



## **ADDENDUM: To the Human Rights and Ethical Guidelines on HIV and AIDS: A manual for Medical Practitioners, published by the South African Medical Association (2006 second edition)**

### 2.1 Informed consent as a precondition for HIV Testing (pg 7)

To provide for an expansion on the requirements of notification where admission of a patient to a health establishment occurs without his/her consent, we include section 9 of the National Health Act:

*9. Health service without consent.—(1) Subject to any applicable law, where a user is admitted to a health establishment without his or her consent, the health establishment must notify the head of the provincial department in the province in which that health establishment is situated within 48 hours after the user was admitted of the user's admission and must submit such other information as may be prescribed.*

Section 9(3) negates the requirement above in the event that the user provides consent themselves within 24 hours of being admitted

### 2.3 Unlinked and Anonymous Testing (pg8)

The Protection of Personal Information Bill, which is currently before Parliament, will regulate the lawful processing of personal information after it is enacted.

### 2.7 Testing the Newborn Baby and Young Infant (pg 9)

The provisions of the Child Care Act regarding HIV testing have been replaced by section 130 of the Children's Act as at 1 July 2007. In short the following applies:

#### **Consent to HIV test for children under 12 years** (effective as of 1 July 2007)

If the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test, consent must be given by:

- the parent or care-giver
- the provincial head of social development
- a designated child protection organisation arranging the placement of the child
- the superintendent or person in charge of a hospital, if the child has no parent or care-giver and there is no designated child protection organisation arranging the placement of the child

- a children's court, if consent is unreasonably withheld by above, including the child; or the child or the parent or care-giver of the child is incapable of giving consent.

Section 132 states that pre and post- counselling for HIV must be provided to the child, if the child is of sufficient maturity to understand the benefits, risks and social implications of such a test; and to the child's parent or care-giver, if the parent or care-giver has knowledge of the test.

### 3.1 Basic Legal and Ethical Criteria (pg 9)

Once regulations have been finalised it will be possible for a minor child of the age of 12, and possessing sufficient maturity to provide informed consent for medical treatment as well as surgery.

It must further be noted that mental impairment of a patient does not necessarily preclude the capacity to provide informed consent. Each instance must be judged on its merits to determine the capacity of the mentally impaired patient to provide informed consent.

### 3.1 Basic Legal and Ethical Criteria (pg10)

The Compulsory HIV testing of Alleged Sexual Offenders Bill 2003 has not been passed. Instead the issue of compulsory testing of alleged sexual offenders has been dealt with in Chapter 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (commencement 16 December 2007).

In short, the legislative amendment stipulates that a victim of a sexual assault may, within 90 days of the assault, apply to a magistrate for an order compelling the compulsory HIV testing of the perpetrator. The results of the test will be made known to both victim and perpetrator.

In addition, the application can also be made by the investigating officer. The results of the test can be used in criminal proceedings against the perpetrator.

### 3.4 Children (pg 11)

For now, the provisions of the Child Care Act are still in effect. However, once the relevant provisions of the Children's Act come into effect, the position will be as follows (section 129):

#### **Consent by a child**

##### Consent to Medical Treatment (note: not yet in effect)

A child may consent to his or her **own medical treatment** or to the **medical treatment of his or her child** if-

- the child is over 12 years; **AND**
- the child is of sufficient maturity **and** has the mental capacity to understand the benefits, risks, social and other implications of the treatment

### Consent to Surgical Operations (note: not yet in effect)

A child may consent to the performance of a **surgical operation on him or his or her child** if-

- (a) the child is over the age of 12 years; **AND**
- (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; **AND**
- (c) the child is duly assisted by his or her parent or guardian.

No parent, guardian or care-giver of a child may refuse to assist a child or withhold consent by reason only of religious or other beliefs, unless that parent or guardian can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned –(Section 129(10)).

Regulations are still being drafted on this section of the Act. What is important to note is that children as young as 12 years will be able to consent to treatment not only for themselves, but for their own children as well. However, for operations on the child or her child(ren), assistance is required by the parent or guardian. The determining factor is not so much the age of the child, but rather the maturity and capacity of the child to understand the benefits, risks, social and other implications of the treatment or surgical operation.

Different types of treatment require different levels of understanding and responsibility. A child may be mature enough to understand the risk and benefits of receiving treatment for a minor injury, but not mature enough to understand the risk and benefits of undertaking long-term treatment for a chronic illness. The maturity requirement in the Children's Act will give the flexibility to require adult guidance where the medical professional deems it necessary.

