



The National Health Act and refusal of consent to health services by children

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The National Health Act¹ deals specifically with consent, and also refers to the right to refuse consent to health services. The Act does not deal directly with refusal of consent by children. This is governed by the Child Care Act,² the Choice on Termination of Pregnancy Act,³ the Constitution⁴ and the common law. The Constitution defines a 'child' as a person under 18 years of age.⁴

The National Health Act and consent to health services

Informed consent

At common law the courts have held that for an informed consent to medical treatment or an operation the patient must: (i) have knowledge of the nature and extent of the harm or risk involved; (ii) have an appreciation and understanding of the nature of the harm or risk; (iii) have consented to the harm or assumed the risk; and (iv) have provided a consent that is comprehensive and that extends to the entire transaction, including its consequences.⁵

The National Health Act states that health care providers must take all reasonable steps to obtain the user's informed consent to health services.⁶ The Act also sets out specific guidelines regarding the type of information that health care providers should give users of health services in order to obtain an informed consent.⁷

The National Health Act states that health care providers must inform users of: (i) the user's health status, except where it would be contrary to the best interests of the user; (ii) the range of diagnostic procedures and treatment options available to the user; (iii) the benefits, risks, costs and consequences generally associated with each option; and (iv) the user's right to refuse health services, including an explanation of the implications, risks and obligations of such refusal.⁸

Material risks

For the purposes of an informed consent at common law, the courts have interpreted the meaning of 'risks' as being 'material risks'. It has been held that a risk will be 'material' if: (i) a reasonable person in the position of the patient would attach significance to the risk if warned of it; and (ii) the medical practitioner concerned should have been reasonably aware that the patient would attach significance to the risk if warned of it.⁵

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This interpretation is also likely to be applied to the meaning of 'risks' in the National Health Act.

Participation in decision-making

The National Health Act also provides that users of health services have the right to participate in any decision affecting their personal health or treatment.⁹ This right extends to children who are sufficiently mature to understand the nature and effect of the health service even though they may not have the legal capacity to consent.¹⁰ In such circumstances the children must be consulted, but their parent or guardian will have to give the necessary consent. The health care provider is required to inform the user 'in a language that the user understands and in a manner that takes into account the user's level of literacy'.¹¹

The National Health Act does not specifically mention consent by children but it is self-evident that the provisions apply to children who have the legal capacity to consent to medical treatment and termination of pregnancy (TOP).

The National Health Act and refusal of consent to health services

At common law, legally competent patients may refuse medical treatment or other procedures, even if their refusal will result in death. The National Health Act now requires health care providers to inform users of their 'right to refuse health services'. As has been mentioned, the Act goes further and imposes a duty on health care providers to explain the 'implications, risks [and] obligations' of such refusal to the user.⁸ This implies that users must give an 'informed' refusal. Therefore, a refusal will not be valid unless the users have had the 'implications, risks and obligations' explained to them before they make their decision to refuse a health service. In order to safeguard the interests of users and health care providers, the latter should ensure that such explanations are properly recorded in the user's medical records when a decision is taken not to provide health services at the user's request.

Emergency medical treatment

The National Health Act also reflects the Constitutional and common law position regarding emergency medical treatment. The Constitution states that nobody may be refused emergency medical treatment.¹² However, according to the common law no legally competent person may be given emergency medical treatment if s/he has refused such treatment.¹³ The Act states that a health service may not be provided to a user without consent unless any delay in the provision of the health service



might result in death or irreversible damage to health (i.e. it is a medical emergency). However, this may only be done if 'the user has not expressly, impliedly or by conduct refused that service'.¹⁴ Therefore once a legally competent patient has refused consent he or she may not be given emergency medical treatment.

Refusal of consent to health services by children

Refusal of consent to health services by persons over 18 years of age is not an issue because such persons are no longer regarded as children. Whether or not a refusal of consent to health services by children under the age of 18 years will be legally valid will depend on the age of the child and the nature of the health service. Children under the age of 18 years may not consent or refuse consent to an operation,¹⁵ unless it is a TOP. Children under the age of 18 years but over the age of 14 years may, however, refuse consent to medical treatment.

In medical dictionaries an 'operation' is defined as 'any form of surgical procedure major enough to require anaesthesia', while 'treatment' is defined as 'care, in terms of medication, nursing and any other therapy, designed to cure a disorder'.¹⁶

Refusal of medical treatment by children under 14 years of age

Although children under the age of 14 years have the right to participate in any decision affecting their personal health and treatment, they are not legally competent to refuse to consent to medical treatment – unless it involves TOP. Even though such children do not have the legal capacity to refuse treatment they must still be given the information required by the National Health Act to enable them to participate in the decision-making process.⁹ If children under the age of 14 years refuse to consent to treatment they should be counselled by the health provider regarding the implications, risks and consequences of their refusal.¹⁷ If after such counselling they still persist with their refusal, they should only be treated against their will, and with the consent of their parents or guardian, where it is in their best interests because lack of such treatment may result in death or irreversible damage to their health.

Refusal of medical treatment by children aged 14 years or older

Children aged 14 years or older are legally competent to consent to medical treatment without the assistance of their parents or guardians.¹⁵ They are also legally competent to refuse medical treatment. Provided that the child is sufficiently mature to understand the nature and effect of the refusal of treatment, and the implications, risks and obligations of such refusal have been explained, understood and accepted, the refusal should be respected.

