

Some consent and confidentiality issues regarding the application of the Choice on Termination of Pregnancy Act to girl-children

David McQuoid-Mason, BComm, LLB (Natal), LLM (London), PhD (Natal)

Advocate of the High Court of South Africa, Fellow of the University of KwaZulu-Natal, Acting Director, Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban

The Choice on Termination of Pregnancy Act (Choice Act) allows a female of any age to consent to a termination of pregnancy, but other statutes such as the previous Child Care Act and the present Children's Act provide for different ages of consent for medical and surgical procedures. As a result doctors are not always certain whether girl-children are legally capable of giving informed consent for certain associated procedures when undergoing a termination of pregnancy. In addition the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Sexual Offences Act) imposes a duty to report sexual offences against children which may undermine the girl-patient's right to confidentiality. This article attempts to clarify the legal position regarding these grey areas for practitioners faced with girl-child patients requesting terminations of pregnancy.

The Choice on Termination of Pregnancy Act¹ (hereafter referred to as the Choice Act) allows a female of any age to consent to a termination of pregnancy.² There are, however, other statutes, such as the recently repealed Child Care Act³ and the Children's Act⁴ which came fully into force on 1 April 2010,⁵ that provide for different ages of consent by children for medical and surgical procedures. The result is that doctors are not always certain whether young girls are legally capable of giving a proper informed consent for associated procedures when undergoing a termination of pregnancy. Similarly, the Criminal Law (Sexual Offences and Related Matters) Amendment Act⁶ (hereafter referred to as the Sexual Offences Act), which imposes a duty to report sexual offences against children, seems to undermine the girl patient's right to confidentiality. As a result medical practitioners face a number of dilemmas regarding issues of consent and confidentiality when young girls seek terminations of pregnancy.

In terms of consent, at what age are girls able to give an informed consent to procedures associated with a termination of pregnancy? Previously, before the Children's Act⁴ became fully operational on 1 April 2010,⁵ the question in terms of the now repealed Child Care Act³ was: May a girl who is under 14 years of age consent to medical treatment (e.g. a blood transfusion) in respect of a termination of pregnancy without the assistance of her parent or guardian? May a girl who is under 18 years of age consent to a surgical operation (e.g. the surgical removal of a defective fetus) without the assistance of her parent or guardian? Now that the Children's Act⁴ is fully operational,⁵ the question is: Will a girl-child under 12 years of age, who is sufficiently mature and mentally capable, be able to consent to medical treatment in respect of her termination of pregnancy without the consent of her parent or guardian? Will such a girl be able to consent to a surgical procedure during a termination of pregnancy without the assistance of her parent or guardian?

In terms of confidentiality, if a girl under the age of 16 years wishes to terminate her pregnancy, must a doctor report the matter

as statutory rape? If so, what must the doctor do if the girl says that she would rather then go to a backstreet abortionist? Is a doctor obliged to tell a girl's parent or guardian if during a termination of pregnancy an emergency arises and additional medical or surgical procedures have to be carried out?

Issues of consent

The provisions in the Choice Act¹ allowing consent to a termination of pregnancy by girls of any age were not affected by the repealed Child Care Act³ or the newly in force Children's Act.⁷ In respect of other procedures, the provisions of the Child Care Act³ regarding consent to medical treatment by children over the age of 14 years and surgical operations by persons over the age of 18 years continued to stand until 31 March 2010,⁹ whereafter the relevant provisions of the Children's Act⁴ came into effect.⁵

Now that the relevant sections of the Children's Act⁷ have been brought into effect,⁵ drastic changes have been made to the capacity of children to consent to medical treatment and surgical operations. In terms of the Act, children are able to consent to medical treatment if they are of 12 years of age or more, and of sufficient maturity and with the mental capacity to understand the benefits, risks, social and other implications of such treatment.⁷ Likewise, children are able to consent to surgical operations if they are of 12 years of age or more, are of sufficient maturity and with the mental capacity to understand the benefits, risks, social and other implications of such operations, and are assisted by their parents or guardians.⁷

At what age are girls able to give an informed consent to a termination of pregnancy?

The Choice Act¹ is clear that a female of any age may consent to a termination of pregnancy.² However, this is not the end of the matter. After being provided with non-directive counselling and advised to consult with her parents, guardian, family members or

friends before the pregnancy is terminated,¹⁰ the patient must still be capable of giving an informed consent.

