

Legal, ethical and counselling issues  
related to HIV testing of children

## HIV testing of children: Legal guidelines for implementers



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# Glossary of Terms:

## **Best interests of the child**

A process which requires those making decisions that affect children to consider a wide range of factors that may impact on children's physical, moral, emotional and spiritual welfare in the decision-making process.

## **Capacity**

A person's capacity refers to their ability in law to do something, e.g., a person is recognised as having the legal capacity to vote at 18 years of age.

## **Consent**

To consent means to agree to the performance of an act. The law requires consent for various acts (e.g., receiving medical treatment) in order for the act to be lawful. Valid consent must be voluntary, based on information and understanding, and given by a person with the legal capacity to consent. Consent can be written or verbal. (See also Informed consent and proxy consent.)

## **Factual determination**

A factual determination is a decision that is made by looking at and weighing up the various facts and circumstances of the particular matter.

## **Informed consent**

Informed consent is a specific term developed by our courts to describe the kind of information and understanding required for consent to a medical intervention. It requires a patient to be given information on the nature and effect of the medical intervention, as well as any significant risks in the procedure.

## **Material risk**

A risk is considered to be material – that is, relevant and important – to a person if that person would attach significance to the risk.

## **Necessity**

An action must be absolutely essential or indispensable (there must be no other option).

## **Proxy consent**

Proxy consent is consent given on behalf of another person who has the legal capacity to consent on the other's behalf, e.g., a parent may give proxy consent for his or her two-year-old child's HIV test.

## **Occupational accident**

An accident that takes place at work between a healthcare worker and a child that involves the possibility of the healthcare worker being exposed to HIV.

## **Client**

The child or his or her parent/caregiver who receives the services of the service provider.

## **Service provider**

Representative of care services. It may be doctor, nurse or social worker

## **Healthcare worker**

A person whose function it is to provide healthcare



# 1. Introduction



## 1.1 Purpose of guidelines

These guidelines deal with the legal rights of children undergoing HIV testing. They explain in simple terms the legal and policy obligations relating to HIV testing. They also describe how healthcare workers and others can ensure that HIV testing of children takes place in a way that protects and promotes their rights. The sections below give more detail about:

- when children may be tested for HIV;
- obtaining informed consent from children or the adult responsible for them;
- maintaining confidentiality regarding the outcomes of HIV testing; and
- reporting to the relevant authorities children who are identified during the testing process as being in need of care and protection.

## 1.2 Provisions of national policy

The National HIV Counselling and Testing (HCT) Policy Guidelines (“the national policy”) describes the circumstances in which lawful HIV testing of children may take place. The requirements in the national policy are similar to the legal requirements for HIV testing which are set out in the Children’s Act (see box). To comply with the law and the national policy guidelines, HIV testing should be:

- client or provider initiated;
- carried out in specific circumstances;
- accompanied by voluntary and informed consent;
- authorised by a person with legal capacity (i.e., a person who is regarded in law as being mature enough to make a decision. (This could, for example, be the child him or herself);
- accompanied by pre-test and post-test counselling; and
- confidential.



In the past there were no specific laws dealing with HIV testing of children. General provisions relating to consent to medical treatment of children set out in the Child Care Act (No. 74 of 1983) were therefore applied to HIV testing. Furthermore, in the early stages of the epidemic, HIV testing was not always undertaken with the best interests of the child in mind; children were sometimes tested for HIV out of fear, ignorance or prejudice, and then discriminated against. The provisions in the Child Care Act did not protect children against discriminatory testing and they also failed to facilitate the obtaining of consent from orphans and vulnerable children who did not have parents or guardians.

*When Parliament re-wrote the Child Care Act it took these factors into account and decided to introduce specific provisions into the Children's Act to ensure that children's rights are specifically protected during HIV testing.*



## The Children's Act and HIV testing

The current Children's Act (No. 38 of 2005) deals directly with HIV testing by describing when and how a child may be tested for HIV. Parliament has also decided to separate HIV testing from other forms of medical treatment and has imposed a number of conditions on the manner in which HIV testing can be undertaken. The Act says that:

- Children may only be tested for HIV in two circumstances:
  - if it is in their best interests and lawful consent has been given for the test; or
  - if the test is needed to establish the child's HIV status where a healthcare worker or another person may have contracted HIV from the child's body fluids.

**Rationale: This provision protects children against discriminatory or arbitrary HIV testing.**

- Consent for HIV testing may be given by a child if he or she is over the age of 12 or by a child under 12 if he or she has "sufficient maturity". If a child is under 12 and is not sufficiently mature, consent may be given by a parent, caregiver or the provincial head of the Department of Social Development.

**Rationale: This section of the Act ensures that a wide range of people may assist a child by consenting for HIV testing on the child's behalf. This facilitates HIV testing of orphans and vulnerable children.**

- HIV testing must be accompanied by proper pre- and post-test counselling done by an appropriately-trained person.

**Rationale: This provision ensures that children and their carers make appropriate choices regarding HIV testing.**

- No person may disclose a child's HIV status without consent, except in a few limited circumstances which are set out in the Act. Consent for the disclosure of HIV status can be given by the child if the child is over 12 or if the child is under 12, but is sufficiently mature. If the child does not have the capacity to give consent to the disclosure, consent can be given by a range of people, including a parent or caregiver.

**Rationale: This provision aims to ensure that a child's right to confidentiality is protected.**



Today, children can benefit significantly from HIV testing, especially where it facilitates access to treatment. Although the Children's Act aims at protecting children from harm and ensuring that HIV testing is used to promote the health and well-being of children, its provisions should not be seen as a barrier to offering HIV testing to children. Children and their parents or caregivers interact with the healthcare services at many different levels. All these opportunities should be used to facilitate access to HIV testing, prevention and treatment services.



## The National HIV Counselling and Testing (HCT) Policy Guidelines ("the national policy")

The National HIV Counselling and Testing Policy Guidelines say that HIV testing may be initiated by:

- the client – in other words, the child or the person caring for the child;
- the service provider – in other words, a healthcare worker could recommend that HIV testing be done to establish the child's HIV status.

The national policy recommends that healthcare providers initiate HIV testing when they are treating or caring for:

- HIV-exposed infants;
- abandoned babies;
- infants younger than 18 months who may be at risk of HIV infection;
- infants older than 18 months who may be at risk of HIV infection;
- breast-fed babies of HIV-positive mothers;
- children not identified by PMTCT (prevention of mother-to-child transmission) programmes;
- young people; or
- child survivors of sexual assaults.





## 2. The circumstances in which a child may be tested for HIV



### 2.1 Provisions of the national policy

The national policy sets out when a child may be tested for HIV. This must be read with the Children's Act which limits when and how a child may be tested for HIV.



#### What the Children's Act says ...

The Children's Act says that no child may be tested for HIV unless:

- it is in the child's best interests; or
- the test is necessary to find out whether:
  - a healthcare worker may have been exposed to or contracted HIV from the child; or
  - any other person may have been exposed to or contracted HIV from the child.