As in previous legislation, there is no definition for “treatment” and “operation”. However, treatment is regarded as non-invasive and innocuous procedures, and includes vaccinations. An operation generally refers to surgical intervention.

### **Consent by Superintendent**

The superintendent of a hospital or the person in charge of the hospital (in the absence of the superintendent) may consent to the medical treatment of or a surgical operation on a child if-

- (a) the treatment or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability; **AND**
- (b) the need for the treatment or operation is so urgent that it cannot be deferred for the purpose of obtaining consent that would otherwise have been required

### **Consent by Minister (Social Development)**

The Minister (Social Development) may consent to the medical treatment of, or surgical operation

- If the parent or guardian of the child-
  - (a) unreasonably refuses to give consent or to assist the child in giving consent;
  - (b) is incapable of giving consent or of assisting the child in giving consent;
  - (c) cannot readily be traced; or
  - (d) is deceased.
- If the child unreasonably refuses to give consent

Section 129 (9) re-iterates that the High Court remains the Upper Guardian of children and may be approached for necessary relief.

### **HIV Testing of Children** (note: effective as of 1 July 2007)

No child may be tested for HIV except when-

- (a) it is in the best interests of the child and consent has been given by a
  - Child over 12 years; or
  - Child under 12 years, and is of sufficient maturity to understand the benefits, risks and social implications of such a test

Therefore, even a child under 12 years may consent independently to an HIV test, provided (s)he is of sufficient maturity to understand the benefits, risks and social implications of such a test. What happens if the child under 12 years is tested HIV positive and requires treatment. In this case, it might be in the best interests of the child to breach confidentiality and disclose to the parent / guardian (see Section 13). Once again, the “best interests of the child” must be taken into account by the health care worker, before disclosing any information.

A child may also be tested in order to establish whether a **health worker** may have contracted HIV due to contact in the course of a medical procedure involving contact with any substance from the child's body that may transmit HIV; or **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. In the latter case, a court order is required, but not for the former case.

### 5.5 New Draft Protection of Personal Information Bill (pg 14)

The Bill contains a prohibition on the processing of personal information concerning, amongst others, a person's religious beliefs, race / ethnic origin, political opinions, health sexual life or criminal behaviour (section 25). There is an exemption to this prohibition in section 30 of the Bill for medical professionals, healthcare institutions, or facilities or social services, provided the processing of personal information is necessary for:

- the proper treatment and care of the person concerned (the data subject), or for the administration of the institution or professional practice concerned.

- In addition there is an exemption for insurance companies, medical aid scheme administrators and manages care organisations if such processing is necessary for:
  - the assessing of risk for the insurance company / medical scheme;
  - and the person has not objected to such processing;
  - the performance of an insurance or medical aid agreement;
  - or the enforcement of any contractual rights or obligations.

The exemption in section 30 is subject to an obligation on the part of the entity processing the information to maintain confidentiality and only to divulge the information if required by law or in connection with their duties.

The prohibition further does not apply if it is carried out:

- with prior parental consent where the data subject is a child;
- where it is necessary for the establishment, exercise or defence of a right or an obligation in law;
- or where it is necessary to comply with an obligation of international public law.

#### 12 HIV/AIDS and Research (pg 25)

The Department of Health has issued an additional document, namely the "Guidelines for Good Practice in the Conduct of Clinical Trials with Human Participants in South Africa." in 2006

#### 13 HIV/AIDS Testing in Schools (pg 27)

The provisions of the Children's Act replace the requirements of the Child Care Act in respect of the obtaining consent to perform HIV testing. (see amendment to par 2.7 above)

#### 15 HIV/AIDS and Popular Education/ Communication

The Declaration of Helsinki has been revised in 2008 and is available on the World Medical Association's website ([www.wma.net](http://www.wma.net))

#### Annexure 1

The Ethical Rules of Conduct for Practitioners registered under the Health Professions Act, 1974 were amended in February 2009, however, these amendments do not directly impact on the issue of HIV and AIDS. Rule 27A, describing the main responsibilities of health practitioners has been added to the Ethical Rules. This rule includes a reference on the responsibility of the health practitioner to respect patient confidentiality, privacy, choices and dignity (Rule 27A (b))

Annexure 2

The HPCSA has revised their Guidelines for the Management of Patients with HIV infection or AIDS and published same on 30 May 2007. This document is available on the HPCSA website, [www.hpcsa.co.za](http://www.hpcsa.co.za)

**NOTE: This document has not yet been approved by the Human Rights Law and Ethics Committee, or the Board of Directors of the South African Medical Association. It is provided for information purposes only and must not be viewed as an official document generated by the South African Medical Association.**