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A critical review of the South African legal framework on adolescent access to HIV prevention interventions

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HIV remains a leading cause of death globally, with adolescents continuing to be one of the most at-risk population groups. Effective public health responses require an enabling legal environment to facilitate adolescent access to HIV prevention tools. South Africa (SA) is a good case study of a country with legislative reforms supporting public health HIV prevention programmes. A desktop review was conducted of relevant SA laws compared with key international norms such as age of independent consent and the right to confidentiality. This article reflects on whether the SA legal framework is a facilitator or barrier to adolescent access to key HIV prevention services such as HIV testing and HIV education. The findings indicate a clear recognition of evolving capacity and the inclusion of protections aimed at enhancing decision-making. International legal norms are, however, scattered, and not comprehensive enough to inform certain national policy choices. As such, developing a coherent approach to the evolving capacity and protection relating to age-appropriate decision-making can be a challenge for states legislating on adolescent access to HIV prevention interventions. This article highlights the fact that SA has largely created an enabling legal environment for adolescent access to HIV prevention. Nevertheless, there are a number of weaknesses in the SA legal framework, such as the divergent approaches between criminal and civil law regarding sexual activity among adolescents. It is recommended that further research be conducted on legal reform toward a coherent approach to support adolescent access to HIV prevention services.

S Afr J Bioethics Law 2021;14(1):16-19. https://doi.org/10.7196/SAJBL.2021.v14i1.716

It is estimated that there are 37.9 million people living with HIV worldwide, and it remains one of the leading causes of death.[1] Within this epidemic, adolescents continue to be an at-risk population, with an estimated 510 000 young people aged between 10 and 24 years newly infected with HIV in 2018.[2,3] South Africa (SA) accounts for a third of all new HIV infections in the southern African region.[3]

In this context, public health responses targeted at assisting adolescents to reduce their risk of HIV infection are critical. It has been suggested that the law ought to create an enabling environment to facilitate public health responses to sexual and reproductive health services for adolescents.[4] However, the law may pose direct and indirect barriers to adolescent access to sexual and reproductive health services.[5-7] Direct barriers are laws that expressly exclude adolescents from accessing services, while indirect barriers are laws that are seemingly neutral but have a disparate impact on access to sexual and reproductive health services.[5] For example, if sex below the age of 16 is a criminal offence, it can make the distribution of condoms to young persons difficult, as service providers may be charged with aiding and abetting a crime. In light of the possibility that the law can act as both a facilitator and a barrier, the International Guidelines on HIV/AIDS and Human Rights recommend a review and reform of laws to ensure that they adequately address public health issues raised by HIV.[8] Furthermore, it has been recommended that measures be taken to remove all barriers hindering adolescents' access to information and preventive measures.[9]

This article reflects on a desk review of SA's legal framework dealing with adolescent access to HIV prevention services. It sets out the relevant international norms regarding adolescents' rights to sexual and reproductive health, describes the methodology used, makes a number of findings and discusses the extent to which the SA framework meets the international norms.

International sexual and reproductive health norms on adolescent access to HIV prevention

The Convention on the Rights of the Child provides that every person under the age of 18 is a bearer of rights.[10] Likewise, SA's Constitutional Court has ruled that children are entitled to all the fundamental rights in the Bill of Rights except for those from which they are expressly excluded, or where the limitation of such rights can be justified.[11]

Sexual and reproductive health rights are regarded as part of the right to the 'highest attainable' standard of health in international law.[12] Likewise, s27 of our Constitution, which deals with health, provides that 'everyone has the right to have access to – (a) health care services, including reproductive health care.'[13]

What, then, are the implications of 'everyone' having a fundamental constitutional right to reproductive healthcare in terms of adolescent access to HIV prevention? It is submitted that interventions to prevent HIV transmission fall squarely within the context of sexual and reproductive health, as the primary mode of transmission among this age group is sexual. Following the approach in the Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development case, children are entitled to this right, as they are not expressly excluded from s27 of the Constitution. Any limitation of this right would have to be justified.

Our Constitution requires the state to 'respect, protect, promote and fulfil the rights in the Bills of Rights'.[13] One of the state's obligations is to ensure that the legislative framework creates such an enabling environment.[4] A review of the international norms relating to ensuring adolescent access to HIV prevention services revealed five key obligations on the state, which are to:

(*i*) set an age at which adolescents can access contraceptives (this would include access to condoms) and medical treatment without parental consent,[6] and set an age for consent to sex that is the same for both girls and boys;[9]
(*ii*) ensure that legal norms do not discriminate on the basis of sex, sexual orientation and health status;[6,9]
(*iii*) facilitate access to health information, including sexual and reproductive information (e.g. family planning, contraceptives, the prevention of HIV/AIDS and the prevention/treatment of sexually transmitted diseases);[6,8,9]
(*iv*) respect adolescents' right to privacy and confidentiality;[9] and
(*v*) ensure that appropriate goods, services and information for HIV prevention are available.[9]

