



## MEDICINE AND THE LAW

## The effect of the new Children's Act on consent to HIV testing and access to contraceptives by children

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On 1 July 2007 a number of sections of the Children's Act<sup>1</sup> came into effect<sup>2</sup> that impact on the capacity of children to consent to HIV testing<sup>3</sup> and to access contraceptives.<sup>4</sup> The Act also provides that where HIV testing of children is done for foster care or adoption purposes the state must pay the cost of such tests where circumstances permit.<sup>5</sup>

The present provisions of the Child Care Act<sup>6</sup> regarding consent to medical treatment by children over the age of 14 years and surgical operations by persons over the age of 18 years still stand.<sup>7</sup> However, the latter is now academic because the provisions regarding the lowering of the age of majority from 21 years to 18 years also came into effect in July 2007.<sup>8</sup> When Section 129 of the Children's Act is brought into effect there will be drastic changes to the capacity of children to consent to medical treatment and surgical operations. In both instances the age of consent – subject to certain conditions – will be reduced to 12 years on similar grounds to those for HIV testing of children. The provisions allowing consent to a termination of pregnancy by girls of any age in the Choice on Termination of Pregnancy Act<sup>9</sup> are not affected by the Children's Act.<sup>10</sup>

### Consent to HIV testing by children where it is in their best interests

The Children's Act<sup>1</sup> provides that where it is in their best interests children aged 12 years or more may consent to an HIV test, and where it is in the best interests of children under the age of 12 years they may similarly consent if they are 'of sufficient maturity to understand the benefits, risks and social implications of such a test'.<sup>11</sup> Although the Act does not mention 'sufficient maturity' in the case of children over the age of 12 years, it is clear that such children must be capable of giving an informed consent<sup>12</sup> – i.e. they must be able to understand the nature and effect of the test and agree to accept

all its consequences.<sup>13</sup> In the case of children under the age of 12 years the extent of the maturity that they require is spelt out in the Children's Act, i.e. they must be able to understand the benefits, risks and social implications of an HIV test.<sup>11</sup>

### Consent where it is in the best interests of children under 12 years, who are not sufficiently mature to give consent to HIV testing

The Children's Act<sup>1</sup> provides that where children under the age of 12 years are not sufficiently mature to consent to an HIV test, and it is in their best interests to have an HIV test, the consent may be given by: (i) a parent or caregiver; (ii) the provincial head of social development; or (iii) a designated child protection organisation arranging the placement of a child.<sup>11</sup> 'Caregiver' is defined very widely in the Act and means any person other than a parent or guardian who in fact cares for a child and includes: (i) a foster parent; (ii) a person who cares for a child with the implied or express consent of a parent or guardian of the child; (iii) a person who cares for a child while the child is in temporary safe care; (iv) the person at the head of a child and youth care centre where a child has been placed; (v) the person at the head of a shelter; (vi) a child and youth care worker who cares for a child who is without appropriate family care in the community; and (vii) the child at the head of a child-headed household.<sup>14</sup> The use of the word 'includes' indicates that these categories are not closed and therefore any other person caring for a child may be able to give consent for an HIV test. In all instances, however, in terms of the National Health Act,<sup>15</sup> any children who are capable of understanding must participate in the decision-making process – even if they do not have the legal capacity to consent.

If there is no parent, guardian, caregiver or designated child protection agency arranging the placement of the child, the superintendent or person in charge of a hospital may give consent to an HIV test on a child under 12 years of age who is not sufficiently mature to consent.<sup>11</sup> In cases where consent is unreasonably withheld by the child him- or herself, the child's parent, guardian or caregiver, or a designated child protection agency arranging the placement of the child, application may be made to the children's court to authorise the test.<sup>11</sup> A similar

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application may be made to the court where the child, parent or caregiver is incapable of giving consent.<sup>11</sup>

In all instances children about to be tested for HIV must be provided with proper pre- and post-test counselling by an appropriately trained person.<sup>16</sup> This means that during pre-test counselling the benefits, risks and social implications of an HIV test must be explained to the child, while during post-test counselling the implications of the results must be explained.<sup>16</sup> In both cases counselling must be given to children who are of sufficient maturity to understand what is being explained and to the child's parent or caregiver if either of them have knowledge of the test.<sup>16</sup> The courts have held that such counselling must be done on an individual basis, otherwise there will have been no proper informed consent to HIV testing.<sup>17</sup>

