

ABSTRACT

Making health care services accessible to everyone is a duty imposed by the Constitution, yet it remains one of the greatest challenges to our transitional health care system. Legislation aimed at improving access to health care has increased over the last few years, testing health workers' ability to practically implement such laws. Children are a particularly vulnerable group within society and should have their health needs addressed at all levels of service provision. However, in most instances children are unable to access necessary health care services on their own and require the prior consent of a legally qualified third party in order to obtain health care. Health legislation further restricts children's ability to consent by setting age limitations resulting in the suspension or prevention of access to health care services for many children in South Africa. Once it is operational, the long awaited Children's Act will increase access to health care for children by lowering the age of consent but it is also likely to add to existing implementation challenges currently faced by health care workers.

Author

PRINSLEAN MAHERY

Children's Institute, University of Cape Town



INTRODUCTION

In the last 10 years various laws in South Africa (SA) have been enacted and amended to improve and protect children's rights to health care services. All countries including SA, set age restrictions when it comes to children accessing medical treatment and operations without parental or guardian consent or assistance. Internationally, a trend can be observed where law makers are tending to lower the age of consent in line with the needs and changes within society and to give effect to international obligations.

In SA, the first amendment in keeping with this international trend was the Child Care Amendment Act¹ which modified the Child Care Act² by lowering the age of consent for medical treatment from 18 to 14 years. The new Children's Act³ will again lower the age of consent to medical treatment from 14 to 12 years once it becomes operational.^a However, it is estimated that this new Act will only become law by 2008.⁴ Other laws which also play a role in this arena include the Choice on Termination of Pregnancy Act,⁵ the Sterilisation Act⁶ and the National Health Act.⁷

In light of children's health care rights being protected under the Constitution⁸ and the State's obligation to take legislative and other measures to give effect to this right, this chapter explores how specific legislation can restrict children's right to health care services particularly by setting age restrictions which influence children's access to required health care services.

THE RIGHT OF ACCESS TO HEALTH CARE SERVICES

The Constitution is the highest law in SA and it is therefore important for everyone, including health care workers, to know and understand the rights that the Constitution gives to health care users.^b This is particularly important because in terms of section 7 of the Constitution, the State has an obligation to respect, protect and give effect to constitutional rights. When it comes to health care rights,⁹ the health profession

is the gateway through which the State discharges its constitutional duties in this respect.

In June 1995 SA ratified the Convention on the Rights of the Child¹⁰ (Children's Convention) and in January 2000, the African Charter on the Rights and Welfare of the Child¹¹ was ratified as well. The provisions of these international instruments are thus binding on the South African state. It is therefore important to know and understand how these instruments protect every child's right to health care services. Article 24 of the Children's Convention provides the following (among other things):

- ◆ The child has the right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.
- ◆ No child may be deprived of access to such health care services.
- ◆ The State must take measures to ensure provision of necessary medical assistance and health care to all children.
- ◆ The State has to ensure that children have access to education and information regarding child health. This information is necessary to allow children to participate in decisions affecting their health.

CONSENT AND ACCESS TO HEALTH CARE

Human beings are considered to be autonomous and are therefore granted the power to make decisions about matters concerning their lives. Medical treatment is an invasion of physical integrity which requires consent by the patient. Health practitioners have to get permission from their patients to treat them and by receiving a patient's consent they may be protected against possible lawsuits arising from providing the necessary treatment.^c

a Note that the Act will only come into operation once the President announces a commencement date in the Government Gazette.

b Children's right to health care is protected in sections 27 and 28 of the Constitution.

c A doctor may also be legally liable for damages to a patient where he / she did not fulfil his / her duty of care when performing an operation or treating the patient.



WHAT IS CONSENT?

Depending on the legislative requirement, consent can be given verbally or in writing. Consent has been explained as “the legal and ethical expression of the human right to have one’s autonomy respected”.¹² Proper consent means valid consent. The common law requirements for valid consent are:¹³

- (a) the consent must be given by a person capable in law to give consent;
- (b) consent must be informed;
- (c) the consent must be clear and unequivocal; and
- (d) the consent must be comprehensive.