#### KEY CONCERNS

- ▶ There may be complex considerations to be taken into account by parents, caregivers or children themselves when deciding to have an HIV test. HIV testing may have implications for the child's mother and her own HIV status, there may be fears of being stigmatised and discriminated against if the child is HIV-positive and, with older adolescents, there may be concern about testing HIV-positive and then facing community disapproval for having engaged in underage sexual activity. Before anti-retroviral (ARV) treatment was widely available, HIV testing was not always in the best interests of children. Knowledge of their HIV status could result in discrimination (for example, HIV-positive toddlers were excluded from pre-schools based on misguided fears that they posed a risk to other children).



- ▶ Within the new context of widespread access to ARVs and the health advantages of early diagnosis of HIV, there are enormous benefits attached to HIV testing. Nevertheless, social factors often still act as barriers to HIV testing and can result in delays in children (and their caregivers) establishing their HIV status. Delaying HIV testing can have serious implications for the health of children who may be at risk or who are already infected with HIV. Therefore, it is important to promote HIV testing and to facilitate a greater uptake of HIV testing amongst children, whilst understanding the complexities that accompany such action.

## 2.2 Implementation guidelines

### Identifying the reasons for HIV testing

The reason for the HIV test must fall within one of two broad categories. HIV testing may be carried out on a child if the testing is:

<p><b>In the best interests of the child; or</b></p>	<p>In this case the HIV testing may be client or provider initiated and it must promote the child's physical and emotional welfare.</p>
<p><b>Necessary to protect a healthcare worker or any other person who may have come into contact with the child's body fluids</b></p>	<p>In this case the HIV testing must be necessary to protect another person who may have had contact with any fluid from the child's body that may transmit HIV. Testing in this situation does not need to be in the child's best interests.</p>

*If the reason for testing does not fall into either of these categories, it may not be undertaken.*



### Treating the various reasons for HIV testing differently

#### ▶ Facilitating HIV testing 'in the best interests of the child'

The Children's Act says the HIV testing of children may occur if it is in the best interests of the child. Acting in the best interests of the child requires that people making decisions that affect children must consider a wide range of factors that may impact on children's physical, moral, emotional and spiritual welfare. The concept of best interests is over 100 years old. It has been recognised not only in our law but also in international documents such as the Convention on the Rights of the Child. It was originally used by the courts to help decide which parent should have custody of any children after a divorce. In this context, courts looked at a wide range of factors to decide what living arrangements would be best for the child. Over the years the courts have identified many factors that should be considered when determining best interests, including:

- the child's own views on the matter;
- the impact the decision may have on the child's emotional well-being; and
- the effect the decision may have on the child's physical health.

The courts have stressed that this must be a flexible test with factors relevant to the circumstances of the individual child being weighed and balanced in each situation.

The new Children's Act has listed many of the factors identified by the courts and some new ones to assist decision-makers in establishing what is in the best interest of the child.





## What the Children's Act says ...

**Section 7 of the Children's Act** lists a wide range of factors that are relevant to establishing the best interests of the child. Those that apply to health decisions include:

- the likely effect of the decision on the child, or on the child's circumstances;
- the child's age, maturity and stage of development, gender, background and any other relevant characteristics of the child;
- the child's physical and emotional security and his or her intellectual, emotional, social and cultural development, any disability that a child may have, any chronic illness from which a child may suffer; and
- the need to protect the child from any physical or psychological harm that may result from the decision.

This means decision-makers must weigh up and balance a range of competing factors (including the child's own views) when deciding what would be in the child's best interests. The views of the child's parent are not the only factor to be considered, as decision-makers must also examine what is best for the child within the broader context of current social values.



### Example:

An example of how the courts have used this concept is shown in a decision made regarding whether a child should have a blood transfusion, despite this being contrary to the parents' religious beliefs. In this case, an application was made to court by healthcare workers for permission to give a child a blood transfusion without parental consent for the procedure. The parents had refused consent as they were Jehovah's Witnesses. In this case, the court had to decide what was in the best interests of the baby. It examined all factors, including the parents' views, their religious beliefs, the impact of denying the child treatment and the child's rights. The court decided it was in the best interests of the child to have the blood transfusion.

If we use the factors identified by the courts and the Children's Act to weigh and balance whether HIV testing is in the best interests of the child, we can see that where HIV testing will facilitate access to appropriate prevention or treatment services it will, in all likelihood, be in the best interests of the child.

To simplify matters, the national policy describes a number of situations in which HIV testing of children is recommended. These guidelines suggest that HIV testing in these circumstances would be in the best interests of the child, provided the information is never used to discriminate against HIV-positive children.

### In the national policy, HIV testing is recommended for:

- **HIV-exposed infants.** Babies born to HIV-positive mothers should be tested for HIV at six weeks of age using a PCR (Polymerase Chain Reaction) test.
- **abandoned babies.** Testing of abandoned babies is recommended when the status and whereabouts of the mother is unknown.
- **infants younger than 18 months.** The national policy recommends early infant diagnosis of HIV with PCR testing as being essential for child survival.
- **infants older than 18 months.** Testing to confirm the HIV status of infants at 18 months is recommended.
- **breastfed babies.** The national policy recommends testing of breastfed babies at five to six weeks if their mothers meet the AFASS (acceptable, feasible, affordable, sustainable and safe) criteria, to inform decisions to stop breastfeeding.



- children not identified by PMTCT programmes. Immunisation visits up to 14 weeks of age should be used to identify babies whose mothers are of unknown HIV status.
- child survivors of sexual assaults. The national policy recommends HIV testing before commencing PEP (post-exposure prophylaxis) for child survivors of sexual abuse.
- young people. Young people should be targeted with youth-friendly HIV testing and counselling services.

Even though HIV testing is recommended in each of these situations, it must still be established in each case that the HIV testing is in the best interests of the child. The table below applies the factors listed in the Children's Act as relevant to HIV testing in order to illustrate how an assessment can be undertaken to establish whether the testing is in the child's best interests.



Factor	Key considerations	Positive implications	Negative implications
Decision will promote the child's physical well-being.	Is the purpose of the HIV test to promote the child's health? Is the purpose of the test unrelated to the child's health needs?	Testing is a gateway to accessing prevention and care services, including ARV treatment.	Child tests positive but no further action is taken to promote access to treatment.
Decision will promote the child's moral, spiritual and emotional welfare.	Is the purpose of the test to promote the child's emotional welfare? Is the purpose of the test to discriminate against the child?	Knowledge of HIV status may enable the child to deal with the emotional implications of his or her HIV status.	Knowledge of HIV status may be an emotional burden to a very young child.
Impact that the decision will have on the child's circumstances.	What will be the impact of a positive or negative HIV test result on a child's circumstances? Will the test result change their circumstances in a negative way? Will a positive test result lead to a child being abandoned or rejected by the family?	Knowledge of HIV status can facilitate access to appropriate services, thus improving a child's circumstances. It can also result in the child being referred for support to assist the child with managing his or her health and in disclosing their HIV status to trusted adults.	Knowledge of HIV status may lead to stigma within the family and community.



Factor	Key considerations	Positive implications	Negative implications
Child's views in accordance with his or her age, maturity and stage of development are considered.	Have the child's views been obtained? Does the child have the capacity to consent to the test? If another person is going to consent, have they consulted with the child and given due weight to the child's views?	If a child's views are expressed during the consent process, it empowers them and assists them in managing their health.	If a child's views are ignored, this may impact on the child's ability to manage his or her own health.
The need to protect the child from harm.	Will the outcome of the test result in harm for the child? Will the child be subject to violence if he or she tests HIV positive?		HIV test results are a requirement for accessing a social benefit. A positive result may be used to withhold a benefit from the child.