An informed consent means that girl patients must: (i) have knowledge of the nature and extent of the harm associated with a termination of pregnancy; (ii) appreciate and understand the consequences of a termination of pregnancy, and (iii) agree to undergo the termination of pregnancy; furthermore (iv) her agreement must be comprehensive and extend to all the consequences of the termination of pregnancy.¹¹ The National Health Act¹² provides that the patient must be told of the range of diagnostic procedures and treatment options available to her and the benefits, risks, costs and consequences generally associated with each option. The Act also provides that the patient must be informed in a language that she understands and in a manner that takes into account her level of literacy.¹³

Therefore, when a doctor is deciding whether or not to procure a termination of pregnancy with the consent of a girl patient only, he or she must be satisfied that the patient is capable of giving consent in terms of the above criteria. The provisions of the Children's Act⁷ provide useful guidelines in this regard by requiring a child patient to be sufficiently mature and mentally capable of understanding the benefits, risks, and social and other implications of the medical or surgical procedure concerned. If the child is not capable of giving such consent, the patient must be told that she will need her parent's or guardian's consent – except if it is an emergency and a parent or guardian cannot be contacted. In such emergency situations the procedure can be done without consent¹⁴ or with the consent of the medical superintendent of a hospital.¹⁵

Under the repealed Child Care Act, could a girl seeking a termination of pregnancy who is under 14 years of age consent to medical treatment in respect of a termination of pregnancy without the assistance of her parent or guardian?

The Child Care Act,³ now repealed by the Children's Act,⁴ previously applied to consent to medical treatment by minors⁹ and stated that children aged 14 years or more may consent to such treatment.⁸ The Choice Act¹ provides that, notwithstanding the provisions of any other law, termination of pregnancy may only take place with the informed consent of the pregnant female, and a female minor may not be refused a termination of pregnancy on the grounds that she has not consulted with her parents, guardian, family members or a friend.² This implies that such a patient does not require the consent of her parents or guardian to undergo a termination of pregnancy. Terminations of pregnancy frequently require medical treatment to be provided. It would have undermined the purpose of the Choice Act¹ if the Child Care Act³ had been interpreted to mean that only girls over the age of 14 years were capable of consenting to such treatment. Therefore, it is clear that in terms of the Choice Act¹ – irrespective of the provisions of the repealed Child Care Act³ – a patient of any age could consent to medical treatment associated with a termination of pregnancy (e.g. a blood transfusion or an anaesthetic), without the assistance of a parent or guardian.

Where a girl requires an HIV test before undergoing a termination of pregnancy, the same principles will apply. In any event the provisions of the Children's Act¹⁶ regarding HIV testing are consistent with the consent provisions of the Choice Act² and could provide useful guidelines for doctors deciding whether or not a girl

is able to give an informed consent. The Children's Act¹⁶ provides that where it is in their best interests children aged 12 years or more may consent to an HIV test, and where it is in the best interests of children under the age of 12 years they may similarly consent if they are 'of sufficient maturity to understand the benefits, risks and social implications of such a test'.

In the light of the Children's Act coming into effect on 1 April 2010, will a girl-child under 12 years of age, who is sufficiently mature and mentally capable, be able to consent to medical treatment in respect of her termination of pregnancy without the consent of her parent or guardian?

The Children's Act⁷ states that the provisions regarding consent by children to medical treatment do not apply to the consent provisions in the Choice Act.² Therefore, although the Children's Act⁷ states that children of 12 years or older who are sufficiently mature and mentally capable will be able to consent to medical treatment without their parent's or guardian's consent, this will not apply to terminations of pregnancy in terms of the Choice Act.² In terms of the latter girl-children of any age may consent to terminations of pregnancy, including any medical treatment associated with it, provided the patients are legally capable of giving an informed consent.

Under the repealed Child Care Act, could a girl-child who is under 18 years of age consent to a surgical operation in respect of her termination of pregnancy without the assistance of her parent or guardian?

The Child Care Act⁸ stated that persons aged 18 years or more may consent to surgical operations. As has been pointed out, this provision became obsolete because 18 years is now the age of majority.⁹ However, the question still arises whether in terms of the repealed Child Care Act⁸ girl patients under 18 years of age may consent to surgical operations during a termination of pregnancy.

The Choice Act² provides that notwithstanding the provisions of any other law, a female minor must give consent and may not be refused a termination of pregnancy on the grounds that she has not consulted with her parent, guardian, family members or a friend. Such a patient does not require the consent of her parent or guardian to undergo a termination of pregnancy or the medical procedures associated with it. Terminations of pregnancy may require an invasive surgical procedure, particularly when performed during the second and third trimesters. Once again it would undermine the purpose of the Choice Act² if, in terms of the Child Care Act,⁸ only women over the age of 18 years were capable of consenting to such operations. Therefore, it is clear that – irrespective of the provisions of the repealed Child Care Act⁸ – a patient of any age could consent to a surgical operation associated with a termination of pregnancy (e.g. a dilatation and curettage or the surgical removal of a fetus) without the assistance of a parent or guardian.