CONSENT MUST BE GIVEN BY A PERSON CAPABLE IN LAW

Generally the law regards children as incapable of consenting to agreements because they are deemed not sufficiently mature enough to understand and respond to the consequences attached to particular agreements. Thus the law tries to protect children against their own immaturity and their inability to make value judgements due to their lack of experience which could result in an inability to assess a particular situation.¹⁴

Parliaments around the world use age-thresholds to determine whether or not a child is capable in law to consent to certain agreements without parental assistance. An age restriction is one of three approaches^d used by legislatures to assess a child’s competence in making informed decisions.¹⁵ The approach is mostly guided by extensive research on children’s levels of maturity^e as well as social movements including the child rights movement.¹⁶ Examples of age restrictions for children capable in South African law of giving consent include the following:

- ◆ At 10 a child is capable of consenting to his / her own adoption.¹⁷
- ◆ At 14 a child is capable of consenting to medical treatment.¹⁸

- ◆ At 16 a child is capable of drawing up his / her own will.¹⁹

- ◆ At 18 a child is capable of consenting to his / her own surgery.¹⁸

CONSENT MUST BE INFORMED

Informed consent generally requires the person giving consent to ‘understand the information supplied, comprehend the consequences of acting on that information, to be able to assess the relative benefits and dangers of the proposed action, and to be able to provide a meaningful response to the question of what should be done’.¹³

CONSENT MUST BE CLEAR, UNEQUIVOCAL AND COMPREHENSIVE

Simply put, this means that the doctor and patient must be absolutely clear about what exactly the patient has consented to. The patient must leave no doubt that s / he wants to undergo the suggested treatment despite the risk.²⁰

PARENTAL CONSENT VS PARENTAL ASSISTANCE

At this point it is instructive to note that some legislation requires parental assistance only and not parental consent. Section 129 of the new Children’s Act is a case in point. Two views can be expressed in this regard. Firstly, it can be said that ‘assistance’ includes the provision of consent resulting in these terms sometimes being used interchangeably. However, when a law specifically states that parental consent is required or explicitly requires only parental assistance then these terms become distinct. Difficulties may arise when it comes to giving meaning to the requirement of assistance. There are clear requirements set down in law for consent to be valid yet there are no clear rules on when ‘assistance’ could be valid or invalid. However, no matter how uncertain the term of parental assistance may be, it is important for health professionals to know when a law requires actual consent (whether verbal or written) or simply assistance, so that the right procedures are followed.

d The other two approaches have been describes as follows: (1) the approach based on an assessment of capacity to perform the function of taking the decision in question and (2) the approach which relies on considering the wisdom of the outcome of the child’s decision.

e For example, many studies have indicated that compared to adults, 14 year olds display the same level of understanding and maturity when it comes to making informed decisions concerning medical treatment.

HOW DOES CONSENT AFFECT ACCESS TO HEALTH CARE SERVICES?

Unless it is an emergency, children can only receive treatment without their parents' consent if they are in law, capable of consenting to the treatment. Thus only those who fall above the age of consent will be able to access the required health service without their parents. If they are not of the required age then they can only be helped if any third party, empowered by the law to give the required consent, assists them by providing the necessary consent.

The problem lies with the possible and inevitable delays or cancellation of procedures which children needing health care are faced with when they don't have parents, or do not want to involve their parents, yet they are not in law capable of consenting to the treatment themselves. Under current law, their access to health care is suspended until the health practitioner gets the Minister of Social Development to consent or until a High Court provides the necessary consent. Health care providers have described the provisions of current law as 'labour intensive and illogical' due to the fact that the person in law capable of consenting (in the absence of a parent or guardian) is someone within the Department of Social Development who has "no or little understanding of the medical procedure, its benefits, indications... and of even greater concern has no knowledge of the child and his / her social circumstances".²¹

RESPONSIBILITIES OF PARENTS AND GUARDIANS

Generally the law aims to protect and strengthen relationships between parents and their children where such relationships exist. The Constitution gives children the right to parental care in section 28 so as to ensure that children are assisted and guided by their parents. Parents in turn have the responsibility to care for and to protect their children. Parental care is thus built into laws requiring parental or guardian consent or assistance before a child could be bound by certain agreements. The Children's Convention also gives parents the duty to guide their children when they attempt to exercise their rights under the Convention.²² This includes their right to access health care. Legislation placing age restrictions on a child and

requiring parents or guardians to assist a child are thus supported by these rights.