### ► Facilitating HIV testing following exposure to a child's body fluids

The Children's Act allows HIV testing of a child if either a healthcare worker or any other person may have been exposed to a child's body fluids and may be at risk of HIV infection. The Act treats testing in these circumstances differently to client and provider initiated testing.

#### (a) Where a healthcare worker is occupationally exposed to a child's body fluids

If a healthcare worker providing medical treatment to a child comes into contact with any of the child's body fluids that could result in exposure to HIV, they may request that the child be tested for HIV. The Children's Act says that children may be tested for HIV if this is necessary after an occupational accident, for example, if a healthcare worker is subjected to a needlestick injury whilst giving a child a blood transfusion. There is no need to show that the testing of the child is in the best interests of the child in this case because the purpose of the test is to benefit the healthcare worker.

In our law, the term "necessary" means that an action must be absolutely essential or indispensable. This means that if an HIV test is requested following an occupational accident, the circumstances, set out below, should exist.



#### What the Act says about HIV testing after occupational exposure to a child's body fluids:

HIV testing may take place in this instance if:

- the person involved is a healthcare worker;
- the healthcare worker was exposed to a child's body fluids during a medical procedure;
- there is a possibility that the healthcare worker may have become infected with HIV as a result (i.e., the child is potentially infected and the accident is one in which transmission may take place); and
- HIV testing of the child is the only way in which the health worker can find out the HIV status of the child. If the child's HIV status can be obtained through less invasive means (e.g., through consulting the doctor or medical records), testing will not be necessary.



If all the above conditions are met, the child may be tested for HIV in accordance with the Act. This means that:

- attempts should be made to obtain consent to the HIV testing from the child or the adult responsible for them;
- if the child, or the adult responsible for the child, consents to the test, the child should be offered pre- and post-test counselling;
- if the child, or the adult responsible for the child, refuses to give consent to the HIV test, the healthcare worker may go ahead and test the child for HIV without consent or counselling;
- the test results may be disclosed to the affected health worker; and
- the test results should be disclosed to the child or the adult responsible for the child, if they agree to receive this information.



*Even though the primary purpose of HIV testing in this situation is to benefit a health worker, the health needs of the child should not be forgotten. The test results should also be used to assist HIV-positive children access treatment.*

*This objective may be difficult to achieve if the child or the child's parent/caregiver does not want to receive the results of the HIV test. Children, or the person giving consent, cannot be forced to receive the HIV test results in this situation. However, they should be counselled on the importance of establishing HIV status and the benefits that can flow from the test.*



#### *(b) Exposure to HIV outside healthcare setting*

The Children's Act also allows HIV testing of a child if "any other person" (such as a childminder or teacher) may be in danger of contracting HIV following exposure to the child's body fluids. The Children's Act recognises that this is an exceptional situation and it restricts the circumstances in which such a child may be tested for HIV without consent by requiring a court to authorise the test. An example of a situation in which such testing may be required includes a teacher who is exposed to the blood of a learner during an accident with sharp equipment in a woodworking class.

**In order to obtain the court order, the individual would have to show that he or she:**

- had contact with the child's body fluids; and
- is now at risk of being infected with HIV.

In this situation, the following procedure should be followed:

- ▶ Attempts should be made to obtain consent to the HIV testing from the child or the adult responsible for the child. If consent is obtained, there is no need for a court order to be obtained. In this case:
  - the child should be offered pre- and post-test counselling; and
  - the test results may be disclosed to the affected person and the child or the adult responsible for the child, if they agree to receive this information.
- ▶ If the child or the adult responsible for the child refuses to give consent to the HIV test, the person will need to apply for a court order authorising the HIV testing. Following the obtaining of the court order:
  - the child may be tested for HIV with or without his or her consent (the court order may specify what is to happen);
  - the test results may be disclosed to the affected person; and



- the test results may be disclosed to the affected person and the child or the adult responsible for the child, if they agree to receive this information.

Even though the primary purpose of HIV testing in this situation is to benefit a third party, the health needs of the child should not be forgotten. The test results should also be used to assist HIV-positive children to access treatment.

## 2.3 Summary

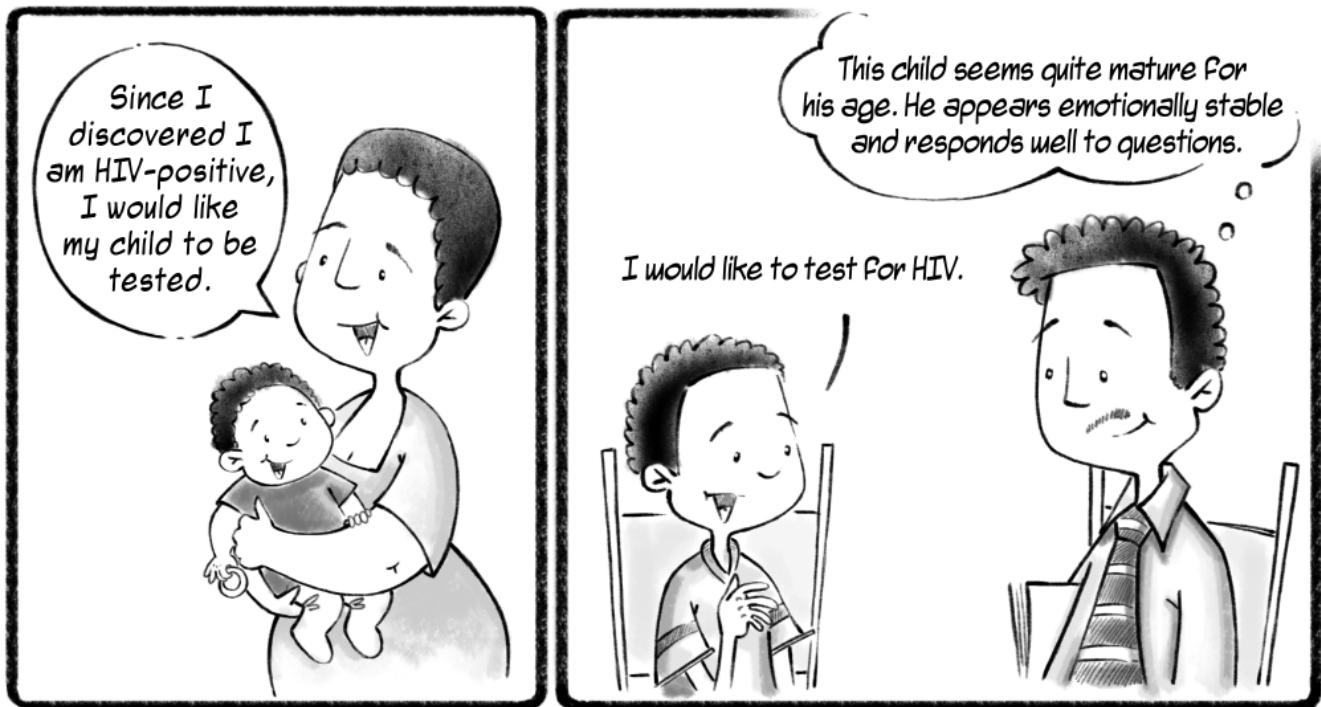
HIV testing may only be undertaken in two broad circumstances, i.e., when it is:

- in the best interests of the child; or
- necessary to find out the child's HIV status to assist a third party (i.e., a healthcare worker or another person in contact with the child) to protect themselves against HIV infection.

