

HOSPITAL CIRCULAR H / 2008

TO:

Divisional ExCo
All Hospital Managers
Chief Director: Emergency Services
All QA managers

THE CHILDREN'S ACT AND INFORMED CONSENT TO TREATMENT

With the long-awaited enactment of **The Children's Act**, the following Acts are repealed:

- The Child Care Act;
- The Age of Majority Act, and
- The Children's Status Act.

Where **healthcare practice** is concerned, the change in statutory provisions impacts primarily on:

1. The legal definition of minor "child" vs "adult";
2. The rights of the minor child to be involved in decisions regarding healthcare;
3. The rights of parents and other adults to make decisions on behalf of the child.

This circular summarises the impact of the Children's Act on the Law of **informed consent to treatment**, and also offers recommendations on how the current legislation should be reasonably interpreted by those involved with the provision of healthcare services to minor children.

- **Legal definition of a "child"**

In accordance with **Section 17 of the Children's Act**, a child (or "minor") legally attains adult status ("majority") on his/her 18th birthday.

On achieving adult status, a person becomes legally entitled to make autonomous decisions on his/her own behalf, without sanction from parents or other legal guardians. Such decisions include entering into contractual agreements, and, where healthcare is concerned, providing informed consent to undergo any form of medical or surgical therapy (*see below*).

- **The best interests of the child.**

Section 9 of The Act states:

"In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied".

This is both a Constitutional principle underlying the new legislation, and should be a foremost consideration wherever conflict arises over decisions regarding medical care of a child.

Specifically where health care is concerned, the **"best interests" principle** demands that children are **included as decision-makers** in their own care where, in the opinion of the health-provider, the child is of such maturity and cognitive ability that he/she may understand the nature of the problem under discussion, and also express an informed opinion.

We believe that this provision may be reasonably interpreted as allowing for minor children to consent themselves to receive recommended treatment, where, in the opinion of the attending doctor, the child is capable of making an informed decision. However, health-workers should not exploit this provision in a manner which excludes the child's parents from the decision-making process. In general terms, and wherever circumstances permit, explicit informed consent to treat a minor child should be sought from the parent or other person legally holding parental rights and responsibilities

Note: Neither the National Health Act nor the Children's Act stipulates any specific **age limit** on the right for children to consent to their own treatment.

- **Parents and legal guardianship**

In terms of **Section 19** of The Act, full and equal parental rights and responsibilities rest with **biological mothers, and biological fathers** where the parents are married.

The **legal guardian of the child's biological mother** may also be regarded as the guardian of the child.

If the mother and father are **not married**, the **biological father** may assume full parental rights and responsibilities for a particular child if:

1. If, at the time of the child's birth, he was living with the child's mother in a permanent life-partnership.
2. He has contributed, or attempted in good faith to contribute to the child's upbringing, maintenance and general welfare for a reasonable period.

Where any **dispute regarding the child** arises between a mother and father, both of whom have parental responsibilities, such dispute should be referred for mediation to The Family Advocate, a social worker, or a suitably qualified professional.

Any adult person who has successfully applied to the High Court for adoption of a minor child is regarded as the legal guardian of that child, in whom full parental rights and responsibilities are vested

Any **person who is not the natural or adoptive parent**, or legal guardian of a minor child, but has an interest in the care and well-being of that child, may apply to the High Court, divorce court (in divorce cases) or children's court for an order conferring parental rights and responsibilities. It will be at the Court's discretion to establish whether or not the granting of such an order would be in the best interests of the child concerned.

"Foster parents" and adults acting "in loco parentis": According to **Section 32** of the Children's Act, a person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either permanently or temporarily, may exercise parental responsibilities and rights necessary to safeguard the interests and well-being of the child. This includes the right to consent to medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or primary care-giver of the child, and where delay in treatment may be detrimental to the child's health.

In terms of this provision, it would be quite reasonable for family members, foster parents, adult supervisors (e.g. school principals) and hospital managers to provide informed consent to medical examination and procedures, **if the child's legal guardians are not contactable**. However, it must be emphasized that the onus rests on the treating doctor to establish the bona fides of the adult acting in this capacity, and to also confirm that the reasonable efforts to notify the parents have failed.

The doctor as "unauthorised agent": In life-threatening emergencies, the pursuit of informed consent should never delay resuscitation and life-saving surgery. In such circumstances a doctor may justifiably proceed without formal consent, believing such action to be solely in the best interests of the patient. However, once the patient is stabilised, the doctor should take the opportunity to discuss further treatment with the child's guardians, both in order to obtain informed consent, and to address their concerns about the child's wellbeing.

When consent is refused: For a variety of reasons, parents may withhold consent to a specific form of medical treatment, or remove the child from hospital against the recommendations of a doctor. Unless the doctor concerned is of the opinion that failure to treat the child will threaten life or limb, it is prudent to explain the possible consequences to the parent, and having done so, withdraw gracefully. Although parents may be asked to confirm their decision in writing, they cannot be forced to do so. The option also exists of **mediation** by the Family Advocate, a social worker or a professional counsellor, but it remains the parent's / guardian's prerogative whether or not to entertain this option.

If, in the doctor's professional opinion, a parent's refusal of treatment would be **life-threatening**, or would in any way be contrary to the child's best interests, he may proceed with treatment against the parents' wishes. This option follows on the 2004 **High Court judgement in Hay vs B** which upheld that the child's best interests, and right to life were of paramount importance as well as being inviolable Constitutional rights. However, no doctor should ever underestimate the weight of responsibility which he/she bears in overriding a parent's wishes, and should only resort to this legal precedent when all other reasonable options are exhausted.