Children who have no parent or guardian have the right to alternative care from the state. In these circumstances the law places parental responsibilities on people in whose care the child is placed following a court order.²³ However, given the rise in the number of orphaned and abandoned children as a result of the HIV epidemic, many children are left out of the formal court process and "instead they live in informal kinship care arrangements, in unregistered children's homes, on the streets and as members of child-headed households".²⁴ This in turn has created various difficulties when it comes to providing such children (especially those under-14) with health care through the application of the current law.

CASE STUDY: Ex Parte Nigel Redman²⁵

This case involved an urgent application by the Aids Law Project (ALP) to obtain consent from the High Court to provide antiretroviral therapy to four orphaned children with HIV. These children were below the age of 14 and needed parental or guardian consent to obtain medical treatment. Due to the urgent health needs of the children the ALP bypassed the Minister and went directly to the High Court to get the required consent because the process of obtaining Ministerial consent was time consuming. The application was successful.

This was followed by several requests made to the Minister to obtain consent to provide a further forty children also needing antiretroviral treatment and HIV testing and who could not get parental consent. The Minister only consented to the treatment of five children. The ALP had to lodge another urgent application to the High Court to get consent for the rest of the children. This application succeeded as well.

Although the applications were successful the case illustrated various problems arising from attempts to comply with the consent provisions of the Child Care Act when parental consent is unobtainable. Particular difficulties include the following:²⁶



- ◆ Applications to the High Court proved to be time consuming, causing delays to obtaining important medical treatment for children.
- ◆ The reach of the Court's decision was limited because the legal circumstances of other children in SA in the same situation remained unchanged.
- ◆ Fresh applications have to be made to the Court or new requests to the Minister have to be made for consent on every occasion.
- ◆ To institute a High Court application every time a child without a legal guardian or parent requires HIV testing or treatment is costly, prohibitive, impractical and inconvenient.
- ◆ Current consent requirements also impede children's access to prerequisite HIV testing.

THE AGE THRESHOLD

While children do need guidance from adults, they are also autonomous beings and those who have the ability to express their will and to make decisions on their own behalf should not be prevented from doing so. Children are the bearers of their own rights and are not merely the subjects of their parents' rights. A number of these rights are interrelated and have a direct link to decision making power when it comes to children accessing health care. In the first instance, children have the right to bodily integrity which includes the right to security in and control over their body.²⁷ This is linked to their right under article 12 of the Children's Convention, to participate in decisions affecting their lives which means that they need to be consulted when it comes to their health care. This right is further connected to the right to freedom of expression. Furthermore, in order to provide an informed and educated expression of will, children's rights to access information and to education regarding their health needs also have to be respected and protected.²⁸

Thus when it comes to accessing health care all these rights are read together and they are interpreted to mean two things. Firstly, that children have the right to participate in the making of decisions about what is done to their bodies. Secondly, that children who are sufficiently mature and have been provided with all the information needed to make an informed decision, have the right to make such decisions for themselves.

Although it is understandable to apply the protection of the law to children who are incapable of consenting to their own medical treatment because of mental disability or immaturity, the legislature needs to be aware that harsh age restrictions which apply to children accessing health care may ultimately stand in breach of various children's rights. Not all children under the legislative age of consent can be said to lack maturity simply because of their age. In fact, it can be argued that if a child at age 10 is sufficiently mature enough to make a life changing decision such as choosing his or her parents through adoption, then a 10 year old could theoretically also consent to certain medical treatments.

It is instructive to note that other countries like Scotland do not place age restrictions on children's access to health care, and simply require the child to be mature and capable of understanding the nature and possible consequences of the procedure or treatment.²⁹ Such an approach could definitely increase access to health care. However, health care practitioners would need to receive training and support to enable them to accurately assess maturity levels of each individual child.

The battle to access health care is especially difficult where children do not have parents because the Minister or the courts need to be approached for consent unless it is an emergency. Thus given the possibility and probability of delays in receiving health care services due to efforts that must be made to obtain third party consent, there is a potential for the violation of the rights of those children who fall outside the legislative age set for consenting to health services.

ANALYSIS OF CURRENT LAW IN RELATION TO CONSENT

Various laws regulate and have an impact on children's competence to consent to their own medical treatment and surgical operations, with or without parental assistance. The most important laws are the National Health Act (Health Act),⁷ the Child Care Act,² the Choice on Termination of Pregnancy Act,⁵ the Sterilisation Act,⁶ and the Children's Act³ (not yet commenced).

