



CONSENT TO MEDICAL TREATMENT, HIV TESTING AND EXAMINATION IN CASES OF ABUSE

1. CONSENT TO MEDICAL INTERVENTION

Ability to consent to medical interventions

Under the previous law, the age of consent for medical intervention and surgical operations was 18. The Child Care and Protection Act allows children to give consent to medical intervention if they are at least 14 years old AND mature enough to understand the benefits, risks and implications of the medical intervention. But if the medical intervention involves a surgical operation, consent must ALSO be given by a parent or guardian of the child, or the child's care-giver if there is no parent or guardian.

For younger or less mature children, the decision on all medical interventions and surgical operations rests with the child's parent or guardian — but the parent or guardian is expected to consider the views of the child. A parent or guardian may not refuse consent to a medical intervention on religious or cultural grounds unless there is a medically-acceptable alternative. The idea here is that parents are not allowed to impose their beliefs on a child where those beliefs could result in harm to the child. If a child has no parent or guardian, the child's care-giver can give consent in their place.

Children who are competent to give medical consents for themselves can also give consent for medical interventions on their own children, if they already have children of their own.

The term “medical intervention” is broader than “medical treatment”. It includes dental, physiological, psychological and psychiatric interventions. It could include diagnostic tests, treatment or blood transfusions. There is a different process for consent to “surgical operations”.



A “care-giver” is a person other than a parent or guardian who takes primary responsibility for the day-to-day care of a child. This might be, for example, a foster parent or kinship care-giver.

Who decides if the child is mature enough to understand the medical issues?

The medical practitioner in charge of the case makes this decision, because this is the person who will have responsibility for explaining the medical situation.

What about emergencies?

The person in charge of a hospital or clinic may consent to a medical intervention or surgical operation on a child if it is necessary to save the child's life or to prevent serious or lasting physical harm or disability — and the situation is so urgent that there is no time to get the normal consent.

What if a parent is unavailable or incapacitated?

The Minister responsible for child welfare or a children's court has the power to give consent in the place of a parent if that parent is incapable of giving consent (for example, because of being unconscious or mentally ill), cannot readily be traced, or is deceased. Anyone with an interest in the child's well-being (such as a social worker) can apply for this substitute consent.

What if a parent or a child unreasonably withholds consent?

The Minister responsible for child welfare or the children's court may override a refusal by a parent or a competent child to give consent, if this will be in the child's best interests. Anyone with an interest in the child's well-being can apply to the Minister or the court in this situation.

2. CONSENT TO HIV TESTING

The 2018 Namibian Guidelines for Voluntary Counselling and Testing allow consent to HIV-testing at 14 years.

The Act expands on this by making it possible for children who are 14 years of age OR are mature enough to understand the implications of HIV testing to give consent to the test. This could mean, for example, that a mature 10-year-old would be allowed to consent to an HIV test. The law says that the test may be given only if the child receives proper counselling before and after the test.

The rules for HIV-testing are broader than those for other medical interventions. This is because testing is mainly about obtaining information rather than being a physical action carried out on the child's body.

Who can give consent to an HIV test if the child is not sufficiently mature?

- (a) the parent or guardian, or the child's care-giver if there is no parent or guardian
- (b) the Minister responsible for child welfare
- (c) the children's court.

The procedure for dealing with refusal or inability to give consent will work in the same way as for consent to medical intervention.

Can an HIV test on a child ever be performed without anyone's consent?

Yes, but only where this is necessary to protect someone else. It is allowed only where the child is pregnant (and there may be a need for steps to prevent mother-to-child transmission) or where someone working with the child in a health setting could have been exposed to the virus (such as in the case of a needle stick, where prophylactic treatment would be required if the child were HIV positive).

Counselling

The child may be tested only if he or she receives pre- and post-test counselling. The parent, guardian or care-giver should also receive counselling if he or she is aware that the child will be tested.

Who decides if the child is mature enough to give consent to an HIV test?

The person who does the pre-test counselling.

Confidentiality

The results of an HIV test are confidential. Consent to disclose the results works in the same way as consent to do the test – unless the results must be disclosed for some legal reason or in terms of a court order. The child's maturity is assessed by the person who does the pre- or post-test counselling. A child who is old enough or mature enough to give consent to the test does not have to disclose the test or the test results to his or her parent.

3. CONSENT FOR MEDICAL EXAMINATION OF ABUSED OR NEGLECTED CHILDREN

Someone who has abused or neglected a child may be reluctant to have the child examined or treated, because they want to hide their actions. Even an abused child may sometimes want to protect the parent. For these reasons, there are special provisions to deal with such circumstances.

A medical practitioner may examine a child who is suspected of being a victim of abuse or neglect without the permission of the child's parent, guardian or care-giver (although permission is needed to administer a general anaesthetic). The child must also give permission for the examination if he or she is of sufficient maturity – although the examination can take place even without the child's consent if the reasons for proceeding without consent are recorded. The purpose of the examination can be to treat the child, to collect evidence for court, or both.

The law also contains rules about how to conduct such an examination without causing any unnecessary trauma to the child.

