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Children and young people

Current law

The law governing minors and consent to medical treatment is contained in several pieces of legislation, one of which is not yet fully in force (see the section on The Children's Act). Table 1 (below) sets out the legal situation as it stands at the time of writing.

Even with the guidance of specific legislation, there will be grey areas in the matter of consent to treatment of minors. The maturity of the child concerned, the wishes and opinions of the parents or guardian, as well as the clinical circumstances, all have to be taken into consideration and some of these may conflict. The principle to bear in mind in such circumstances is that the child's best interests are paramount.⁷

In law, the consent of the parent or legal guardian is required if a child is under the age of 12. In practice, however, it is reasonable to seek the consent of a minor with the capacity to understand the nature and implications of the proposed treatment or procedure. This should not present a problem if the child and parents are in accord about a decision to consent to treatment. If there are two people with parental responsibility (see Box 4), it is usually sufficient for one of them to give consent, but where decisions may have profound, irreversible consequences, both of them should be consulted where practicable.

If surgery is being proposed and the child is aged 12 or over and has the maturity to understand the implications, the child may consent on his/her own behalf with a parent or guardian's written assent.

In an emergency, where a person with parental responsibility is not available to give consent, required treatment may proceed with the consent of the superintendent of a hospital, or the person in charge if the superintendent is unavailable. If neither is available, HPCSA guidance states that a healthcare practitioner may treat the child, provided it is in the child's best interests and that the treatment given is "limited to treatment which is reasonably required in [the] emergency". In state hospitals, the decision to give emergency treatment should be taken by the clinical manager.⁸ In non-urgent situations, an application should be made to the Minister, who is empowered to give consent in lieu of the child's parent or guardian.⁹

Occasionally, parents make decisions that are likely to affect a child adversely; they may disagree with the orthodox management of certain conditions, for example, and although this may not be life-threatening, the child may suffer by not having access to conventional treatment. If there is reason to believe that a parent's refusal to consent to a child's medical treatment is placing that child at risk, the matter should be referred to the hospital's legal department, who may either petition the court for a ruling or apply to the Minister of Health for consent.¹⁰

If a minor with decisional capacity refuses lifesaving treatment, any decision to overrule the patient's withholding of consent should be made by the courts, rather than the treating clinicians, except in an emergency where immediate action must be taken to preserve the child's life or prevent serious harm.

Even when children lack the decisional capacity to give consent, they should still be involved in the decision-making process – for example, in terms of who goes to theatre with them or what toys they take.

Table 1: The current legal situation regarding clinical treatment of minors

Circumstance: Medical treatment

Age at which patient can consent: 12

Relevant Act: Section 129 of the Children's Act 2005

Comments: A child of 12 or older may consent to medical treatment.

Conditions that have to be met: The patient must be mature enough to understand the implications of undertaking the proposed treatment, but if he/she lacks capacity, a person with parental responsibility or a care-giver can consent on his/her behalf. Failing that, the head clinician of a hospital can give consent.

Circumstance: Surgical treatment

Age at which patient can consent: 12

Relevant Act: Section 129 of the Children's Act 2005

Comments: A child of 12 or older may consent with a parent's or guardian's assent

Conditions that have to be met: Patients may consent to surgery if they are mature enough, but a parent or guardian must also agree to the operation. The patient's consent and parent's assent must be in writing and signed using Form 34.

Circumstance: HIV test

Age at which patient can consent: 12

Relevant Act: Section 130 of the Children's Act 2005

Comments: Consent for an HIV test may be given by a child of 12 or older, or by a younger child with sufficient maturity to understand the implications of the test.

Conditions that have to be met: The child must have proper pre- and post- test counselling. The clinical and social implications must be explained.

Circumstance: Termination of pregnancy

Age at which patient can consent: No lower age limit

Relevant Act: Section 5 of the Choice on Termination of Pregnancy Act 92 of 1996

Comments: 5(2) "no consent other than that of the pregnant woman shall be required for the termination of a pregnancy." For the purposes of this Act, "woman" means any female person of any age.

Conditions that have to be met: A girl of any age can request a TOP, but if she is a minor, she should be advised to consult with her parents/guardian, though she should not be denied a TOP if she fails to do so.

Circumstance: Request for contraception

Age at which patient can consent: 12

Relevant Act: Section 134 of the Children's Act 2005

Comments: Came into force in July 2007.

Conditions that have to be met: It is illegal to refuse to sell (or supply freely available) condoms to children aged 12 or over. Other forms of contraception can also be supplied if the child is mature enough to understand the implications and it is clinically appropriate. If a minor seeks contraceptive advice without parental consent, his/her confidentiality should be respected, unless there are reasonable grounds for suspecting the child is being exploited or abused.

Circumstance: Virginitv test

Age at which patient can consent: 16

Relevant Act: Section 12 of the Children's Act 2005 when it comes into force.

Comments: It is illegal to carry out a virginitv test on someone under the age of 16. If they are 16 or older, a test may be carried out only with their written consent.

Conditions that have to be met: Consent for a virginitv test must be given in writing on the specified form (Form 1) and signed by both the subject of the test with the signed assent of a parent or guardian.

Circumstance: Circumcision

Age at which patient can consent: 16 (males only)

Relevant Act: Section 12 of the Children's Act 2005

Comments: Female circumcision is illegal at any age. Male circumcision is permissible under specific circumstances (see **page 16** of this booklet)

Conditions that have to be met: Male circumcision may only be carried out on a boy under 16 if it conforms to religious practices or is medically necessary. Consent must be in writing on Form 2. Circumcision for social or cultural reasons must only be carried out if the boy is aged 16 or older and with his written consent (using Form 3) and the signed assent of a parent or guardian.

Circumstance: Sexual intercourse

Age at which patient can consent: 16

Relevant Act: Sections 1, 15, 16 & 57 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Comments: Section 54 of the Act places an obligation on anyone with knowledge (or a reasonable suspicion) of a sexual offence against a child to report it to the police. There are harsh penalties for failure to report.

Conditions that have to be met: Children are considered incapable of consenting to sex until the age of 12. Between 12 and 16, they are considered capable, but not mature enough to consent to sex. At 16, the law considers them both capable and mature enough for consensual sex.

Circumstance: Minor with parental responsibility for a child

Age at which patient can consent: 12

Relevant Act: Section 129 of the Children's Act 2005.

Comments: A child-parent of sufficient maturity may consent to medical or surgical treatment on her child's behalf.

Conditions that have to be met: If the consent is for surgical treatment, the assent of the parent or guardian of the child-parent's should also be obtained. The consent must be in writing on Form 35.

Circumstance: Sterilisation

Age at which patient can consent: 18

Relevant Act: The Sterilisation Act 44 of 1998 and the Sterilisation Amendment Act 3 of 2005.

Conditions that have to be met: Minors may only be sterilised if their life would be jeopardised or their health seriously impaired by a failure to do so. In such cases, a sterilisation can be carried out if the parents/guardian have consented and an independent medical practitioner, after consulting with the child concerned, makes a written statement that the sterilisation would be in the best interests of the child.

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