THE NATIONAL HEALTH ACT^f

The relevant provisions of this Act are now in force and health care providers need to ensure that they understand the rights and obligations set out in it.³⁰ On the issue of consent this Act goes further than the old Health Act of 1977³¹ and the Child Care Act.²

Informed consent is required from the health care user before a health care service may be provided to him or her.³² Section 1 provides that where "the person receiving treatment or using a health service is below the age of consent as established under the Child Care Act then 'user' is deemed to include the person's parent or guardian or another person authorised by law to act on the first mentioned person's behalf". The National Health Act thus cross references the age threshold of 14 years for medical treatment and 18 years for surgical operations to the Child Care Act.

In conjunction with the requirement of informed consent, the Health Act requires the user to have full knowledge of a range of issues relating to the treatment or health service such as his / her health status, the range of treatment options, benefits, risks and costs of the treatment.³³ The Act states that a user has the right to participate in any decision affecting his / her personal health or treatment and if the user is capable of understanding then he / she must be informed in terms of section 6 even if he or she lacks the legal capacity to give the informed consent.³⁴

There is an obligation on the health care provider to explain to the child's parent (if the child is below the age threshold) and the child (whether below or above

the age threshold) the options for the treatment and the consequences of taking or not taking the treatment. The Act further states that the disclosure of information regarding the health status or treatment of the user can only be done with the written consent of the user. This means that where a child is above 14 years then the child needs to consent to the disclosure of information but when the child is under-14 years a parent or guardian needs to consent to the disclosure of information regarding the child's health status or treatment.³⁵

THE CHILD CARE ACT²

A child is defined in section 28 of the Constitution as any person below the age of 18 years.³⁶ The Child Care Act allows children of 14 years or older to consent to medical treatment without parental or guardian assistance and 18 year olds can consent to operations without parental or guardian assistance. Medical treatment⁸ is not defined in this Act or in the Health Act.

It is important to note that this Act does not explicitly require any assessment of the child's capacity to consent and that it is assumed that a child of the set age is competent to consent. Furthermore, the Act does not require informed consent to be given by the child possibly 'absolving' health care workers from the duty to ensure that the child understands what he / she is consenting to. However; the rules regarding informed consent as outlined by common law and now the Health Act, apply in all medical circumstances involving the issue of consent which means that there is a duty on health practitioners to provide the health users with all the necessary information regarding the treatment and to ensure that the user understands the information provided and gives informed consent thereto.

HIV TESTING

There is no legislation specifically regulating HIV testing. The Department of Health (DoH) adopted a Draft National Policy on HIV testing.³⁷ In terms of this policy, an HIV test cannot be carried out without the informed consent of the patient. This includes pre- and post counselling. In terms of the Guidelines

^f While some of the provisions of this Act have not yet come into operation, all the sections relevant to this discussion are in force since 2nd May 2005.

^g Note for the sake of interest that dentistry can fall under either medical treatment or surgical procedures depending on the needs of the patient.



for the Management of HIV infected Children,³⁸ a child should receive age-appropriate pre- and post test counselling regardless of whether the child is able to consent in terms of the Child Care Act. Although neither the Child Care Act nor the National Health Act define medical treatment; state law advisors have stated in a legal opinion to the Department of Social Development that HIV testing falls within the definition of “medical treatment”.²⁶ This means that the age requirement of 14 years for consent to an HIV test will apply. Parental or guardian consent is needed for an HIV test of a child younger than 14 years of age and for the disclosure of the child's HIV status.³⁹

The provisions of the National Health Act with regards to informed consent also apply when it comes to HIV testing. The disclosure of one's HIV status is also protected by the confidentiality provisions in the National Health Act.

CONTRACEPTIVES

As with HIV testing there is no law specifically governing access to contraceptives. However, contraceptives fall under reproductive health care, making the provisions of the Health Act applicable in this regard. In terms of the Health Act the provisions of the Child Care Act govern the ages of consenting to the receipt of contraceptives. This is also confirmed in the National Contraception Policy Guidelines.⁴⁰ Thus in terms of these provisions, generally the age of giving informed consent for accessing contraceptives without parental assistance is 14 years in terms of current law.