### Consent to HIV testing of children where endangered third parties are at risk

The Children's Act<sup>1</sup> provides that the court must approve an HIV test on a child where it is necessary to establish whether (i) a health worker may be at risk of being infected with HIV due to contact with the body fluids of a child, or (ii) any other person may be at risk of being infected with HIV due to contact with the body fluids of a child.<sup>18</sup> Clearly the need for a court order only arises if consent for HIV testing of a child to protect endangered third parties cannot be given under conditions where it is also in the best interests of the child to be tested for HIV.

### Confidentiality of information on HIV status of children

The confidentiality of the HIV status of children is strictly protected by the Children's Act<sup>1</sup> and disclosures concerning their status may only be made: (i) by persons carrying out their powers and duties in terms of the Act or any other law; (ii) when it is necessary for the purposes of carrying out the provisions of the Act; (iii) for the purposes of legal proceedings; or (iv) in terms of a court order.<sup>19</sup> In addition, children who are legally able to consent or persons authorised by the Act to consent on their behalf<sup>11</sup> may consent to disclosure of information about the HIV status of the relevant child.<sup>20</sup>

### Access to contraceptives

The Children's Act<sup>1</sup> states that no person may refuse to sell condoms to children over the age of 12 years, or refuse to

provide condoms to children over the age of 12 years on request where such condoms are provided or distributed free of charge.<sup>21</sup> This section applies to male and female condoms and would seem to be aimed at combating HIV infection among sexually active children. The section implies that condoms may be provided to children under the age of 12 years but that such requests can be refused.

Contraceptives other than condoms may be provided to the child on his or her request and without the consent of the parent or caregiver of the child if: (i) the child is at least 12 years of age; (ii) proper medical advice is given to the child; and (iii) the child is medically examined to determine whether, on medical grounds, a specific contraceptive should not be provided to the child.<sup>22</sup> Contraceptives other than condoms may therefore not be provided to children below 12 years of age without parental or caregiver consent. Children who obtain condoms, contraceptives or contraceptive advice in terms of the Act are entitled to confidentiality.<sup>23</sup>

### Effect of reduction of age of majority from 21 to 18 years on contractual capacity

The effect of reducing the age of majority from 21 to 18 years<sup>8</sup> is that 18-year-olds now have full legal capacity and can sue and be sued in their own names. Therefore patients of 18 years or more who enter into contracts with medical practitioners or hospitals will be personally liable for any expenses incurred unless their parents have agreed to pay such expenses or they are listed as dependants on their parent's medical schemes.

1. Children's Act No. 38 of 2005.
2. Government Notice No. 13. *Regulation Gazette* No. 8706, *Government Gazette* No. 30030, 29 June 2007.
3. Section 130 of the Children's Act No. 38 of 2005.
4. Section 134 of the Children's Act No. 38 of 2005.
5. Section 131 of the Children's Act No. 38 of 2005.
6. Child Care Act No. 74 of 1983.
7. Section 39(4) of the Child Care Act No. 74 of 1983.
8. Section 17 of the Children's Act No. 38 of 2005.
9. Choice on Termination of Pregnancy Act No. 92 of 1996.
10. Section 129(1) of the Children's Act No. 38 of 2005.
11. Section 130(2) of the Children's Act No. 38 of 2005.
12. Section 7(1) of the National Health Act No. 61 of 2003.
13. *Cf. Castell v De Greeff* 1994 (4) SA 408 (C).
14. Section 1 of the Children's Act No. 38 of 2005.
15. Section 8 of the National Health Act No. 61 of 2003.
16. Section 132 of the Children's Act No. 38 of 2005.
17. *C v Minister of Correctional Services* 1996 (4) SA 292 (T).
18. Section 130(1) of the Children's Act No. 38 of 2005.
19. Section 133(1) of the Children's Act No. 38 of 2005.
20. Section 133(2) of the Children's Act No. 38 of 2005.
21. Section 134(1) of the Children's Act No. 38 of 2005.
22. Section 134(2) of the Children's Act No. 38 of 2005.
23. Section 134(3) of the Children's Act No. 38 of 2005.