This article submits that a gap exists in the international norms, i.e. there is no norm that requires states to ensure that legal protections to support good decision-making by adolescents are linked to access rights.[7]

Methodology

The SA National Strategic Plan for HIV, TB and STIs, 2017 - 2022[14] was used to create a list of the HIV prevention interventions provided by the state. These are:

(*i*) voluntary medical male circumcision (VMMC);
(*ii*) information and education on HIV;
(*iii*) pre-exposure prophylaxis (PrEP);
(*iv*) HIV testing and counselling services; and
(*v*) provision of contraception (condoms).[14]

This was followed by a review of all SA laws that could potentially impact on adolescent access to these HIV prevention modalities. The review first examined relevant laws to establish whether they met the international norms described above. This required an examination to see whether the laws:

(*i*) set a non-discriminatory age of consent to contraceptives, medical treatment and sex;
(*ii*) created a right to access to information;
(*iii*) protected adolescent privacy rights; and
(*iv*) created a right to sexual and reproductive health services.

Secondly, the review examined whether the norms offered any special protections.

Results

The present review found that SA has to a large extent created an enabling legal environment for adolescent access to HIV prevention. It has done this through legislating ages of adolescent self-consent to condoms, medical treatment and sex.[15] The Children's Act No. 38 of 2005[16] also creates a right to information on the prevention of disease, and on sexuality and reproduction. The Act further enhances access to services through providing specific rights to privacy regarding contraceptive services and HIV testing. There are no differential or discriminatory requirements for access to HIV services or regarding the age of consent to sex. In essence, the SA legal framework meets four of the five international legal norms.

On examination of the ages of consent to sex and HIV prevention services, these are dealt with in the Children's Act and the Sexual Offences and Related Matters Amendment Act No. 5 of 2015[17] (Table 1). SA meets the minimum norm by having an age of consent to sex of 16 years, i.e. below the age of 18. It also meets other age-of-consent norms by having an age of consent to both medical treatment and contraceptives. The Children's Act separated HIV testing as its own category, rather than letting it fall within the general ambit of medical treatment.[15] This has facilitated the setting of special protections relating to when and how HIV testing may be undertaken.[18] SA has gone further than the minimum international law requirement by also setting ages of consent to VMMC and virginity testing (Table 1). Virginity testing is a cultural practice that has been revived in some areas as a form of HIV prevention.[15]

It is submitted that in light of the above, the framework provides adolescents with a right to independently access VMMC, PrEP, HIV testing and condoms. Although PrEP is not expressly referred to in the Children's Act, it is argued that it could be accessed independently by adolescents from the age of 12 onwards as a form of medical treatment.[19]

Regarding discrimination, the review found that there were no discriminatory provisions in relation to the accessing of HIV prevention services. The Sexual Offences Act does not discriminate against adolescents based on their sex or sexual orientation. In other words,

Table 1. Age of consent to sex and sexual and reproductive health services in SA

Category	Age of consent	Protections, if any
Sex	16 (heterosexual and homosexual)	-
VMMC	16	'Proper' counselling before the circumcision
Medical treatment (to include PrEP)	12	Adolescent must display 'sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of the treatment'
HIV testing	12	HIV testing must be in the best interests of the child and accompanied by pre-and post-test counselling
Contraceptives (condoms)	12	-
Virginity testing	16	'Proper' counselling

SA = South Africa; VMMC = voluntary male medical circumcision; PrEP = pre-exposure prophylaxis.

there is a single age of consent for both heterosexual/homosexual sex and between girls and boys. Furthermore, the Children's Act requires every child to be treated 'fairly and equitably'.[16]

The norm regarding the right to information on HIV prevention is also met by the Children's Act, which provides that every child has the right to access to age-appropriate health/sexual and reproductive prevention information.[16] Although this section does not specifically refer to HIV prevention, it is broad enough to encompass education on HIV.

The Children's Act provides that every child has a right to 'confidentiality regarding his or her health status', unless this is not in his or her best interests.[16] It also expressly provides for an adolescent's right to privacy regarding contraceptive advice and HIV testing.[16]

There is no provision in the Children's Act or any other legislation creating a legal right to HIV prevention services. However, s28 of the Constitution provides that every child has the right to 'basic health care'.[13] It is submitted that the term 'basic' refers to primary healthcare services, which would include HIV prevention.

