

# Ethics and medicine: revisiting the Children's Act and the implications for healthcare practitioners

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## Abstract

Under the Constitution of the Republic of South Africa, the rights of children are protected in the same manner as are those of ordinary South African citizens. In Section 28, the Constitution also makes provision for the protection of specific children's rights. Thus, for children, constitutionally articulated rights, such as the right to autonomy (derived from the privacy rights), the right to equality, the right to education and freedom of religion, expression and association, are meaningful. It is mainly through social services for children and their families that definitive objectives are met, such as family (or alternative) care, protection from ill-treatment, neglect, abuse and degradation, and the best interests of the child. This article focuses on human rights issues that relate to children and explores the Children's Act with regard to children and informed consent, surgical operations and termination of pregnancy. It concludes that children need support from their families and communities when faced with medical decision-making, and that in the context of children, professional medical practice requires patience, dedication, honesty and mindfulness.

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## Introduction

Under the Constitution of the Republic of South Africa, the rights of children are protected in the same manner as are those of ordinary South African citizens.<sup>1</sup> In Section 28, the Constitution also makes provision for the protection of specific children's rights.<sup>2</sup> Children have not always been on the human rights programme as a separate group, as the human rights agenda itself is a rather recent historical occurrence. Most societies simply thought of children as the property of their parents and as quite replaceable. According to Blackstone's 1758 legal commentaries, in England, child abduction was not theft in the legal sense, unless the child happened to be wearing clothes. The breach of law was not that a clothed child was abducted, but that his or her clothes were stolen for at that time. Children had no legal status and certainly no human rights.<sup>3</sup>

The idea that children might be subjects with rights, as opposed to welfare and concern, is often connected with the work of Eglantyne Jebb.<sup>4</sup> Ms Jebb was an influential force behind the International Save the Children Fund (ISCF) and the International Peace Union. In 1919, the ISCF was established. It dedicated itself to child protection and operated under a Declaration of Child Rights. This represented the first international charter that protected the rights of a particular segment of the community: children.

Children were mentioned in the 1948 United Nations' Universal Declaration of Human Rights. Article 25, Paragraph 2, of the Universal Declaration states that: "Motherhood and children are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection".<sup>5</sup> Other declarations and covenants, such as the Council of Europe, the Organization of African Unity and the Pan-American Organization, focused on the protection and welfare of the child as opposed to the idea that children were subjects with their own rights. The Convention on the Rights of the Child represents the first legally binding international instrument that incorporated the full range of human rights for all children defined as humans under the age of 18 years, such as civil, cultural, economic, political and social.<sup>6</sup>

In South Africa, the passing of the Children's Act No 38 of 2005,<sup>7</sup> as amended by the Children's Amendment Act No 41 of 2007,<sup>8</sup> (henceforth the Act), aimed to fortify the rights of children. In 2010, this Act came into effect.<sup>9</sup> For healthcare practitioners, this Act is sometimes regarded as confusing and ill-grounded. This article will try to clarify some of the key points and to identify some of the ethical issues that have been raised around them.

### The Children's Act No 38 and the best interests of the child

The term "best interests" of the child refers to a legal standard that is often articulated in court decisions concerning children. They are also used by ethicists, usually in the context of respecting a child's autonomy, informed consent or assent, as well as in making or being involved in any type of decision-making. National and international law clearly states that the best interests of the child must be supreme, yet exactly what these interests involve remains another matter. The difficulty is that no set answer is applicable to all cases. A single principle or course of action cannot be outlined that could be applied universally. Each case has to be judged on its own merits, with sensitive consideration of the circumstances of the role players, as well as the particular historical, social, cultural and economic time and place, in order for the best interests of the child to be realised.

Many factors should be taken into account by those who make decisions for a child that are in his or her best interests. For example, such considerations include the child's age and cognitive level, his or her physical, emotional and educational needs and desires, as well as his or her cultural belief system and social environment. The standard of best interest requires a surrogate decision-maker to opt for a choice of action that will maximise the benefits for the child, in accordance with a decision that would be taken by most reasonable people. Those who are uncomfortable with the best interests standard find that it is too subjective. This is because "best" is seldom achievable, not consistently applied and (arguably) unethical in that the interests of others often weigh heavier than those of a single individual. It is also possible that interests may compete, such as the opposing views of parents and their children, which may require the input of a multidisciplinary team for case resolution.

Nonetheless, when considering what is or is not in the best interests of a child, the Act sets out the issues of which healthcare practitioners and others must be aware when they are involved in children and decision-making:

- “(a) the nature of the personal relationship between
  - (i) the child and the parents, or any specific parent, and
  - (ii) the child and any other caregiver or person relevant in those circumstances;
- (g) the child's:
  - (i) age, maturity and stage of development
  - (ii) gender
  - (iii) background and
  - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (l) the need to protect the child from any physical or psychological harm that may be caused by:
  - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation, or exposing the child to violence or exploitation, or other harmful behaviour; or
  - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child”.<sup>9,10</sup>

### Children and informed consent

Under South African law, a legal duty is placed upon healthcare practitioners to fully inform their patients of the benefits and risks of treatments or procedures, the time factors involved, costs, medical and psychological implications and available alternatives. Informed consent requires that the patient must be competent and have the capacity to understand.