The recommended processes for ensuring that children are tested for HIV in accordance with national policy and law are set out on the following pages.



### 3. Informed consent for testing children for HIV



#### 3.1 Provisions of national policy

	Testing is in the best interests of the child	Testing following an occupational accident in healthcare setting	Testing following exposure in non-healthcare setting
<b>Step One</b>	Identify the reason for the HIV testing and establish whether it is in the child's best interests.	Establish whether the request for HIV testing falls within the scope of an occupational accident as required by the Children's Act.	Ensure a court order exists authorising the HIV testing of the child unless consent is given for the testing.
<b>Step Two</b>	Obtain consent for the testing from the child or the child's proxy.	Obtain consent for the testing from the child or the child's proxy. If consent cannot be obtained undertake the testing without consent if it falls within the circumstances described in the Act.	Obtain consent for the testing from the child or the child's proxy. Or apply for a court order to do the testing without consent.
<b>Step Three</b>	Undertake the HIV testing.	Undertake the HIV testing.	Undertake the HIV testing.





	<b>Testing is in the best interests of the child</b>	<b>Testing following an occupational accident in healthcare setting</b>	<b>Testing following exposure in non-healthcare setting</b>
<b>Step Four</b>	Disclose the test results to the child or the child's proxy	Disclose the test results to the health worker and the child or the child's proxy, if they have requested the results.	Disclose the test results to the affected individual and the child or the child's proxy, if they have requested the results.
<b>Step Five</b>	Refer the child to appropriate services, if needed.	Refer the child to appropriate services, if needed.	Refer the child to appropriate services, if needed.

The national policy requires informed consent for testing children for HIV. The policy states that HIV testing must be undertaken:

- **with voluntary and informed consent.** Although HIV testing may be initiated by the client or by a service provider, the client is still required to “opt-in” to HIV testing, by providing his or her express verbal or written consent to the HIV test. Additionally, the decision to provide consent must be an informed decision, based on adequate information about the testing, which is given in an easily understandable manner;
- **by a person with capacity to provide informed consent.** Informed consent for HIV testing may be given by a child, or alternatively, by a person responsible for the child.

### **Securing Informed consent**

A child may give independent informed consent to an HIV test if he or she is:

- twelve years or older; or
- under 12 years of age but with sufficient maturity to understand the benefits, risks and social implications of a test.

If the child cannot give informed consent, it may be provided by:

- the parent or caregiver of the child;
- the provincial head of Social Development; or
- a designated child protection organisation arranging placement for the child.

Where there is no parent, caregiver or designated child protection organisation, informed consent may be provided by:

- a superintendent or person in charge of a hospital.

Finally, where those listed above are unwilling or unable to consent, the Children's Court may consent to an HIV test where testing is in the best interests of the child.





## KEY CONCERNS

Children are considered to be a vulnerable group in need of protection from harm. For this reason, our laws protect children in various ways, limiting their capacity to act independently until they are sufficiently mature. The national policy seeks to protect children from unlawful HIV testing through various measures including:

- ▶ limiting the circumstances in terms of which children may be tested for HIV, so that HIV testing only takes place "in the best interests of the child";
- ▶ limiting the people who may provide proxy consent for a child to have an HIV test, in order to protect children from unlawful HIV testing; and
- ▶ providing children of 12 years of age, or those even younger who are able to understand the implications, with the right to give independent informed consent to HIV testing, so that they may take control of their own health.

Key concerns for implementers include:

- ▶ assessing the age and maturity of children in order to determine whether they may provide independent informed consent to HIV testing;
- ▶ ensuring that proxy consent is given by those legally authorised to do so, where children are unable to give independent informed consent to HIV testing; and
- ▶ ensuring that consent is voluntary and based on adequate information and understanding.

## 3.2 Implementation guidelines

### Identifying the age of the child

A healthcare provider needs to know the child's age in order to determine whether the child is old enough to provide independent informed consent to an HIV test. This is a factual determination (i.e., decided on the basis of the facts of each circumstance) that can be established by referring to official documents such as a birth certificate, identity document (ID) or a sworn affidavit. In the absence of official documents, a healthcare provider may also take note of unofficial documents (such as a school report or clinic card) that clearly indicate the identity and age of the child. In the absence of documentation relating to the child, a healthcare provider should rely on determining the child's maturity (see below) in order to determine the child's capacity to consent.



#### **Example: A street child of unknown age with no official documentation**

A boy who lives on the street wants to get tested for HIV. He has no ID or other documents and does not know his date of birth. The healthcare worker thinks that he may be around 10 years of age. In the absence of documentation relating to the child's age, the healthcare worker will need to determine the boy's level of maturity in order to decide whether he is able to understand the risks, benefits and implications of taking an HIV test.



## Determining the child's level of maturity

In addition to the age of the child, a healthcare provider needs to determine the child's level of maturity in order to determine whether the child has the legal capacity to provide informed consent to an HIV test. This is also a factual enquiry, but may be a little more complex than determining a child's age. A healthcare provider needs to be satisfied that the child is able to understand the benefits and risks of an HIV test, as well as the social implications that accompany an HIV test, in order to consent to the test.

### Determining maturity levels for informed consent

Our common law and case law on informed consent provide that in order for a person to have legal capacity to give informed consent, the person has to be able to appreciate and understand the information provided to them about the medical procedure, and has to be able to act in accordance with that understanding. Furthermore, in determining a child's capacity, our courts consider the child's circumstances at the time (such as the child's age, knowledge, experience, judgement and circumstances).

In the case of HIV testing, this means that a child will be sufficiently mature to provide independent informed consent if he or she is able to:

- understand information about the benefits, risks and social implications of HIV testing; and
- act accordingly (i.e., agree or refuse to test) based on that understanding.

In deciding whether a child is sufficiently mature, the following factors are useful:

- **Age.** Sufficient maturity is more likely the older the child;
- **Knowledge.** Children with knowledge about HIV and AIDS and the benefits, risks and social implications of HIV testing are more likely to have sufficient maturity;
- **Experience.** Children with experience of HIV and AIDS and the benefits, risks and social implications of HIV testing are more likely to meet the maturity requirements;
- **Judgement.** Children who show the ability to judge the advantages and disadvantages of testing for HIV are likely to have the capacity to give informed consent;
- **Views.** Children who are able to articulate their views on HIV testing and whether it is in their best interests are likely to have sufficient maturity to give informed consent; and
- **Circumstances.** A child's personal circumstances may be an important indicator of the child's maturity, or lack thereof, to give independent informed consent to an HIV test. For instance, a child living independently from his or her family may be more likely to have sufficient maturity to make an independent and informed decision.

## Determining child's capacity to give independent informed consent

A healthcare provider should decide, based on the two factual determinations described above, whether the child has the legal capacity to give independent informed consent to an HIV test. In most cases a healthcare provider can assume that a child of 12 years or older can consent to an HIV test. However, there may be unusual circumstances where a child of 12 years or older has limited capacity (for whatever reason) and is not able to understand the consequences of consenting to the test. Likewise, there may be situations in which a child younger than 12 years has the legal capacity to provide independent informed consent if he or she has sufficient maturity.