However, the policy states that adolescents who are sexually active and request contraceptives but are not willing or unable to obtain parental or guardian consent “should have their health and social needs met”.⁴¹ This has been interpreted to mean that a child younger than 14 years can access contraceptives if a health care worker has considered the individual circumstances of the child.⁴² The rules regarding informed consent, the supply of relevant information and patient confidentiality as set out in the Health Act also apply to accessing contraceptives as a particular health care service.

CHOICE ON TERMINATION OF PREGNANCY ACT⁵

Although the definition of a termination of pregnancy can fall either under medical treatment or surgical operation depending on the procedure, the lawmakers have decided that the rules relating to a termination of pregnancy need to be set out separately. The rules regarding informed consent are stated in section 5 of this Act and the identity of the woman must remain confidential at all times unless the woman chooses to disclose it.⁴³

This law is different to the above mentioned Acts in two respects. Firstly, a woman is defined in section 1 of this Act as a female of any age. This means that the ages of consent in terms of the Child Care Act are not applicable to girls requesting a termination of pregnancy. Secondly, no parental or guardian assistance is required at any stage unless the girl agrees thereto.⁴⁴

It is only where the woman suffers from a severe mental disability making her incapable of completely understanding or appreciating the nature or consequence of a termination of pregnancy or if she is in a state of continuous unconsciousness and won't wake up in time to consent to the termination of her pregnancy that someone other than the woman will need to consent to the termination of her pregnancy.⁴⁴ It must be noted though that informed consent is required from a girl capable of providing it and even if age-restrictions do not apply to a termination of pregnancy, a child may nevertheless be refused a termination of her pregnancy if she is incapable of providing informed consent for the termination.⁴⁵

COMPULSORY REPORTING IN RESPECT OF TERMINATION OF PREGNANCY

Even though the Choice on Termination of Pregnancy Act states clearly that the identity of the woman seeking a termination of pregnancy needs to be kept confidential, the Child Care Act on the other hand imposes obligations on health care workers as well as other persons working with children or persons caring for children to report suspected abuse or neglect of children.⁴⁶ The Choice on Termination of Pregnancy Act has not repealed the provisions of the Child Care Act or changed it in any way. This means that strictly speaking, where a child comes to a clinic requesting a

termination of pregnancy and the health practitioner suspects that the child has been raped or sexually abused, the health practitioner is legally obliged to report this suspicion to a social worker.

THE STERILISATION ACT⁶

The legislature has again decided to separate regulations concerning sterilisation even though it can fall under either a medical treatment or an operation. Sterilisation can only be performed if a person who is capable of consenting consents thereto and the person is 18 years of age.⁴⁷ When it comes to children under-18 years of age then sterilisation can only be performed if failure to sterilise would result in his / her life being in jeopardy or his / her physical health being seriously impaired. The Sterilisation Amendment Act of 2005⁴⁸ has brought about various changes in respect of sterilisation. While section 4 of the 1998 Act made provision for the person to be informed of the nature and consequences of the procedure, it failed to require that person to actually understand all the information given to him / her. This compromised the notion of informed consent. The Amendment Act qualifies 'consent' by requiring informed consent. It is noteworthy that written consent and not merely oral consent is required for sterilisation.

Other changes made by the Amendment Act include changing the definition of sterilisation to include sterilisation through non-surgical procedures (meaning medical treatment). Although sterilisation can occur through operation and medical treatment the age of consent for sterilisation remains 18 years in all respects.

The 1998 Act dealt with persons incapable of consenting due to severe mental disability. The Amendment Act removes the word 'severe' and merely refers to people incapable of consenting due to mental disabilities. Furthermore, where sterilisation is to be performed on a person incapable of consenting due to mental disability, then a panel consisting of a psychiatrist or a medical practitioner, a psychologist or a social worker and a nurse also has to agree that the sterilisation should be performed.⁴⁹

The Amendment Act also states that a child under-18 years may be sterilised if failure to do so would

jeopardise both his / her physical and mental health. As a safeguard, the Amendment Act requires that before sterilisation takes place on a child, a medical practitioner must consult with the child and provide a written opinion that the sterilisation would be in the best interest of the child. The 1998 Act didn't make room for the participation of a child where a request to sterilise the child was made by parents if the child was below 18. The Amendment Act requires the medical practitioner to consult with the child before such sterilisation takes place.

