

CHILDREN'S ACT: IMPLICATIONS FOR RESEARCH

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The table below sets out the changes introduced by certain sections of the Children's Act on 4th July 2007, and the implications for research with a focus on HIV prevention trials.

PROVISIONS IN THE CHILDREN'S ACT THAT BECAME EFFECTIVE ON THE 1/7/07	HOW THE NEW PROVISIONS CHANGE THE EXISTING LAW	IMPLICATIONS FOR RESEARCH
<p><i>Section 7: Best interests of the child standard</i> This section of the Act describes the factors that must be taken into account when using the best interests of the child standard</p>	<p>Currently the principle is undefined. However the courts have generally held that the principle requires a wide range of factors to be considered to promote a child's physical, moral, emotional and spiritual welfare during decision-making affecting the child (<i>Mc Call v Mc Call</i> 1994 (3) SA 201 (C) at 204)</p>	<p>The list of factors to be taken into account in establishing a child's best interests may be of little assistance when applied to research. RECS will have little guidance on the factors to be taken into account, and will need to establish their own guidelines on when "therapeutic research" is in the best interests of children</p>
<p><i>Section 10: Child participation</i> Every child that is of such an age, maturity and stage of development that they can participate in decision-making is entitled to express their view regarding such a decision and these views must be given due consideration</p>	<p>No such right in existing law</p>	<p>Researchers and RECs must ensure that children who have the maturity to participate in decision-making are included in informed consent processes either by way of assent or if section 71 of the National Health Act comes into operation by giving full informed consent along side their parents/guardians if they can demonstrate "understanding"</p>
<p><i>Section 13: Right to information</i> Every child has the right to have access to information on health promotion and the prevention & treatment of ill-health/diseases</p>	<p>No such right in existing law</p>	<p>Child research participants are entitled to health related information, for e.g., the results of tests</p>
<p>Every child has the right to have access to information on their health status, the cause of current or future health problems and treatment</p>	<p>No such right in existing law</p>	<p>Child research participants are entitled to information on their health status even if they have not provided consent to research participation</p>
<p>Every child has the right to confidentiality regarding their health status provided this is in their best interests</p>	<p>Clarifies the application of the right to privacy to children by stating that children have a right to confidentiality even when they have not consented independently to medical treatment</p>	<p>Child research participants have the right to have their medical information (such as their health status or the health treatment they receive) kept confidential while taking part in a</p>

		research
<p><i>Section 17: The age of majority</i> A child becomes a legal major at the age of 18</p>	In the past young persons only become legal majors at the age of 21	Children will have full legal capacity from the age of 18. This will mean that from the age of 18 young persons will be able to consent independently to any form of health research
<p><i>Section 19: Parental responsibilities and the rights of mothers</i> If the biological mother of a child is an unmarried child (i.e. a person under the age of 18) then the guardian of the child's mother will also be the guardian of the baby i.e. the maternal grandmother will be the baby's guardian</p>	The new Act has changed the common law by providing that guardianship will just rest with the maternal grandmother. Under common law where an unmarried minor gives birth to a child, the minor's parent/s (or guardian/s) become the legal guardian/s of their grandchild	If the protocol requires the enrolment of infants and some of the mothers of such infants are unmarried children (i.e. under 18 themselves) then the guardian of the baby's mother (the grandmother) will be lawfully capable of providing consent for research participation by his or her grandchild
<p><i>Section 27: Assignment of parental responsibilities</i> Allows a parent to appoint a guardian in the event of his or her death. This must be done through a valid will</p>	Although previously a person could have nominated a guardian for their children in a will there was no express mention of this in the law. A key principle of the common law is that every person has "testamentary freedom". This enabled them to decide freely how to dispose of their property and make other arrangements in their will, such as nominating another person to act as a guardian for minor children	A minor without a parent or legally appointed guardian will not be able to participate in research
<p><i>Section 130: HIV testing</i> All children of 12 years of age, or children below 12 years of age with sufficient capacity, should have the right to consent independently to HIV testing</p>	This provision changes the current law which allows children to consent independently to HIV testing from the age of 14	The age of consent for HIV testing is specified in the Act. This means that if an aspect of the research involves HIV testing, participants from the age of 12 will be able to consent independently to this procedure. Participants under the age of 12 who have sufficient capacity will also be able to provide consent to this procedure
<p><i>Section 132: Counselling before and after HIV testing</i> Children may only be tested for HIV after they or their care-givers/parents have been counselled for HIV by an appropriately trained person. They must also receive post-test counselling</p>	This changes the current law as at the moment there is no express legal obligation to counsel patients there is simply an obligation to obtain informed consent. There was however an obligation to provide counselling in terms of the National Policy on HIV testing	Where research involves HIV testing pre and post test counselling will have to be provided
<p><i>Section 133: Confidentiality regarding the HIV status of children</i> No person may disclose the fact that a child is HIV positive without consent from the child unless they are required to do</p>	This clarifies the existing law by specifying when HIV status may be disclosed	If the research protocol involves HIV testing it must ensure that HIV status is not disclosed unless consent from the appropriate person, such as the child is obtained

<p>so by law.</p> <p>A child who is over 12 can consent to the disclosure of their HIV status</p> <p>A child who is under 12 but has sufficient maturity can consent to the disclosure of their HIV status</p> <p>If the child is under 12 and doesn't have sufficient maturity then the parent or caregiver, a designated child protection organisation, a hospital superintendent or a Children's Court may consent to the disclosure of their HIV status</p>		
<p><i>Section 134: Access to contraceptives</i></p> <p>A child of 12 years or older has the right to access contraceptives independently, and the right to confidentiality in this regard</p>	<p>This changes the current law as at the moment children may only obtain contraceptives independently at 14</p>	<p>Researchers may lawfully provide contraceptives to children of 12 years and older. They are also under a legal obligation to not disclose this information to parents or care-givers. However if the offering of contraceptives forms part of the package of services offered by the study then this will have to be stated in the parental consent form</p>

It should be noted that the provisions in the Act dealing with **circumcision** and the age of consent to medical treatment have not been brought into operation therefore the current law still regulates both these issues, namely a child can consent independently to medical treatment at 14, and to a medical operation at 18. Circumcision will be classified as an operation, therefore in an adolescent prevention trial consent to circumcision (as part of prevention services offered in a trial) will require parental consent until 18 years.