### Example: A boy over 12 with potentially limited capacity to consent

A 16-year-old boy wishes to be tested for HIV. The child has a history of substance abuse and admits to having smoked dagga shortly before coming to test.

The boy is old enough to provide independent informed consent to an HIV test. However, a healthcare worker must also assess the boy's capacity to consent to the HIV test, based on weighing up the various facts of the matter. If the boy's judgement and views on HIV testing have been significantly impaired as a result of his recent drug use, the healthcare worker may consider advising the boy to come back at a later stage.

## Proxy consent

If a child lacks capacity to give independent informed consent to an HIV test, various people can give informed consent on the child's behalf (known as "proxy consent") for the HIV test, including:

- a parent, guardian or caregiver;
- a provincial head of the Department of Social Development; or
- a designated child protection organisation arranging the placement of the child.

Where there is no parent, caregiver or designated child protection organisation, the superintendent or person in charge of a hospital may provide the necessary informed consent.

*A healthcare provider needs to identify the most appropriate legally authorised person to provide proxy consent for the child's HIV test, in the order of preference provided in the national policy.*



### How to determine the parent, guardian or caregiver

A child's parent includes a natural as well as an adoptive parent, either male or female. Determining the child's parent, guardian or caregiver is a factual determination that can be made with reference to official documents such as a birth certificate, identity document or a sworn affidavit. In the absence of such official documents, unofficial documents (e.g., a school report or medical record) as well as the evidence given by an adult and the child may also provide information relating to a child's parents or caregiver. A healthcare worker is not required to be a "detective" in this regard, but should simply be reasonably satisfied of the identity of the child's parent, guardian or caregiver.



### What the Children's Act says ...

The Children's Act defines a **caregiver** as any person, other than a parent or guardian, who *factually* cares for a child and includes:

- a foster parent;
- a person who cares for a child with the implied or express informed consent of a parent or guardian;
- a person who cares for a child whilst the child is temporarily in safe care;
- the person at the head of a child and youth care centre where the child has been placed;
- the person in charge of a shelter;
- a child and youth care worker who cares for a child who is without appropriate family care in the community;
- the child at the head of a child-headed household.



Factual care for a child may include:

- providing the child with a place to live;
- providing financial support to the child;
- protecting the child from harm;
- guiding and directing the child's education and upbringing;
- guiding the child in decision-making; and
- generally taking care of the best interests of the child.



**Example: Proxy consent by a relative and caregiver**

An aunt arrives at a testing facility with her five-year-old niece. She reports that the child's father has abandoned the family, and the mother is away in town looking for work and returns infrequently, so she is taking care of the child in the mother's absence. The aunt suspects that the child's mother may be living with HIV and wants to have the child tested for HIV.

In this case, the child is too young to have legal capacity to consent. Proxy consent may be given by the parent (the mother) on her return, or may be given by a caregiver (the aunt) who is caring for the child "with the express or implied consent of the parent or guardian". A healthcare provider should be satisfied, on the available evidence, that the aunt is the child's caregiver. This factual evidence could be provided in various ways. For example, it may be provided by the child's address, reflected on any records, as well as the testimony of the child, the aunt and through telephonic contact with the mother.

If there is no-one willing or able to give informed consent, despite the fact that an HIV test would be in the best interests of the child, the Children's Court may give proxy informed consent for the child to have an HIV test. A court application is necessary to direct HIV testing to take place. Healthcare providers will need the assistance of legal or social welfare organisations that are familiar with the court application process.



**Example: Proxy consent given by hospital superintendent or Children's Court**

A girl who has been living on the street for five months comes to a hospital to be tested for HIV. She says that she is 14 years old (although she looks far younger), and that her parents are deceased and she has no contact with other family members. She does not seem to have a clear understanding of why she should be tested for HIV.

The healthcare provider must try to determine the child's age and level of maturity. Where the healthcare provider is unsure of the child's age and assesses that the child does not have sufficient maturity to provide informed consent to an HIV test, proxy consent for HIV testing is required. Since there is no parent, guardian, caregiver or designated child protection agency in this situation, the superintendent or person in charge of the hospital can provide proxy consent to the HIV test. In the unlikely situation that the superintendent unreasonably refuses to provide proxy consent, an application can be made to the Children's Court for the required consent.

## Ensuring appropriate level of understanding for informed consent

Adequate and appropriate information is crucial to obtaining lawful and informed consent. A healthcare provider needs to assess what kinds of information should be provided to the child (or the child's parent, guardian, caregiver or other legally authorised representative) and how that information should be given, in order to ensure that an informed decision is made about whether to accept or refuse an HIV test.





## What is needed for informed consent?

Our common and case law on informed consent to medical procedures requires the person consenting to have adequate information about the nature and effect of the treatment or procedure, including information about any material risks (risks that the person would consider significant) related to the medical intervention.

Section 13 of the Children's Act No. 38 of 2005 also provides every child with the right to health information that is relevant and that is in a format accessible to children.

This means that the person giving informed consent to the HIV test (the child, or the person giving proxy consent) must be provided with relevant and accessible information to give them a complete understanding of, amongst other things:

- HIV and AIDS;
- HIV testing;
- the benefits of HIV testing (e.g., accessing appropriate healthcare, preventing the further spread of HIV);
- the risks of HIV testing (e.g., the psychological impact of a positive test result); and
- the social implications of HIV testing (e.g., lifestyle changes, possible stigmatisation and discrimination of HIV and AIDS).

The information should be appropriate and relevant to the person providing informed consent. For example, information relating to benefits, risks and social implications of HIV testing that may be important to one person may not be important to another person. A healthcare provider will need to assess, based on discussions with the person providing informed consent, what information is important to that person in making the decision.



*Additionally, the person giving informed consent to an HIV test must understand and appreciate the information relating to the HIV test, and what consenting to the HIV test will mean in practice.*



## Has the person understood the information provided?

South African common and case law on informed consent provide that a patient must understand and appreciate the nature and extent of the harm and risk attached to a medical intervention, in order to provide informed consent to the intervention. Appreciation implies that the person not only understands what the test is and why it should be done, but also appreciates what the possible consequences (both positive and negative) might be of discovering his or her HIV status.

Establishing whether the person providing informed consent has understood and appreciated the information is a factual enquiry. It can be determined by carefully questioning the person regarding his or her thoughts, beliefs and feelings about testing for HIV, and the possible outcomes of the HIV test.

## Ensuring consent is voluntary

Consent to an HIV test must be provided voluntarily. The policy indicates that HIV testing may be initiated by a client or by a service provider (in defined circumstances). However, a healthcare provider should ensure that even when an HIV test is provider-initiated, consent to it has been given freely. This is particularly important where a child gives informed consent, since a child can be more easily persuaded by adults.



### Watch out for signs of force

According to our common and case law on consent, consent to a medical intervention will only be lawful if a person voluntarily made an informed choice to undertake the medical procedure.