Finally, the law creates a number of protections to support adolescent decision-making. For example, in terms of VMMC, these protections include: (*i*) circumcision is prohibited in those <16 years old, unless it is undertaken for religious or medical reasons;[16] (*ii*) the adolescent boy must self-consent;[16] and (*iii*) prior to providing consent, the adolescent must receive counselling.[16]

Discussion

The concept of an enabling legal environment in the context of HIV prevention is complex for a number of reasons. Firstly, the elements of such a legal environment are scattered through various documents. Secondly, they are not comprehensive, often providing very broad norms, such as setting an age of consent to sex below adulthood, without any further detail on the complexities that accompany such a policy choice. For example, should the criminal or civil law be used to enforce or regulate consensual underage sex? How does one ensure synchronicity between the age of consent to sex and the ages at which adolescents can access HIV prevention services? Thirdly, there is more of a focus on barriers to adolescent access to sexual and reproductive health services than on other issues, such as developing a coherent approach to the evolving capacity of adolescents, and support or protection relating to age-appropriate decision-making. It is submitted that the lack of a set of international norms to guide states in legislating on adolescent access to HIV prevention and other sexual and reproductive rights is a key failing. More research is needed in this area if the law is to support the implementation of public health programmes.

This review has found that the strengths of the SA framework are fourfold. Firstly, there is a clear recognition of evolving capacity, with different ages of consent set for various interventions. The age of 12 years is generally considered the youngest age at which adolescents would have the capacity to consent to HIV testing, contraception (condoms) and medical treatment, whereas VMMC, virginity testing and sex are all set at the higher age of 16.[15] Secondly, creating ages of independent consent to various HIV prevention tools has facilitated access to such services at a structural level. Thirdly, the inclusion of protections aimed at enhancing decision-making, such as mandatory counselling, are an innovative approach. Fourth, the framework does not discriminate against adolescents on the basis of sex or sexual orientation. There is the same age of consent to both heterosexual and homosexual sex,[17] and service providers may not discriminate against an adolescent on the basis of his or her sexual orientation.[16] Importantly, this enables the provision of services to adolescent men having sex with men.

There are some weaknesses in the framework, which include, firstly, that while the age of consent to sex is 16 years, and the Sexual Offences Act[17] provides that consensual sex between the ages of 12 and 15 years will not be prosecuted if both parties are aged between 12 and 15, or if one party is older but there is not more than a 2-year age gap between the partners, there are still many adolescents who might fall foul of the criminal law.[20,21] The narrowing of the circumstances in which consensual underage sex is criminalised has been welcomed, but it remains inadequate. Current law continues to have a disparate impact on adolescent girls, who are more likely to have older sexual partners. A further problem with the Sexual Offences Act is that it requires service providers to report consensual sex.[20] This means that when adolescents lawfully access services such as condoms or HIV testing, the service provider is required to report any disclosures of underage sex that fall into the protective categories described above.[15] This undermines the ability of service providers to offer confidential HIV prevention services.[20] Secondly, setting the age of consent to VMMC at 16 years means that boys aged<16 need parental consent for circumcision as a form of HIV prevention. This may well be a barrier to younger boys wishing to access this service.[22] Using a similar argument, Savage-Oyekunle and Nienaber[23] argue that setting 12 years as the age at which it is legal to access contraceptives is arbitrary, and undermines the public health imperative of ensuring that all adolescents (aged 10 - 19) are able to access such services.[23] Thirdly, while it has been argued that requiring HIV counselling before testing is an important decisional support, if it is not interpreted broadly, it may act as a barrier to new forms of HIV testing such as self-testing.[24,18]

Conclusions

This review has found a number of enabling elements in the SA framework. While there is no specific provision creating a right to HIV prevention services, the Constitution provides a general right for every child to access basic healthcare. All laws reviewed indicate that the legal framework recognises evolving capacity, and balances this approach with special protections. The law does not discriminate or differentiate based on sex or sexual orientation in relation to age of consent to sex or sexual and reproductive services. There is a general right to information on prevention of disease, sexuality and reproduction, and an express right to access information on HIV testing and contraceptives.

It is concluded that the SA legal framework does, to a large extent, support adolescent access to HIV prevention. However, there are some barriers to adolescent access to critical HIV prevention tools. These include the issue of divergent approaches between the criminal and civil law regarding sexual activity among adolescents, which creates implementation problems, and the legalisation of an outdated customary practice, virginity testing, which is not a form of HIV prevention and has been used to discriminate against young women.[15]

Acknowledgements. The work described here was in part supported by award number 1RO1 A1094586 from the National Institutes of Health (NIH) entitled CHAMPS (Choices for Adolescent Methods of Prevention in SA). The content is solely the responsibility of the authors, and does not necessarily represent the official views of the NIH

Author contributions. JT prepared the first draft of the article. AS assisted with the editing and analysis.

Funding. None.

Conflicts of interest. None.

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Accepted 10 November 2020.