Sterilisation falls under reproductive health care and thus the rules regarding patient confidentiality applies through the provisions of the Health Act.



CASE STUDIES

MEDICAL TREATMENT

Scenario: 12 year old Trudy goes to a clinic alone and shows signs of having an STD. She needs medication and contraceptives.

What does the law require the health provider to do?

- ✧ Trudy is below 14 years and thus a health care provider is not allowed to provide her with any medication without her parent's consent and she should be advised to return with her parents.
- ✧ With regards to contraceptives, children under-14 need parental consent; however, if the child's social and health needs would be met by providing the child with contraceptives, then this age limit may be waived.

SURGICAL PROCEDURES

Scenario: Trudy (now 15) is living on the streets and is involved in a car accident and rushed to hospital. She is stabilised but later it is discovered that she will need surgery.

What does the law require the health provider to do?

Trudy is under 18 and cannot consent to the required surgery on her own.

- ✧ If it is an emergency then the superintendent of the hospital can consent to the surgery.
- ✧ If it is not an emergency, consent needs to be obtained from the Minister of Social Development.
- ✧ An application can be made to the High Court to obtain the required consent.
- ✧ Trudy must receive all the information relevant to the surgery and must participate in the decision making process.

HIV TESTING

Scenario: 12 year old Bongiwe who lives on the streets and works as a sex worker decides that she wants to know her HIV status. She goes to a clinic and requests information on HIV and an HIV test.

What does the law require the health provider to do?

- ✧ The health care provider is not allowed to give Bongiwe an HIV test as she is under the age of 14 and cannot consent to the test herself.
- ✧ Consent for the HIV test needs to be provided by the Minister or the High Court

- ✧ Bongiwe may be given information regarding HIV and pre-test counselling.
- ✧ If consent is obtained, Bongiwe must be given age-appropriate pre and post test counselling.
- ✧ Information about Bongiwe's HIV status cannot be disclosed to anyone.

However, if Bongiwe lived with her parents and wanted to have an HIV test she would need her parents' consent for the test. Furthermore, if the parents consented to the test then strictly speaking they would have the right to know the results of the test. The parents would also be the ones who are able to consent to the disclosure of Bongiwe's HIV status.

TERMINATION OF PREGNANCY

Scenario: Bongiwe now 13 years old, becomes pregnant. She goes to a clinic and requests a termination of her pregnancy.

What does the law require the health provider to do?

- ✧ Informed consent for the termination of her pregnancy must be obtained. Although she is only 13 years old no one else needs to consent except Bongiwe.
- ✧ Counselling and all the necessary information regarding the termination her pregnancy must be provided.
- ✧ Information about the termination of pregnancy should not be provided to anyone. However Bongiwe is 13 years and it is illegal for an adult to have sex with a girl under the age of 16 years, therefore the compulsory abuse reporting requirements in the Child Care Act become relevant. Note that it is only illegal if an adult had sex with Bongiwe but if it was a boy of her similar age and Bongiwe consented to the sex with the boy then the sex would not be illegal. Thus if the nurse suspects that Bongiwe was sexually abused then she would have to report the termination of pregnancy to the Director General of Social Development.

Although access to the health care service is successful, the fact that the termination of her pregnancy might have to be reported if she was sexually abused means that patient confidentiality would have to be breached.

It must be noted that recently the Constitutional Court was faced with constitutional challenges to various health legislation.⁵⁰ This legislation included the Choice on Termination of Pregnancy Amendment Act 38 of 2004 and the Sterilisation Amendment Act 3 of 2005. This judgement, however, does not alter the current law on consent in as far as sterilisation or terminations of pregnancy are concerned. In this case the Court did not deal with the substances of these Amendment Acts but rather considered the validity of the process through which these Acts became law. The consequences of the judgement in relation to the issues raised in this chapter can be set out as follows: As far as the Sterilisation Amendment Act is concerned, the Court dismissed the challenge of invalidity and therefore the law as it is laid out in this article still remains solid. The Choice on Termination of Pregnancy Amendment Act did not amend the current TOP Act as far as the issue of consent is concerned. Thus the Court declaring the latter Amendment Act invalid does not alter the existing law. A press release by the national DoH makes it clear that “the Constitutional Court judgement does not apply to the existing Choice on Termination of Pregnancy Act, 92 of 1996 and the Act still applies in its totality.”⁵¹