In the case of HIV testing, a child (or legally authorised representative) must give free informed consent to the test, and should not be persuaded to consent due to:

- fear, force, threats or coercion (e.g., bullying a child into testing);
- deceit or fraud (e.g., lying about the nature of the test); or
- undue influence, perverse incentive or financial gain (e.g., offering a child a free service for agreeing to test).

*Simply put, this means that if a child gives informed consent to an HIV test in a situation where he or she has been made afraid to refuse consent, or has been tricked into consenting, or has been persuaded to consent for any reason (such as the promise of a benefit), the informed consent is not free and is therefore invalid.*



### Obtaining verbal or written informed consent

After providing the child (or the child's legally authorised representative) with the information, and determining that the information has been understood, the healthcare provider may obtain informed consent for the HIV test.

Informed consent must be express, that is, the child (or legally authorised representative) must actually agree to the HIV test either verbally or in writing. Express consent is particularly important where provider-initiated HIV testing takes place. In this case, a client's failure to specifically refuse an HIV test cannot be considered as informed consent to an HIV test. Each child (or child's representative) must actually state his or her consent to the test.

### Summary

Process	Action to be taken
<b>Step One</b>	Identify the age of the child.
<b>Step Two</b>	Identify the child's maturity level.
<b>Step Three</b>	Decide if the child is able to give independent informed consent.
<b>Step Four</b>	If the child is not able to give independent informed consent, identify a person who can give proxy consent.
<b>Step Five</b>	Determine what information is needed and in what format in order to ensure consent is informed by adequate understanding.
<b>Step Six</b>	Ensure informed consent is voluntary.
<b>Step Seven</b>	Obtain verbal or written informed consent.



## 4. The child's right to confidentiality relating to HIV tests



### 4.1 Provisions of national policy

The national policy provides every child with the right to confidentiality with regard to his or her HIV status. The policy details various aspects of confidentiality, including:

- **the information that is required to be kept confidential.** Every patient who takes an HIV test has the right to confidentiality with regard to the HIV test records, the record-keeping system and the HIV test results;
- **the people legally authorised to consent to disclosure of information.** The child, or the person/organisation responsible for the child, may consent to disclosure of the child's HIV status.



#### What the Children's Act says ... Consent to disclosure

The Children's Act provides that the following people may consent to disclosure of a child's HIV status:

- the child him or herself (where the child is over 12 years of age or under 12 years of age but capable of providing informed consent);
- the parent or caregiver or a designated child protection organisation arranging the placement of the child (where the child is incapable of providing informed consent); or
- the superintendent or person in charge of a hospital (in the absence of a parent, caregiver or designated child protection organisation).

*If the people or organisations set out above are unable or unwilling to consent to disclosure, the Children's Court may order disclosure where it is in the best interests of the child.*





- **the circumstances in which disclosure of a child’s HIV status is permitted without informed consent.** Disclosure of a child’s HIV status without the necessary informed consent is generally prohibited, except where the disclosure is:
  - within the scope of a person’s powers or duties in terms of a law;
  - necessary to carry out the provisions of the Children’s Act;
  - required in terms of legal proceedings; or
  - required by a court order.

The policy also states that clients should be encouraged to disclose to their sexual partner, or in the case of children, to their parent or caregiver.



## KEY CONCERNS:

- ▶ Children are considered to be a vulnerable group in need of protection from harm. For this reason, our law provides children with rights to privacy, but at the same time limits these rights when necessary. The national policy seeks to balance children’s rights to confidentiality with limits to confidentiality “in the best interests of the child”, by:
  - providing children of sufficient maturity with the right to confidentiality and the right to consent to disclosure of their HIV status, so that they may control their own health information;
  - providing limited people with the right to confidentiality and with the right to consent to disclosure in the case of incapable children, so that these people may protect children’s health rights; and
  - prescribing circumstances in which disclosures are authorised by law or by court.
- ▶ Healthcare providers are primarily concerned with the welfare of the child. Their approach towards confidentiality and disclosure should aim to protect a child from harm and to promote the child’s best interests. Thus, key concerns for implementers include assessing and determining:
  - who should exercise the right to confidentiality and the right to consent to disclosure in each circumstance;
  - when disclosure of a child’s HIV status is required by law; and
  - whether, in the circumstances of each case, disclosure of HIV status is in the best interests of the child.

## 4.2 Implementation guidelines

### Establishing who exercises the right to confidentiality

Firstly, it is important to establish who exercises the right to confidentiality (and the corresponding right to consent to disclosure) in a particular circumstance. The policy sets out detailed standards for determining who may consent to take an HIV test and who may consent to disclosure of a child’s HIV status. Generally, a healthcare provider can safely assume that where a person has the capacity to provide informed consent to an HIV test, that same person will exercise the right to confidentiality and will have the capacity to consent to disclosure of a child’s HIV status.



### Who has the right to confidentiality?

- The child him or herself exercises the right to confidentiality where the child is 12 years or older, or below 12 years of age but with sufficient maturity to understand the benefits, risks and social implications of testing for HIV.
- The parent, caregiver or a designated child protection organisation involved in arranging placement for the child exercises the right to confidentiality, where the child is incapable of doing so.
- The superintendent or person in charge of a hospital exercises the right to confidentiality, where there is no parent, caregiver or designated child protection organisation.

### Establishing what information is to be kept confidential

All information relating to an HIV test is confidential. This includes:

- the fact that the child has tested for HIV;
- the child's health and related information disclosed or discovered as part of the pre-test counselling, HIV testing, or post-test counselling process;
- the child's HIV test results; and
- the HIV test record-keeping system.

### Following systems and procedures to protect confidentiality

Protecting a child's right to confidentiality entails more than simply not disclosing information to another person. It includes using systems and procedures to ensure that the HIV testing process and all medical records relating to the HIV test are maintained in such a way that promotes confidentiality. Where systems and procedures are not followed, the unlawful disclosure of a child's private medical information could occur, even unintentionally.



### Establishing any lawful reasons for disclosure of confidential medical information

The national policy sets out various circumstances in which disclosure of a child's medical information (including HIV status) is lawful. A healthcare provider should consider whether there are circumstances allowing for disclosure. These are whether the disclosure:

- has been authorised by a person with capacity to consent to disclosure;
- is within the scope of a person's powers or duties in terms of the Children's Act or any other law;
- is necessary to carry out the provisions of the Children's Act;
- is required for legal proceedings; or
- is required in terms of a court order.

Each of these circumstances is discussed in more detail below.



► **Where consent to disclosure is given by a person with capacity:**

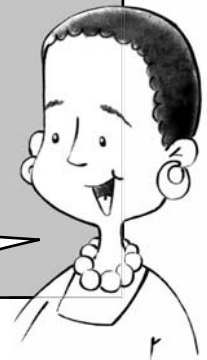
Where consent has been given for disclosing confidential medical information, the disclosure will be lawful. However, in order for this consent to be valid, it must be given by a person with legal capacity. In the case of disclosure of a child’s HIV status, the person disclosing must have sufficient maturity to understand the benefits, risks and social implications of disclosing a child’s HIV status. As set out above, a healthcare provider can generally assume that a person with the capacity to provide informed consent to the test also has the capacity to consent to disclosures of confidentiality.

**Who gives consent for disclosure?**

Consent for disclosure of a child’s HIV status may be given by the person who provides informed consent to the HIV test, such as:

- the child him or herself;
- a parent, guardian, caregiver, or designated child protection organisation arranging placement for the child; or
- the superintendent or person in charge of a hospital (where there is no parent, guardian, caregiver or designated child protection organisation).