As a result of the Children's Act coming into effect on 1 April 2010, will a girl-child under 12 years of age, who is sufficiently mature and mentally capable, be able to consent to a surgical procedure during a termination of pregnancy without the assistance of her parent or guardian?

The Children's Act⁷ states that the provisions regarding consent by children to surgical operations do not apply to the consent provi-

sions in the Choice Act.² Therefore, although the Children's Act⁷ provides that children of 12 years or older who are sufficiently mature and mentally capable may consent to surgical operations with the assistance of their parents or guardians, these provisions do not apply to terminations of pregnancy in terms of the Choice Act.² In terms of the latter, girl-children of any age may consent to terminations of pregnancy, including any surgical operations associated with them, provided the patient is legally capable of giving an informed consent.

Confidentiality issues

Doctor-patient confidentiality is an integral part of medical practice and the right to privacy.² The right to privacy is protected by the Constitution,¹⁷ the National Health Act¹⁸ and the common law.¹⁹ A breach of confidentiality and the right to privacy may result in legal action unless there is a valid defence such as consent, a court order, a statutory duty or a privileged occasion.¹⁹

If a girl under the age of 16 years wishes to terminate her pregnancy, must a doctor report the pregnancy as evidence of a sexual offence against the child?

The Criminal Law (Sexual Offences and Related Matters) Amendment Act⁶ provides that a person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official. One of the offences created by the Act is that of consensual sexual penetration with a person under the age of 16 years or statutory rape.²⁰ The question arises whether, if a girl under the age of 16 years wishes to terminate her pregnancy, the doctor must report the matter as a sexual offence against the child. The answer depends upon the age of the male who has had sexual intercourse with the girl.

The Act²¹ provides that if there is less than 2 years' difference in age between a boy and a girl who have had consensual sex, and they are both under 18 years of age, it would be a good defence to a charge of statutory rape. Therefore, where a girl under 16 years of age wishes to terminate a pregnancy that arose as a result of sexual intercourse with a boy under 18 years of age who is less than 2 years older than she is, it can be argued that no sexual offence has been committed in terms of the Act. As a result it is not necessary for the medical practitioner to report the girl-child's condition to the authorities as arising from statutory rape. Where, however, a girl under 16 years of age is pregnant as a result of having had sexual intercourse with an adult or a boy who is more than 2 years older than she is, there will be a duty on the doctor to report it. In terms of the Act the offence must be reported to the police⁵ – not to the girl's parents.

The provisions in the Children's Amendment Act²² that came into force on 1 April 2010²³ also impose a duty on medical practitioners and others to report sexual abuse of children.

What should a doctor do if a girl under the age of 16 years seeking a termination of pregnancy does not want the matter reported to the police as a sexual offence and threatens to go to a backstreet abortionist if the doctor were to make such a report?

Doctors are expected not only to respect the confidentiality of their patients but also to comply with the duties imposed upon them by the law.¹⁹ Furthermore, practitioners are required to act in the best interests of their patients – particularly child patients.²⁴ Where there

is a clear duty on doctors and others to report sexual offences against children, they may only refrain from doing so where they have a valid defence such as necessity. The defence of necessity applies where a person acts to protect their own or somebody else's legally recognised interest (e.g. their life or bodily integrity), which is threatened with immediate harm.²⁵

In situations where a pregnant girl under the age of 16 years threatens to go to a backstreet abortionist to procure a termination of her pregnancy, if the doctor reports her case to the authorities as evidence of a sexual offence against her, the doctor should counsel the girl. The doctor should explain that technically once they know about the offence – even if they do not treat the patient – they are duty bound to report it. They should also explain the dangers associated with backstreet abortions and advise the girl that she will be committing a crime if she procures a termination of pregnancy from such abortionists. However, if the doctor reasonably believes that the patient is firm in her threats to go to a backstreet abortionist, he or she may rely on the defence of necessity to protect the best interests of the patient. The doctor may tell the patient that given the circumstances they will respect the patient's confidence and not report the case to the police. Although it is a crime not to report sexual offences against children,⁶ a doctor who is prosecuted in terms of the Sexual Offences Act⁶ for failing to report statutory rape may be able to rely on the defence of necessity²⁵ in situations where the girl patient threatens to expose herself to harm and illegal conduct by going to a backstreet abortionist.

Is a doctor obliged to tell a girl's parents or guardian if, during a termination of pregnancy, an emergency arises and additional medical or surgical procedures have to be carried out, where the patient has said that she does not want her parents or guardian to know?