A NEW AND IMPROVED LAW

The Children’s Bill was drafted by the South African Law Commission over a period of 8 years and handed to the Minister of Social Development in 2003. When the Bill was tabled in Parliament for debate and passage in 2003, it was split into two Bills which are commonly referred to as the section 75 Bill and the section 76 Bill.^h The section 75 Bill dealt with a range of issues including children’s consent to medical treatment, surgical operations, contraceptives and HIV testing. After both the National Assembly and the National Council of Provinces considered the section 75 Bill it was finally passed in December 2005. The Bill has been signed by the President and is now called the Children’s Act 38 of 2005.³ Now all that is still required is that the President announces the commencement of the Act so that it can become operational. This is predicted for late 2008.

Health practitioners need to be prepared for the changes which this new law will bring in relation to consent. It is also necessary to see whether the provisions of the Children’s Act will increase access to health care services for children. This next section explores the relevant provisions of the Act and provides practical examples of how the new law would need to be applied once it comes into operation. Until then the relevant provisions of the Child Care Act still apply.

THE CHILDREN’S ACT³

The Children’s Act brings about three important shifts with regards to medical treatment, surgical operations, HIV testing and access to contraceptives:⁵²

- (a) The age threshold for medical treatment, surgical operations, HIV testing and contraceptives has been lowered from 14 to 12 years
- (b) The Act also requires the child to be of sufficient maturity and to understand the benefits, risks and social implications of the treatment, the operation or the HIV test thereby introducing a more nuanced test aimed at protecting children.
- (c) Relatives and other caregivers caring for children but who do not have court acquired parental rights and responsibilities but who, de facto, care for the child, may consent on behalf of a child under-14 years for medical treatment, contraceptives and HIV testing. This also includes foster parents and the head of children’s homes and shelters.

^h See Lucy Jamieson & Paula Proudlock ‘Children’s Bill Progress Update’ 13 March 2006 p1-3 for an explanation on section 75 Bills and section 76 Bills. The Section 76 Bill has been tabled and is now referred to as the Children’s Amendment Bill (B19 of 2006).



SUMMARY OF THE PENDING NEW LAW IN TERMS OF THE CHILDREN'S ACT 38 OF 2005

MEDICAL TREATMENT

- ✧ At age 12 a child can consent to his / her own medical treatment.
- ✧ The child must be of sufficient maturity and have the mental capacity to understand the implications and consequences of the treatment.
- ✧ The rules regarding the supply of information, the requirement of informed consent, the child's participation in the process and confidentiality and disclosure of information regarding the treatment will also apply here as well.
- ✧ If the child is under 12 or over 12 but not capable of consenting then the following people can consent to the medical treatment:

Parents / Guardian or care-giver

In emergencies: The superintendent of a hospital or person in charge of the hospital.

Where parental consent cannot be obtained or if the child unreasonably refuses to give consent, the Minister can consent.

In all instances where consent is refused or cannot be obtained, The High Court or Children's Court can consent.

Note that parents / guardians or care-givers are not allowed to refuse to assist a child or to provide the required consent for any treatment or operation simply because of their religious or cultural beliefs unless they can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned.

SURGICAL OPERATIONS

- ✧ At age 12 a child can consent to having an operation but the child must be assisted by parents or a guardian. The child must also be sufficiently mature to understand the benefits, risks and social implications of the operation. A care-giver cannot consent to an operation for a child; it must be a parent or guardian.
- ✧ If the child is under-age or 12 years old but incapable of consenting then the same persons authorised to consent to medical treatment for the child can consent to the child's surgery

depending on the circumstances. The only exception is that a care-giver cannot assist or consent to an operation for a child (this includes a foster parent or head of a children's home).

- ✧ Rules regarding the supply of information, the requirement of informed consent, the child's participation in the process and confidentiality and disclosure of information regarding the operation will also apply here.

HIV TESTING

- ✧ At age 12 a child can consent to having an HIV test without parental or care-giver assistance.
- ✧ A child under 12 can also consent to an HIV test if the child is mature enough to understand the consequences and social implications of such a test.
- ✧ The child and parents / care-giver (if they know about the test) must receive pre- and post-test counselling.
- ✧ If a child is under 12 and not mature enough to understand the implications of the test, the following people can consent to an HIV test for the child:

The parent or care-giver.