Difficulties arise where a refusal of treatment by a child of 14 years of age may result in death or irreversible damage to

health. Given the Constitutional provision that everyone has the right to 'security in and control over their body',¹⁸ the South African courts may be reluctant to allow the parents or guardian of such a child to overrule an informed refusal of life-saving treatment by the child. For the same reason the courts may, unlike those in the UK,¹⁹ also be reluctant to interfere if they are satisfied that the child was legally competent to make an informed refusal. However, an argument could be made that the courts should intervene because there is a Constitutional duty to ensure that the 'child's best interests are of paramount importance'.²⁰

Refusal of consent to termination of pregnancy by female children of any age

Female children of any age may consent to TOP without the assistance of their parents or guardians, provided that they have the capacity to understand the nature and effect of the procedure and have agreed to undergo the termination after being given the information required by the National Health Act⁷ and the Choice on Termination of Pregnancy Act.²¹

Health care providers should be aware that although age may not be a barrier to consent to TOP, lack of sufficient mental capacity to understand the nature and effect of the procedure may constitute a barrier to informed consent. It has been suggested that a health care provider can test the level of understanding of children by 'getting them to paraphrase their knowledge of the proposed treatment or procedure, their appreciation of the consequences of the proposed treatment or procedure, and their willingness to accept all the harm or risks involved in such treatment or procedure'.²²

Female children of any age may refuse to undergo TOP, provided that they are mature enough to understand the nature and effect of their refusal, and provided that the implications, risks and obligations of such refusal have been explained, and have been understood and accepted by them. The Choice on Termination of Pregnancy Act is clear that TOP may not be denied where a child does not wish to consult with her parents, guardian, family members or friends before the pregnancy is terminated, despite advice to the contrary.²³ If the general principles regarding refusal of health services apply it could be argued that a female child of any age who is sufficiently mentally mature may legally refuse TOP without the assistance of her parents or guardians, even if this is life-threatening.

An argument could be made that because the Choice on Termination of Pregnancy Act is silent regarding refusal of TOP, the provisions of the Child Care Act regarding consent to treatment by 14-year-old children should apply,¹⁵ as well as the 'child's best interests' provisions of the Constitution,¹⁹ which might enable the courts to intervene. However such an approach undermines the principle that the right to consent includes the right to refuse consent.



A health care provider who is unsure whether a young girl who refuses to undergo TOP in a life-threatening situation is sufficiently mature to give an informed refusal should err on the side of caution and act in the 'child's best interests' as required by the Constitution.¹⁹ If after counselling the girl persists in her refusal, the health care provider should contact the girl's parents or guardian for consent to undertake the TOP. Such a disclosure would be a technical breach of confidentiality, but would not be unlawful because of the common law principle of qualified privilege, on the basis that the health care provider had a social, moral or legal duty to inform the parents who had a reciprocal interest in receiving the information.¹⁵

The National Health Act states that all information concerning a user of health services is confidential unless, *inter alia*, 'a court order or any law requires that disclosure'.²⁴ In uncertain cases, if health care providers do not wish to breach the girl's confidentiality by contacting her parents or guardian about her refusal to consent to TOP in life-threatening circumstances, they may apply to court for an urgent order to do the procedure. The court may or may not insist that the parents are involved in the proceedings, depending on whether it is in the 'child's best interests'.

Conclusion

The National Health Act does not deal directly with refusal of consent to treatment by children, but provides some guidelines regarding refusal of consent that apply to all health service users. In this respect health service providers are required to inform users of their right to refuse services and to give them an explanation of the implications, risks and obligations of such refusal.

Children under the age of 14 years have the right to participate in any decision affecting their personal health and treatment, but they are not legally competent to refuse medical treatment, unless it involves TOP.

Children aged 14 years or older are legally competent to refuse medical treatment, provided that they are sufficiently

mature to understand the nature and effect of the refusal of treatment, and provided that the implications, risks and obligations of such refusal have been explained, and have been understood and accepted by them. Where the refusal of consent may be life-threatening a more cautious approach is required and it may be necessary to seek guidance from the courts.

Female children of any age may refuse to undergo TOP provided that they are mature enough to understand the nature and effect of their refusal, and provided that the implications, risks and obligations of such refusal have been explained, and have been understood and accepted by them. Where a health care provider is uncertain whether a girl is mature enough to refuse consent to TOP the provider should contact the girl's parents or guardian for consent or obtain a court order.

References

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2. South African Parliament. Child Care Act No. 74 of 1983.
3. South African Parliament. Choice on Termination of Pregnancy Act No. 92 of 1996.
4. South African Parliament. Constitution of the Republic of South Africa Act No. 108 of 1996. Section 28.
5. *Castell v. De Greeff* 1994 (4) SA 408 (C) at 425 and 426.
6. South African Parliament. National Health Act No. 61 of 2003. Section 7(2).
7. South African Parliament. National Health Act No. 61 of 2003. Section 6(1) read with Section 7(3).
8. South African Parliament. National Health Act No. 61 of 2003. Section 6(1).
9. South African Parliament. National Health Act No. 61 of 2003. Section 8(1).
10. South African Parliament. National Health Act No. 61 of 2003. Section 8(2)(b).
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12. South African Parliament. Constitution of South Africa Act. Section 27(3).
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