*Where the people or organisations listed above are unable or are unwilling to consent to disclosure, and disclosure is believed to be in the best interests of the child, the Children’s Court may consent to disclosure.*



**Example: Disclosure ‘in the best interests of the child’**

There are situations where disclosure may be deemed to be “in the best interests of the child” (this is discussed in further detail, below). For instance, social workers frequently argue that during adoption proceedings, it is in the best interests of the child for his or her HIV status to be disclosed to the adoptive parents, in order to ensure that they are willing and able to provide for the child’s needs. In this situation, a Children’s Court may be willing to consent to disclosure if the child, parent, caregiver or designated child protection organisation refuses to disclose the child’s HIV status.

► **Where disclosure is within the scope of a person’s powers and duties in terms of the Children’s Act or any other law:**

In some instances, laws may require a service provider (such as a doctor, nurse or social worker) to disclose a child’s HIV status in the course of their work with the child. Laws requiring disclosure of a child’s HIV status generally only limit a child’s right to confidentiality when it is considered necessary to do so in the interests of the child, or in the interests of society. For example, our law requires people to report offences against children in order to protect children from harm. (This is dealt with in more detail in Section 5 on mandatory reporting of abuse). Our law also requires limits to the right to confidentiality where it is believed to be in the best interests of the child, or in the best interests of others who may be at risk of harm.





### Example: Disclosure within the scope of a person's power or duties

Section 15 of the National Health Act No. 61 of 2003 says that:

"A health worker or any healthcare provider that has access to the health records of a user may disclose such personal information to any other person, healthcare provider or health establishment as is necessary for any legitimate purpose within the ordinary course and scope of his or her duties where such access or disclosure is in the interests of the user."

This is an example of a situation where disclosure is "within the scope of a person's powers or duties" in terms of the law. A healthcare provider is given the legal power to disclose a child's HIV status, provided that disclosure is in the best interests of the child, and provided that disclosure is necessary in order for a healthcare provider to carry out his or her daily functions in caring for the child (e.g., a healthcare worker may consider disclosure to another healthcare provider necessary when referring a child for care).

### Deciding whether disclosure is in the child's best interests

In determining whether disclosure is in the best interests of the child, the Children's Act lists various factors that should be considered, including the following:

- the effect the decision will have on the child and the child's circumstances;
- the child's age, maturity and stage of development, gender, background and any other relevant characteristics;
- the child's physical and emotional security and his or her intellectual, emotional, social and cultural development, any disability that a child may have, any chronic illness from which a child may suffer; and
- the need to protect the child from physical or psychological harm that may result from the decision.

Taking into account the factors set out above, the following questions will need to be considered, and both beneficial and harmful consequences deliberated, in order to determine whether disclosure is in the "best interests" of the child:

- **Effect of the decision.** What will happen to the child if his or her HIV status is disclosed? How will it help the child's circumstances? How will it harm the child's circumstances?
- **Characteristics of the child.** What are the characteristics of the child that may impact on the decision to disclose his or her HIV status? For example, is the child young and in need of additional protection? Is the child older and mature enough to make his or her own decision regarding disclosure?
- **Development of the child.** How will disclosing the child's HIV status impact on his or her physical and emotional security? How will it impact on the child's intellectual, social and cultural development? How will it impact on the child's disability or illness? How will it help and how will it harm the child's development?
- **Protection from harm.** Will the disclosure of the child's HIV status protect the child from physical or psychological harm, or will it expose the child to harm?



*In all likelihood, the answers will indicate both positive and negative consequences of disclosing a child's HIV status. All possible outcomes will need to be balanced and weighed up in order to determine whether disclosure is ultimately in the best interests of the child.*



It is argued that maintaining confidentiality regarding a child's HIV status may not be in the child's best interests as HIV is a chronic, long-term condition that requires specialist treatment and emotional support. Children may require support to access appropriate health services (such as treatment for opportunistic infections and ART) that promote their survival. For this reason, it may be in the child's best interests to involve a trusted adult in the child's healthcare. However, it is important to remember that the best interests of the child must always be determined in relation to each individual child, with due regard to the child's particular circumstances, rather than determining what is generally in the best interests of all children.

► **Where disclosure is necessary to carry out the provisions of the Children's Act:**

The Children's Act provides for a range of mechanisms for the care and protection of children (e.g., the Act provides for fostering and adoption of children in need of care). There may be instances where disclosing a child's HIV status is considered necessary in order to properly follow the provisions in the Children's Act. In this situation, a disclosure would be lawful.



**What the Children's Act says ...**

**Section 13 of the Children's Act** provides for limiting a child's right to confidentiality with regard to his or her health status if maintaining confidentiality is not in the best interests of the child.

In order to carry out the provisions of the Act in this regard, disclosure of a child's HIV status may be required where non-disclosure would not be in the best interests of the child. The enquiry into the best interests of a child would require a balancing of the various factors set out above. Where failure to disclose a child's HIV status would harm his or her physical, moral, emotional and spiritual welfare, disclosure is permitted.

► **Where disclosure is required for legal proceedings, or is required in terms of a court order:**

There may be circumstances in which a court of law determines that a child's HIV status is a relevant factor in legal proceedings, or where a court of law orders a party to disclose a child's HIV status. In this situation, legal documents will authorise the disclosure.



**Example: Disclosure of HIV test results for use in legal proceedings**

Section 30(1)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 says that within 90 days after an alleged sexual offence, an application may be made to court for an order that the alleged offender be tested for HIV and that the results of the test be disclosed to the complainant of the alleged sexual offence.

This is an example of where a court may order HIV testing of any person accused of a sexual offence.

Section 34 of the Act provides that the HIV test results may only be used:

- to support the complainant (e.g., in making lifestyle and healthcare decisions);
- to enable the complainant to use the test results in future civil legal proceedings; and
- to enable the state to use the test results in future criminal legal proceedings.

This is an example of where an HIV test result may be required for legal proceedings. The HIV status of the alleged offender would be evidence used in the legal proceedings.



## Discussing disclosures

A healthcare provider should discuss disclosures required by law with the relevant people, such as the child or the responsible adult. Additionally, a healthcare provider should discuss the possibility of the child disclosing to a trusted adult (e.g., teacher, religious leader, parent or caregiver) when such disclosures would be beneficial to the child. Care should be taken to ensure that encouragement does not become coercive. Encouragement for disclosure may be in the best interests of the child, but all possible outcomes of disclosure should be canvassed with the particular child. Where the child has sufficient maturity to understand the benefits, risks and implications of disclosure and genuinely fears negative outcomes from disclosure, his or her decision should be respected.



*Any consent for disclosure, or disclosure required by law, legal proceedings or court order, should be carefully recorded in a child's medical records.*



# 5. Mandatory reporting of abuse

## 5.1 Provisions of the national policy

The national policy sets out the circumstances in which mandatory reporting of information relating to children is required, in order to protect children from abuse, neglect, maltreatment or degradation. These include the following circumstances:

- A service provider (such as a doctor, nurse, social worker) who has reason to believe that a child has been physically or sexually abused or neglected must report this to a designated child protection organisation, the provincial Department of Social Development or to a police officer.
- A service provider or any person who knows that a sexual offence has been committed against a child must report this to the police.