The provincial head of Social Development

A designated child protection organisation arranging the placement of the child.

Where the child has no parent or care-giver and no designated child protection organisation is arranging for the placement of the child, the superintendent or person in charge of a hospital can consent.

Where consent by anyone authorised to give it is unreasonably withheld or the parents, care-giver or the child self is incapable of giving consent, A Children's Court can consent.

The child can consent to the disclosure of HIV status if over 12 years or under 12 years, but, mature enough to understand the consequences and implications of taking such test. Where children under 12 are not mature enough to make the decision to disclose the results of the test then the same people authorised to consent to the child taking the test can consent to the disclosure of the child's HIV status. Again the Children's Court can provide the required consent where the disclosure is in the best interest of the

child and someone unreasonably withholds consent or where the child or parent / care-giver is incapable of giving consent.

CONTRACEPTIVES

- ❖ A child over 12 may not be refused condoms on request at places where they are either sold or distributed free of charge.
- ❖ Where contraceptives other than condoms are requested by a child 12 years or older, they must be supplied to the child without the consent of the parent or care-giver provided that the child is given proper medical advice and has been examined to determine whether there are medical reasons as to why a particular contraceptive cannot be given to the child.
- ❖ Confidentiality on children's access to contraceptives is also subject to the rules regarding compulsory reporting of abuse and neglect.

TERMINATION OF PREGNANCY

- ❖ A child of any age can consent to a termination of her pregnancy.
- ❖ A medical practitioner or registered midwife who performs a termination of pregnancy on a child and concludes that the child has become pregnant due to sexual abuse has to report the incident to the Provincial Department of Social Development, a designated child protection organisation, police official or clerk of the Children's Court. This must be done despite confidentiality requirements in terms of the Choice on Termination of Pregnancy Act.

CONCLUSION

The objectives of this chapter were twofold. On the one hand, it aimed to demonstrate how consent laws in respect of children influences their access to health care services. The influence is either negative in that it results in a delay or denial of access to health care or positive in that it makes health care accessible and by insisting on parental assistance the child is protected against his/her immaturity and the child's right to parental care is respected and protected. Where access to health care is either suspended or denied then it results in violation of the right to health care services as guaranteed in the Constitution as well as international treaties binding on the State. Where access is increased or more accessible then the right to health care is upheld.

The second objective of the chapter aimed to describe and analyse current legislation around consent so as to provide a meaningful comparison between current law and provisions of the pending Children's Act. By comparing these provisions the advantages as well as challenges in practical implementation of the current and up coming law could be more easily identified. As a result of the analyses it was found that current consent laws can cause unnecessary delays to health care for children and they fail to effectively assist parentless children needing health care but who are below the age of consent. The age of consent is problematic in itself in that it assumes children under that age lack maturity and understanding. However, this approach is in line with countries all over the world using age as the determinant of children's capacity.

Although the Children's Act does not do away with the age-threshold it effectively increases access to health care for children by lowering the age of consent. It further improves the law by including care-givers as people capable of consenting to certain health care services giving access to more children who have no parent or guardian to provide the necessary consent. This provision is supported by some health care professionals.²¹

The challenges created by the Act include the burden placed on medical practitioners to assess maturity and understanding where children seek access to health care without adult assistance. The implication of this onus is very severe and guidelines on doing the assessments



will need to be drafted in Regulations after consultation with health care providers. It has been proposed that a child's level of understanding could be tested by "getting them to paraphrase their knowledge of the treatment or procedure, their appreciation of the consequences of the proposed treatment or procedure, and their willingness to accept all the harm or risks involved in such treatment or procedure".⁴⁵ The other major challenge is the provisions of compulsory reporting. This will result in breach of patient confidentiality and could be resisted by children and compound social and health problems faced by children.

Given the unanimous outcry for law reform by many, including child and health care workers, the enactment and operationalisation of the Children's Act is long overdue. It is granted that there are still many challenges ahead and most of the current challenges are yet to be mastered, but having legislation just a few steps away of becoming a law which would improve children's access to health care services is definitely something to look forward to.

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