# SUBMISSION ON THE CHILDREN'S BILL

## PORTFOLIO COMMITTEE ON SOCIAL DEVELOPMENT

## NATIONAL ASSEMBLY

**27 July 2003**

**By**

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**The submission has been endorsed by Childline.**

The AIDS Law Project[1] and Human Rights Watch[2] welcome the opportunity to comment on the Children's Bill currently before Parliament. We are aware that other organizations are addressing other aspects of the bill. Our submission therefore addresses only Section 32 of the bill on major decisions involving children. We write to endorse this section, but also to raise our concerns about its limitations. In our view, the current draft of the Children's Bill is not sufficiently clear or comprehensive to safeguard children's rights to medical care and treatment. We therefore recommend that all the sections of the 12 August 2003 version of the bill pertaining to consent be enacted together with Section 32 to ensure the protection of children's rights to life and to the highest attainable standard of health guaranteed by the South African constitution and international human rights law.

## Limitations of current law on consent to medical care and treatment for children

In South African common law, parental consent or consent from a legally appointed guardian is required before medical treatment can be administered to a child. In cases where parental consent or consent from a legal guardian cannot be obtained, the High Court, as the upper guardian of all children, can be approached to provide consent. In terms of the Child Care Act 74 of 1983, children above the age of fourteen[3] years are permitted to consent without the assistance of a parent or legal guardian to receive medical treatment. For children under the age of fourteen where the consent of a parent or guardian

[1] The AIDS Law Project (ALP) is based at the Centre for Applied Legal Studies, University of the Witwatersrand, and is a human rights research and advocacy institute. The ALP provides free legal advice and litigation services to advance the rights of people living with HIV/AIDS. Its aim is to use the law to address unfair discrimination on the basis of HIV/AIDS status, to find redress for human rights violations, and to ensure access to treatment.

[2] Human Rights Watch is an independent, international, nongovernmental organization that conducts investigations of human rights abuses in more than eighty countries around the world. Since 1978, Human Rights Watch has sought to promote respect for international human rights throughout the world. Since 1994, we have worked in cooperation with local groups in South Africa to develop legal and policy responses to address sexual violence against women and girls, including government efforts to prevent HIV/AIDS after rape.

[3] Section 39 of the Child Care Act.

cannot be obtained, permission for a medical procedure may be sought from the Minister of Social Development, if in the opinion of a medical practitioner the procedure is necessary. In urgent cases, the medical superintendent of a hospital can provide consent.

The large number of children affected by HIV in South Africa has been widely documented. The Child Care Act, enacted in 1983, did not anticipate that the HIV/AIDS epidemic would leave large numbers of children without parents or legal guardians. Nor did it anticipate that the dual epidemics of HIV/AIDS and sexual violence—including a virtually unprecedented epidemic of child rape—would threaten the lives of so many South African children. The provisions of this act and the systems set up to support it are over-burdened and unable to cope with the large numbers of children that require assistance. This is clearly evident in the problems that surround the obtaining of consent for medical treatment and HIV testing for children who have been orphaned or abandoned.

In our work with children orphaned by, abandoned or otherwise without parental care because of HIV/AIDS, children living with HIV/AIDS, and child survivors of sexual violence, we have found that the current requirements on consent, instead of protecting children, pose serious barriers to protecting their rights to life and to the highest attainable standard of health under the Constitution and international human rights law.

The ALP has been forced to resort to litigation to obtain consent for antiretroviral treatment for children living with HIV/AIDS. In *Ex Parte Nigel Redman N.O.*[4], for example, four of ten children with HIV/AIDS needing antiretroviral therapy at a public clinic in Soweto were orphans; all were below the age of fourteen; all lived in informal care settings; and none had been placed in legal custody of their

[4] Currently unreported.

care-givers. It was therefore impossible to obtain consent to treatment for these children under the common law. It was decided, based on the health needs of the children, not to seek consent from the Minister of Social Development. An urgent application was brought in the Johannesburg High Court in June 2003 to seek permission from the High Court for the children to receive antiretroviral treatment. A second, similar application was successfully brought in August 2003 on behalf of a fifth child.

In an attempt to use the provisions of the Child Care Act relating to ministerial consent in cases where parental consent could not be obtained, the ALP made several requests to the Minister of Social Development during the period October and November 2003. These requests were on behalf of some forty children who required access to antiretroviral treatment and HIV testing and who could not obtain parental consent. Although the Minister provided consent on behalf of five children, the ALP was unsuccessful in its attempt to obtain permission from the Minister for the remainder of the children to receive antiretroviral treatment and therefore filed a third urgent application with the High Court to obtain permission in December 2003. Although the High Court petition was successful, the process was time-consuming, thus delaying important medical treatment. Moreover, its reach is limited: although the order permits a group of medical practitioners in Gauteng, the Wits Paediatric HIV Working Group, to seek consent from care-givers (in the same way as it envisaged by Section 32), the legal circumstances of other children in South Africa remain unchanged. New applications must be filed to obtain consent, or fresh attempts can be made to obtain ministerial permission. The costs of such applications are prohibitive, and it is clearly impractical and inconvenient to bring such applications in the High Court every time a child without a legal guardian or parent requires HIV testing or treatment.