### KEY CONCERNS FOR IMPLEMENTERS INCLUDE:

- ▶ determining whether they have “reasonable grounds” for concluding that a child has been physically or sexually abused or neglected; and
- ▶ understanding which acts amount to sexual offences and require mandatory reporting.

## 5.2 Implementation guidelines

### Identify who is required to report abuse

The national policy sets out the circumstances under which our law requires a person to report abuse or neglect of a child. The requirement to report is one of the instances in which disclosure of a child’s health information (including HIV status, if relevant) is permitted within the scope of a person’s powers and duties as set out in our criminal and children’s laws.



### What the law says about reporting offences against children

**The Children’s Amendment Act No. 41 of 2007** contains a detailed list of service providers and what should be reported in the case of children. Although the Act is not yet in operation, when operationalised, it will replace existing provisions on mandatory reporting of offences against children and is therefore included in these guidelines.

Section 110(1) of the Act requires that any correctional official, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre, or child and youth care centre, who, on reasonable grounds, concludes that a child has been abused either in a manner that has caused physical injury, or constitutes sexual abuse or deliberate neglect, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial Department of Social Development or to a police official.



Section 110(2) says that any person who believes on reasonable grounds that a child is in need of care and protection may report the matter to the provincial Department of Social Development, a designated child protection organisation or a police official.

Additionally, currently, section 54(1)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 says that any person who has knowledge that a sexual offence has been committed against a child must report this to a police official immediately.

People providing HIV counselling and testing services to children may encounter situations where they receive information regarding abuse and neglect of children.

- A service provider falling within the category of people listed above (e.g., social worker, psychologist, nurse or doctor) is required to report information relating to physical and sexual abuse or neglect of a child discovered during the HIV testing process.
- Any person (e.g., a lay counsellor) may report information discovered during the HIV testing process that reveals that a child is in need of care and protection, and must report information relating to a sexual offence against a child.

### Who should report what?

This means that:

- in the case of a sexual offence, all people have a legal obligation to report the matter;
- in the case of abuse or neglect of a child, the service providers listed in the Act are obliged to report the matter; and
- in the case of children in need of care and protection, all people may report the matter, but are not legally obliged to do so.

### Determine whether a child has been abused or neglected

The HIV counselling and testing process may reveal information relating to the child's sexual history, personal circumstances, physical and emotional welfare and medical status, amongst other things. In certain circumstances, information may indicate possible physical or sexual abuse of a child, as well as neglect.







## What the law says about abuse of children

**Section 1 of the Children’s Act No. 38 of 2005** describes “abuse” of a child as any form of harm or ill-treatment deliberately inflicted on a child, including:

- assaulting or deliberately hurting a child (e.g., beating);
- sexually abusing a child (e.g., rape) or allowing a child to be sexually abused;
- bullying by another child (e.g., humiliating a child);
- a labour practice that exploits a child (e.g., forcing an underage child to work); and
- exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.

The Act describes “neglect” as a failure to provide for the child’s basic

- physical needs (e.g., food, shelter, clothing);
- intellectual needs (e.g., education);
- emotional needs (e.g., love and care); and
- social needs (e.g., friendships).

*The Act Furthermore provides a broad definition of children in need of care or protection. Children who are abused or neglected by their parent, guardian or caregiver, or who live in, or who are exposed to, circumstances that lead to abuse or neglect would also fall within the definition of children in need of care or protection.*



The Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 lists a range of sexual offences against children, including:

- **Rape.** This is defined as the sexual penetration of a boy or girl child without his or her consent. A child below 12 years of age is considered unable to provide consent to a sexual act, so sexual penetration of a child below 12 years of age will always amount to the crime of rape. The Act also punishes “compelled rape” – where a boy or girl child is forced to rape another person.
- **Statutory rape.** This refers to the sexual penetration of a girl or boy child aged 12 to 16 years with the child’s consent. This means that, despite the fact that the law recognises that the child can and has consented to the sexual act, our law nevertheless regards the act as a crime, due to the young age of the child.
- **Sexual assault.** This is the sexual violation of a boy or girl child without his or her consent. A child below 12 years of age cannot provide consent, so any sexual violation of a child below that age will always amount to sexual assault. The Act also punishes “compelled sexual assault” – where a boy or girl child is forced to sexually violate another person without the person’s consent, as well as “compelled self-sexual assault” – where the child is forced to sexually violate him or herself.
- **Statutory sexual assault.** The sexual violation of a girl or boy child aged 12 to 16 years with the child’s consent. As in the case of statutory rape, our law punishes sexual acts with 12- to 16-year-olds as a crime, despite the child’s consent being given.
- **Incest.** Sexual acts between members of a natural or adoptive family.
- **Sexual exploitation of children.** Such exploitation of children, with or without their consent, is an offence. Forcing a child to engage in child prostitution is an example of sexual exploitation.
- **Sexual grooming of children.** This takes place when a person undertakes various activities designed to encourage sexual acts with children, such as selling child pornography or arranging child sexual partners for another person.



- **Exposing children to pornography.** The offence consists of exposing a child to any form of pornography, such as films, magazines, pictures, etc.
- **Compelling children to witness sexual offences.** It is a crime to force children to witness a sexual act or sexual offence. This includes the crime of "flashing" to children.

Our law says that reporting must take place where a person has "knowledge" of a sexual offence, or has "reasonable grounds" to believe that a child has been abused or neglected. This means that a service provider who provides counselling and HIV testing to a child should have some form of persuasive evidence of abuse or neglect, in order to report the matter.



**Example: Grounds to report suspected abuse**

Section 110(3) of the Children's Amendment Act says that the person reporting must substantiate the conclusion or belief that a child has been abused or neglected.

This suggests that a person is not required to prove, beyond any doubt, that the child has been abused or neglected. They simply need to be able to give some form of persuasive evidence that shows they have reasonable grounds to believe that abuse or neglect has taken place, based on their own knowledge, skills and experience.

For example, if a child has an extensive medical history of repeated sexually transmitted infections, and the same child tells an HIV counsellor during the HIV testing process that he or she has been forced into sex work, a counsellor would be justified in concluding, on reasonable grounds, that the offence of sexual exploitation has taken place. The counsellor would be in a position to substantiate this belief based on the child's version of events as well as the medical evidence.

**Disclose to relevant authorities**

Where it is deemed appropriate, the person providing counselling and HIV testing services needs to disclose information relating to physical abuse, neglect or a sexual offence to the relevant authorities. In the case of physical abuse and neglect, the report may be made to a designated child protection organisation, the provincial head of Social Development or the police. In the case of a sexual offence, disclosure should be made to the police. Disclosure of this information is required by law, with or without the consent of the child, since it is determined to be in the child's best interests.

*The nature and extent of the disclosure should be carefully recorded in the child's medical records.*



**HIV status is not always relevant**

Disclosure of the child's HIV status may not always be relevant in circumstances requiring mandatory reporting. The circumstances of each case will determine what information needs to be disclosed in order to report the offence against the child. A healthcare provider will need to consider what information requires to be disclosed in order to fulfil the requirement of reporting the offence. The relevant authorities may have prescribed forms for the reporting process.





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