

# **HIV TESTING IN THE CONTEXT OF ADMISSION TO THE PRIESTHOOD AND RELIGIOUS LIFE**

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## **Introduction**

The discussion that follows is a consequence of a question asked by religious formators about the validity or otherwise of the HIV testing of candidates for the priesthood and religious life. Clearly the Church and the religious orders are presented with a highly controversial issue in that civil law takes a position somewhat in opposition to that of canon law. The constitution of the country is binding on everyone, and at the same time the Church has its own code of law. The discussion does not claim to present all the arguments, and is not presented by a lawyer. However the points presented emanate from discussions held with two South African constitutional lawyers, and from discussions and correspondence involving three canon lawyers, two here and one in Canada.

## **The position taken by civil law under the constitution**

The president, parliament, the church, everybody falls under the constitution. In the old dispensation and under the old constitution proper procedures rather than the substance of the law was given weight. Now the constitution is supreme. HIV testing in law comes into the area of equality and discrimination. At a minimum the practice can involve discrimination on the grounds of disability. Because of the problem of perpetuating discrimination, this would mean it comes under heightened scrutiny. The same exclusions would apply as to race issues. A landmark case is the recent one involving Hoffman vs SAA. (Discrimination in the area of disability). Sections of the constitution prohibit discrimination in the area of disability and unlawful labour practice regardless of whether or not there is remuneration. While the Church in its pastoral role is not an employer, it is still subject to the Employment Equity Act and the Labour Relations Act.

## **The position taken by canon law**

The Church is *sui generis*, it has its own law. The Church's laws are not arbitrary. All countries recognize canon law to some degree. Because no one has a right to the priesthood or religious life, the receiving group has the right to establish qualifications. Superiors are permitted to verify the state of health of a candidate. Canon law would see HIV as an impediment to religious life and would possibly see HIV in the area of health in its own category. In a Canadian case someone not admitted to a religious congregation because of HIV claimed for damages in the area of sentimental damage (around discrimination because of disability); he did not subsequently request admission to the congregation. A delicate area is that concerning who would have access to the results. The candidate and the superior? Or preferably, the candidate would present an HIV- negative certificate before admission; any falsehood in this area would nullify profession and terminate the obligation of the institute.

### **In court**

Under the constitution an individual is given support to take legal action, but what is difficult to prove is substance in a particular instance. A civil rather than a criminal case gives advantage to the Church because you have to prove damage, which is difficult. That *this* decision flowed into *this* damage has to be proved. An HIV policy could be used as evidence in court; a policy could be written up as part of positive legislation. Or it could be part of the customary law of the church/ religious congregation, the practice of the people. The customary law is the protection.

### **HIV testing is not for employment**

Even though the constitution would regard testing as unfair, unless it can be established that it is fair, no right is absolute, even in South African law. The Church does not test for employment. In the case of religious life an analogy is one of family; the relationship is not between employer and employee. In the case of the diocesan priesthood and the fact of incardination in a diocese there is a greater comparison with employment. When one joins a voluntary association (e.g. a diocese, a religious congregation) one needs to abide by its laws; as a member of a voluntary association a person gives up certain rights in exchange for others. No one is forced to stay in the

church. Final profession and incardination are key. Incardination demands that the diocese take care of a priest who is more than an employee. Candidates are screened for their suitability for celibacy. The Church needs continually to assess candidates for their suitability for celibacy before it assumes total responsibility for them.

### **The position taken by canon lawyers**

There is place for HIV testing of candidates, but testing should not be arbitrary, and not in isolation from other measures used to assess the suitability of the candidate for a life of celibacy and service. Some form of discrimination does exist in that, e.g. women are not permitted to be ordained in the Catholic Church, or priests may not marry. What can be problematic is the harmful publicity around HIV testing to the church/religious congregation and its mission.

### **The position taken by civil lawyers**

What is to be encouraged is a framework for voluntary testing, of both current members and candidates. But an HIV+ result may not be used to exclude someone. Rather there need to be good, rational reasons for HIV testing, e.g. around financial planning and treatment issues. The Church needs to engage with the problem. Candidate selection criteria need to be clear and non-discriminatory under the provisions of the constitution.

### **Conclusion**

HIV /AIDS is a serious concern for religious congregations and dioceses admitting candidates. I believe it highlights the many issues around candidate selection, and selection criteria applied in practice, that continue to be of concern. Selection should never be a haphazard process, though all too often it is. AIDS in the wider context as we have seen in several articles elsewhere in this journal points to the deep issues society seems unable to grapple with. Are we saying the same of ourselves in the Church?