Capacity is viewed as comprising two aspects. The first is that of age. The Act regards a child to be a person under the age of 18 years. Unless it is determined that a person of 18 years of age or older has a mental or other impairment that compromises his capacity to make autonomous decisions, then a person who is 18 years old or older can make life choices as he or she sees fit. When a person is 18 years old or older, sufficient maturity no longer becomes an issue, as competent adults can refuse medical treatment without having to provide reasons. The second is that of decisional or mental capacity. The capacity of a child should be impartially judged and based upon his or her ability to understand, keep in mind and evaluate his or her decision. This cannot be achieved unless the healthcare practitioner provides all of the relevant information that concerns the treatment or procedure. Mental capacity or decisional capacity is also a key factor regarding decision-taking. Patients who are mentally challenged and those who are institutionalised are examples of people who would lack decisional capacity. The National Patients' Rights Charter of 2008 states: "Everyone has the right to be given full and accurate information about the nature of one's illness, diagnostic procedures, the proposed treatment and the costs involved to make a decision that affects any one of these elements".<sup>11</sup> Healthcare practitioners should understand that the conclusion reached by a child about a treatment or procedure should not be the primary focus. Instead, the reasons given by the child in reaching his or her decision should be viewed as key to understanding his

or her ability to make decisions and to his or her mental capacity.

### **Surgical operations and medical treatments or procedures**

In South Africa, a 12-year-old child may consent to medical treatments and surgical operations for himself or herself or for his or her own offspring. Factors that feed into the decision for or against medical or surgical treatment include considerations relating to the age of the child, his or her maturity, and his or her competence and capacity to understand the risks, benefits, social and economic considerations, available alternatives and ability to reach a reasoned decision, based upon the information with which he or she has been provided. Healthcare practitioners must remember that a child lacks life experience. The former represent authority figures. Thus, avoidance of unnecessary medical jargon and judgmental stances remains vital to professional conduct. Empathy is key.

The Act provides no definition of "medical treatment" or "surgical operation". According to the Cape Town Children's Institute, "treatment would refer to noninvasive and innocuous procedures and include vaccinations and psychological treatment. A 'surgical operation' generally refers to invasive surgical interventions".<sup>9</sup>

In the Act, a child may consent to the performance of a surgical operation on him or her, or on his or her child if the following conditions are met:

- "(a) the child is over the age of 12 years; and
- (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and
- (c) the child is duly assisted by his or her parent or guardian".<sup>8</sup>

The Act informs us that in the case of surgery on children over 12 years of age who demonstrate sufficient maturity, parental assistance is still required to help the child to reach a decision.<sup>12</sup> Should the parents refuse to assist the child and to sign the assent form, then the surgery cannot be performed unless it is overridden by a ministerial or court-ordered consent. The Children's Institute writes: "According to Regulation 16, the child consenting to his or her own surgery and the parent or guardian who assists the child must do so in writing on Form 34. This form must be completed by the person performing the operation or by a representative of the institution at which such operation will be performed and signed by the child and the parent.

"When completing the form, the healthcare practitioner performing the operation or the representative of the institution is required to indicate that he or she has explained to the child the nature, consequences, risks and benefits of

the surgery, and that he or she is satisfied that the child is of sufficient maturity and has the mental capacity to understand the risks, benefits, social and other implications of the operation".<sup>9</sup>

Section 1215 of the Act informs that a child may consent to his or her own medical treatment or to that for his or her children under the following conditions:

- "(a) the child is over the age of 12 years; and
- (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment".<sup>8</sup>

Should a healthcare practitioner or other licensed healthcare professional make the decision that a 12-year-old or older child is not mature enough to give consent, then the health professional must involve the child's parent or guardian. In the case of surgery on a child whose parent is less than 18 years of age, i.e. a child-parent, the Act and Regulations require the child-patient to be assisted by his or her parent or guardian, i.e. the grandparent of the child to be operated on. The child-parent must consent and the grandparent must assent to the operation in writing on Form 35.<sup>9</sup>

### **Termination of pregnancy**

The Choice on Termination of Pregnancy Act 92 of 1996 determines the rules and regulations, such as informed consent that is required for termination of pregnancy.<sup>13</sup> As noted by the Children's Institute: "Section 5 (read with the definition of a 'woman' in Section 1) of the Choice on Termination of Pregnancy Act provides that a woman of any age can consent to a termination of her pregnancy, and only her consent is required. This effectively means that no age threshold is specified in the law in relation to children's legal capacity to consent to termination of pregnancy".<sup>9</sup>

### **Conclusion**

The Children's Act No 38 of 2005, as amended by the Children's Amendment Act No 41 of 2007, requires careful reading on the part of healthcare practitioners. The use of the word "and" is important. One might surmise that a major idea behind the formulation of the Act was to make it representative of the time and circumstances faced by today's South African children. Moreover, the introduction of the thought that children have more capacity for decision-making than history has afforded them is a subtext which is present in the document and is worth consideration.

Working with and caring for children will always remain a challenge for healthcare practitioners. Holding to the tenets of professional medical practice requires that informed consent or assent in the case of children should be purposely sought and implemented. It requires an understanding of how children view their world. It requires empathy for the circumstances that are faced by many South African

children and the limits that many children face in having the needed support from their families and communities when faced with medical decision-making. At the very least, in the context of children, professional medical practice requires patience, dedication, honesty and mindfulness.

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