In the face of South Africa's explosive HIV/AIDS epidemic, rape and other sexual violence can be a death sentence. The South African government has pledged

to provide sexual violence survivors with post-exposure prophylaxis (PEP), antiretroviral drugs that can reduce the risk of contracting the virus from an HIV-positive attacker. Human Rights Watch and the ALP have found, however, that current consent requirements have impeded children's access to post-rape medical care, including lifesaving PEP services and prerequisite HIV testing.

Human Rights Watch's research found, for example, that problems in obtaining consent on behalf of unaccompanied children and those whose parents or guardians refused to consent to medical treatment barred some children from receiving post-rape medical services, including lifesaving PEP.[5] The ALP also has found that the lack of clarity regarding whether HIV testing constitutes "medical treatment" within the meaning of the Child Care Act has impeded some children from obtaining HIV prevention and treatment services. Some health care workers have declined to provide HIV testing to children above the age of fourteen years without parental consent. It is only recently that the State Law Advisors have clarified in a legal opinion sought by the Department of Social Development that HIV testing does fall within the definition of "medical treatment." It is however not clear whether any steps have been taken to ensure that this has been brought to the attention of health care workers providing services to child survivors of rape and sexual violence.

**Proposed legislative changes to ensure medical care and treatment for children**

Section 32 of the current draft of the bill states that:

*"(1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in*

*that person's care –*

*(a) safeguard the child's health, well-being and development; and*

*(b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical or mental harm or hazards;*

*(2) A person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or primary care-giver of the child."*

This section, along with the definitions of care-giver and primary care-giver, represents a significant and welcome departure from the current law and in our view will benefit a large number of children.

Section 32 of the Children's Bill imposes an obligation on anyone who cares for a child to safeguard the child's health and well-being and permits care-givers, including those who have no parental rights or responsibilities in respect of a child, to consent to medical examination and treatment of the child if such consent cannot be reasonably obtained from the child's parent or primary care-giver. This provision will remove major impediments to medical treatment for children (some of which we have described above), including children living with HIV/AIDS and child sexual violence survivors, and we welcome the inclusion of this provision in the Bill.

We are concerned, however, that neither Section 32, nor the current draft of the Children's Bill more generally, are sufficiently clear or comprehensive to

[5] *See "Deadly Delay: South Africa's Efforts to Prevent HIV in Survivors of Sexual Violence,* vol. 16, no. 3(A) (2004),

safeguard children's rights to medical care and treatment. Many children—including child rape survivors and children living with HIV/AIDS—are unlikely to benefit from the provision of antiretroviral drugs, both as treatment and PEP, unless the definition of consent is broad enough to address their needs.

A prior version of the Children's Bill included several provisions regarding consent that would expand the definition of consent more broadly than the bill currently before parliament. Although these provisions are likely to be included in the section 76 version of the bill, we are concerned that if they are not adequately addressed in the current bill, some children will still not be able to obtain access to potentially life-saving medication. We call attention to the following provisions in particular:

1. Sections 135 and 237 of the consolidated bill (12 August 2003 version) permit a hospital superintendent to consent to medical treatment in certain emergency situations and on behalf of a street child or a child in a child-headed household.

   We believe that such a provision is still necessary and should be included in this bill – in our experience, many child survivors of sexual violence, particularly those who live in rural areas, are brought to hospitals without their parents or care-givers. Because government protocols require that PEP be commenced within 72 hours of a sexual assault, it is necessary to have a provision that permits consent to be given by a medical practitioner where it cannot reasonably obtained from a parent or care-giver.

2. Section 136 specifically addresses HIV testing, stating that consent to an HIV test may be given by a child over twelve and by a child under twelve if the child is of "sufficient maturity to understand the benefits, risks and

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http://www.hrw.org/reports/2004/southafrica0304/, pp. 38, 42.

social implications of the test," the child's parents, care-givers, or a designated child protection agency arranging placement of the child or a hospital superintendent in certain defined circumstances. A child and family court also can give permission for an HIV test if the consent is being unreasonably withheld or the child's parent or care-giver is incapable of giving consent.

Given the need to ensure that child survivors of sexual assault do undergo HIV testing, we are again concerned that this section has not been moved to this bill and recommend that it be included.

We recommend that Section 32 of the Children's Bill, as well as all sections of the prior draft of the bill pertaining to consent, be enacted immediately to ensure that all children have access to medical services, including lifesaving PEP and antiretroviral medicines.

We thank you for this opportunity to comment on the proposed Children's Bill and hope that our submission will be of assistance in consideration of this important legislation.