

Consent: children and young people



MPS



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Valid consent is just as important when treating children and young people as it is with adults. In some situations children are able to give consent themselves, and sometimes others need to take the decision on their behalf. This factsheet sets out the basic information to enable you to obtain the appropriate consent from children and young people

Key principles

There are several pieces of legislation in force that govern the issue of minors and consent to medical treatment, but even with this guidance, there are grey areas. These may include the maturity of the child concerned, the wishes and opinions of the parents/guardian, and the clinical circumstances – and it is possible that some of these may conflict. The overriding principle in such situations is that the child's best interests take precedence.

In law, assistance by a parent or legal guardian is required if a child is under the age 12 for surgical procedures. In practice, however, it is fair and reasonable to seek the consent of a minor who has the capacity to grasp the nature and implications of the proposed treatment or procedure. Regarding parental consent, if there are two people with parental responsibility, one parent should not give consent concerning a major health decision of a child without giving due consideration to the views and wishes of the child and other parent.

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 superintendent of the hospital or clinical manager. In non-urgent situations, an application should be made to the Minister of Social Development, who is empowered to give consent if the child's parent or guardian unreasonably refuses to give consent, is incapable of giving consent, cannot readily be traced or is deceased.

Age and consent

Children aged 12 or more

The age at which a person is able to consent to treatment in South Africa is 12. Provided they have the maturity "to understand the benefits, risks, social and other implications of the treatment", children of this age may consent to medical treatment on their own behalf. If the proposed treatment involves a surgical procedure, a sufficiently mature child may still consent, if he or she is "duly assisted by his or her parent or guardian".

Minors aged 12 or more who are themselves parents ("child parents") may also, if they possess the maturity to do so, consent to medical examinations and treatment for their child. They may also consent to surgical treatment for their child, but only with the assistance of someone who has parental responsibility for them.

Children under 12 or over 12 but lacking the maturity to make an informed decision

A parent, guardian or care-giver of the child may consent on behalf of the child to medical treatment. A parent or guardian may also consent to surgical treatment on the child's behalf. In the absence of a parent, guardian or care-giver, the superintendent of a hospital can consent, in an emergency, to a child's medical or surgical treatment if it is necessary to preserve the child's life or "to save the child from serious or lasting physical injury or disability".

Continuing treatment when a child withholds consent

If a minor with decisional capacity refuses life-saving 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.

Continuing treatment when parents withhold consent

Occasionally, parents may disagree with the orthodox management of certain conditions and, as a result, make a decision on consent that is likely to affect the child adversely. Even if this decision is not life-threatening, there may still be a degree of suffering on the child's part.

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 reported to either:

- A designated social worker in the service of the department,
- The provincial department of social development.

A social worker in the service of a designated child protection organisation

The designated proxy may then petition the court for a ruling or apply to the Minister of Health for consent. In the event of either a legally competent child or a child's parent or guardian "unreasonably refusing to consent" to treatment, the Minister of Social Development, the High Court or the Children's Court may overrule the refusal. It is always prudent to keep accurate notes on what was discussed and explain when consent is withheld.

Virginity tests

Virginity testing of children under the age of 16 is prohibited and may only be performed on children over 16 with their consent, obtained after proper counselling and in the manner prescribed. The results of a virginity test may not be disclosed without the child's consent.

Circumcision

Female circumcision is prohibited, regardless of age. Male circumcision is prohibited under the age of 16, unless it conforms to prescribed religious practices or is medically necessary. Circumcision of boys of 16 and over must be carried out in a prescribed manner and only with the boy's consent, given after appropriate counselling and in the manner prescribed. The Children's Act 2005 states: "Taking into consideration the child's age, maturity and stage of development, every male child has the right to refuse circumcision."

Further information

- Medical Protection booklet, *Consent to Medical Treatment in South Africa: An MPS Guide for Clinicians*
- Medical Protection factsheet, *Consent: The Basics* – www.medicalprotection.org/southafrica/factsheets
- The Children's Act 38 2005 as amended by the Children's Amendment Act 41 of 2007 and the Child Justice Act 75 of (2008) – www.doh.gov.za/docs
- HPCSA, *Seeking Patients' Informed Consent: The Ethical Considerations* – www.hpcs.co.za

Parts of this factsheet are based on the booklet *Consent to Medical Treatment in South Africa: an MPS Guide* authored by Sandy Anthony.

For medicolegal advice please call us on:

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This factsheet provides only a general overview of the topic and should not be relied upon as definitive guidance. If you are an MPS member, and you are facing an ethical or legal dilemma, call and ask to speak to a medicolegal adviser, who will give you specific advice.

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