evidence serve if the child is ultimately not prosecuted based on incapacity to act?

There are many other areas of concern regarding the interface between Chapter 5 of the *Sexual Offences Act* and the *Child Justice Act*: confidentiality concerns,¹⁰⁴ accountability concerns,¹⁰⁵ and issues relating

104 In light of the fact that confidentiality and open justice are interpreted differently in the *Child Justice Act*, the confidentiality of the results of HIV testing will have a different impact on child offenders, especially in light of who has access to the results.

105 In the case of child offenders, the *Sexual Offences Act* provides no guidance on the release of the results of an HIV test to a child offender and fails to

to diversion¹⁰⁶ and restorative justice practices and the results of HIV testing, the result of HIV testing on bail considerations¹⁰⁷ and the use of HIV status in aggravation of sentence.¹⁰⁸ This submission is, however, limited in length and cannot address all of these concerns in detail.

In conclusion, the *Child Justice Act* is a balancing act between the offender and the victim. Yet we cannot help but conclude that, in this instance specifically, the *Act* is not conversant with either side – one cannot simply say that legislation is applicable to a child without considering the overall aim of the *Child Justice Act*, viz. restoration and rehabilitation. The overall aim of Chapter 5 of the *Sexual Offences Act* is to protect victims of sexual abuse, but when the offender is a child, this must be viewed in light of the aims of the *Child Justice Act*, to wit restorative justice. As the court confirmed in *J v National Director of Public Prosecution*, the best interest standard demands that the law should generally distinguish between adults and children, and that child offenders must be treated using an individualized approach. We are not advocating that child offenders should be exempt from the prescripts of Chapter 5, but we support the prescript that

a truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.¹⁰⁹

stipulate whether such results can be made known to parent(s), the head of a child and youth care centre, or the head of a prison where child offenders are housed, for example.

- 106 Does a positive HIV result have any effect on the decision to divert? Should a positive HIV result be taken into consideration when selecting a diversion method?
- 107 Sec. 60(11) of the *Criminal Procedure Act* 51/1977 stipulates that an accused will not be granted bail if charged with rape where s/he knew that s/he was HIV positive at the time of the act. Bail will only be allowed if the accused can show that exceptional circumstances exist, which, in the interest of justice, permits his/her release. Although sec. 60(11) is applicable to child offenders, the *Child Justice Act* encourages release over detention pending trial and while on remand, and one must question the impact of a positive HIV finding on a child offender's right to be granted bail. In addition, questions of safety become relevant where bail is denied and a child offender is held in a child and youth care centre, or prison, where s/he is exposed to other children.
- 108 Sec. 51(3) of the *Criminal Law Amendment Act* 105/1997 prescribes a minimum sentence of life imprisonment for an accused who committed rape knowing that s/he was HIV positive at the time. The HIV status of the accused is thus relevant in order to comply with the minimum sentence requirements. The *Criminal Law Amendment Act* 105/1997 does not, however, apply to child offenders and thus the victim of a sexual offence committed by a child offender who knew that s/he was infected with HIV, does not enjoy equal protection or benefit of the law, because the offender is a child.
- 109 *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (M):par. 15.

7. Conclusion

It should be stressed that the rights of two opposing parties, *viz.* the offender and the victim, must be weighed up against each other in the context of criminal justice. The two parties involved may both be children, or the victim may be an adult who was sexually violated by a child offender. It is submitted that the disclosure of the HIV status of the child offender to the victim of the sexual offence is a justifiable infringement of the child offender's right to privacy, especially if regard is had to the purpose of HIV testing as alluded to in the beginning of this submission. It appears from an interrogation of relevant legislation and associated documentation that there is no express prohibition against applying the provisions relating to compulsory HIV testing to children accused of sexual offences. This position is trite. Our concern is that the interface between the *Sexual Offences Act* and the *Child Justice Act* has not been sufficiently addressed from a procedural perspective. There are many areas of concern which have the potential to infringe the best interests of a child offender and therein negate the overall aims of the *Child Justice Act*.

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