As a general rule, doctor-patient confidentiality has to be respected.¹⁹ Therefore, if an emergency arises during a termination of pregnancy procedure and the girl patient has said that she does not want her parents or guardian to know, the patient's wishes must be respected. However, when obtaining an informed consent prior to the commencement of the termination of pregnancy, the medical practitioner should discuss with the patient what she would like to happen should an emergency arise and she is not capable of making any decisions. The doctor should counsel the patient on the desirability of informing her parents or guardian should such an emergency arise. The practitioner should also inform the patient that in terms of the National Health Act²⁶ she may appoint (in writing) a person as a proxy to make decisions for her should an emergency arise during the procedure and she is no longer able to make decisions for herself.

Should an emergency arise, and the girl patient become incapable of communicating her wishes, without having given instructions regarding contacting her parents or guardian, or without having appointed a proxy in terms of the National Health Act,²⁶ the doctor may legally breach his or her patient's confidence. In these circumstances the doctor may rely on the defence of qualified privilege,¹⁹ in that it could be argued that the practitioner had a moral, legal or social duty to inform the girl's parents or guardian and they had a reciprocal interest in receiving the information. This would be a valid defence to any claim against the doctor for breach of confidentiality and invasion of privacy.¹⁹ The defence, however, may not succeed where the patient has prohibited such disclosure beforehand or is mentally competent and insists that her parents or guardian not be informed.

Conclusion

A girl of any age may consent to a termination of pregnancy without the assistance of her parent or guardian provided she is sufficiently mature and mentally capable of giving an informed consent. An informed consent regarding a termination of pregnancy necessarily includes consent to any medical treatment or surgical operation associated with the termination. The consent provisions in the repealed Child Care Act¹⁵ and the in-force Children's Act⁷ do not apply to the Choice Act.¹ The Sexual Offences Act⁶ requires incidents of pregnancy arising from statutory rape to be reported to the police. This may not apply where both parties are children and the age difference between them is less than 2 years. Otherwise, a doctor who decides not to report a statutory rape incident to the police in order to prevent a patient consulting a backstreet abortionist may successfully raise the defence of necessity. Doctors should canvass with girl-child patients seeking a termination of pregnancy whether they would like their parents or guardian to be informed if an emergency should arise, or whether they would like to make a written nomination of a proxy to make decisions for them in terms of the National Health Act.²⁶ Where emergency situations have not been discussed doctors may claim a qualified privilege should they decide that it is necessary to inform the girl's parent or guardian about an emergency and the patient has not prohibited this.²⁷

References

1. Choice on Termination of Pregnancy Act No. 92 of 1996.
2. Sections 5(2) and 5(3) of the Choice on Termination of Pregnancy Act No. 92 of 1996.
3. Child Care Act No. 74 of 1983, repealed by section 313 read with Schedule 4 of the Children's Act No. 38 of 2005.
4. Children's Act No. 38 of 2005.
5. See Government Notice R12 in *Government Gazette* 33076 1 April 2010.
6. Section 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
7. Section 129 of the Children's Act No. 38 of 2005.
8. Section 39(4) of the Child Care Act No. 74 of 1983.
9. See McQuoid-Mason DJ. The effect of the new Children's Act on consent to HIV testing and access to contraceptives by children. *S Afr Med J* 2007; 97: 1252-1253.
10. In terms of sections 4 and 5(3) of the Choice on Termination of Pregnancy Act No. 92 of 1996.
11. *Castell v De Greeff* 1994 (4) SA 408 (C) at 425.
12. National Health Act No. 61 of 2003.
13. Section 6 of the National Health Act No. 61 of 2003.
14. Dada MA, McQuoid-Mason DJ. *Introduction to Medico-Legal Practice*. Durban: Butterworths, 2001: 17.
15. Section 39(2) of the Child Care Act No. 74 of 1983.
16. Section 130 of the Children's Act No. 38 of 2005.
17. Section 14 of the Constitution of the Republic of South Africa, 1996.
18. Section 14 of the National Health Act No. 61 of 2003.
19. Dada MA, McQuoid-Mason DJ. *Introduction to Medico-Legal Practice*. Durban: Butterworths, 2001: 17-22.
20. Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
21. Section 56(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
22. Section 110 of the Children's Amendment Act No. 41 of 2007.
23. See Government Notice R13 in *Government Gazette* 33076 1 April 2010.
24. In terms of section 28 of the Constitution of the Republic of South Africa, 1996.
25. Burchell J, Milton J. *Principles of Criminal Law*. 2nd ed. Cape Town: Juta & Co. Ltd, 2002: 154-174.
26. Section 7 of the National Health Act No. 61 of 2003.
27. A shortened earlier version of this article dealing with the legal position prior to the coming into effect of all the sections of the Children's Act No. 38 of 2005 and the Children's Amendment Act No. 41 of 2007 appeared as McQuoid-Mason D. Termination of pregnancy and children: Consent and confidentiality issues. *S Afr Med J* 2010; 100: 213-214.