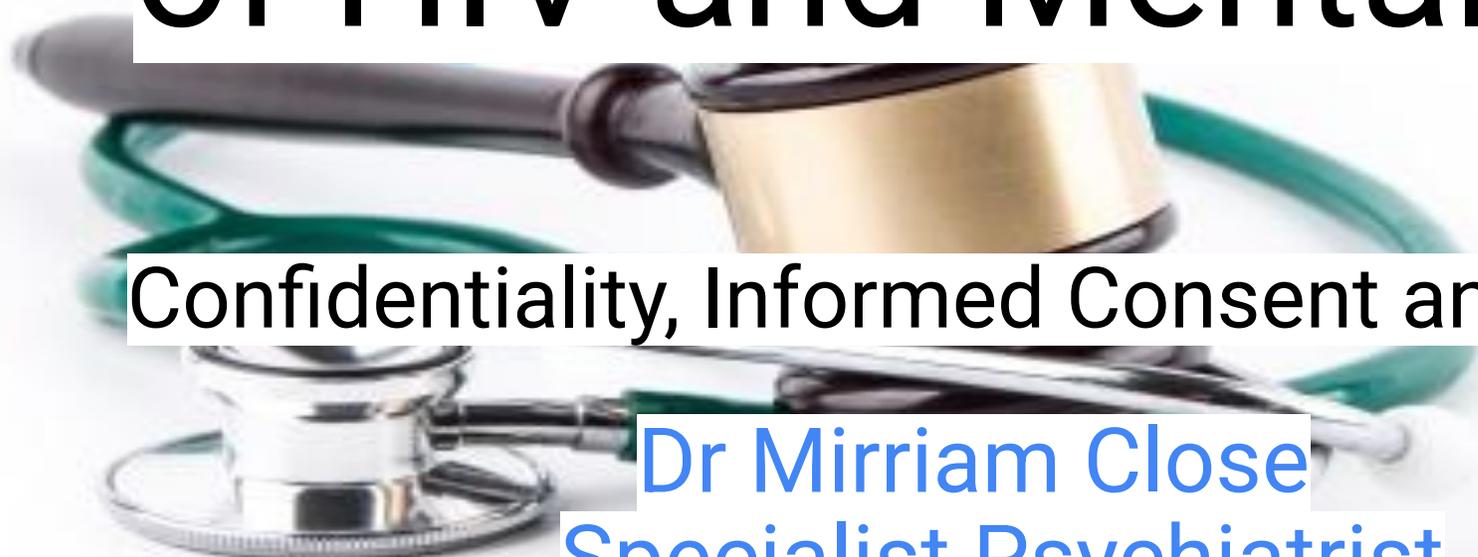


The Ethical and Legal Aspects of HIV and Mental Health



Confidentiality, Informed Consent and Capacity

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DISCLAIMER

Dr M Close received an honorarium from the following pharmaceutical companies for various talks and consultancy

Services:

Dr Reddy's

Cipla

SunPharma

ACC- Kheth 'Impilo

LEGISLATION

- Constitution and Bill of Rights: supreme law, right to privacy, dignity, freedom, emergency medical treatment, access to health and children paramount.
- The United Nations Convention on the Rights of Persons with Disabilities (CRPD): Article 12 with regards to legal capacity
- Health Professions Act 56 of 1974:
 - Ethical rules of conduct for practitioners registered under the Health Professions Act
 - Regulations defining the scope of the profession of Psychology
 - Professional Board for Occupational Therapy, Medical Orthotics Prosthetics and Arts Therapy

LEGISLATION

- The National Health Act 61 of 2003: offence to divulge without consent except: Statute or Court or public health safety
- Children's Act 38 of 2005: Age, confidentiality and informed consent
- Protection of Personal Information Act 4 of 2013 (POPI): Processing of information
- The Promotion of Access to Information Act 2 of 2000 (PAIA): records access
- Mental Health Care Act 17 of 2002: Admission procedures, confidentiality

MENTAL HEALTH CARE ACT 17 of 2002

- “Mental illness” in section 1 as “a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis”.
- Consent:
- Capacity
- Information
- Voluntariness
- Risk Assessment- harm to self and/or others

ADMISSION OPTIONS-MHCA 17 OF 2002

Voluntary:

- MHCU has a mental illness.
- MHCU is competent to make an informed choice.
- MHCU consents to treatment.

ADMISSION OPTIONS-MHCA 17 OF 2002

Assisted:

- MHCU has a mental illness
- MHCU is a danger to him/her self and/or others.
- MHCU is not competent to make an informed choice.
- MHCU does not refuse treatment.

ADMISSION OPTIONS-MHCA 17 OF 2002

Involuntary:

- MHCU has a mental illness.
- MHCU is a danger to him/her self and/or others or care and treatment and rehabilitation is necessary for the protection of the financial interests or reputation of the user.
- MHCU is not competent to make an informed choice.
- MHCU refuses treatment.

ADMISSION PATHWAYS-MHCA 17 OF 2002

Emergency:

- MHCU has a mental illness.
- Any delay may result in:
- Death or irreversible harm to the MHCU.
- MHCU inflicting serious harm to him/her self or others.
- MHCU causing serious damage or loss of property belonging to him/her self or others.
- MHCU is not competent to make an informed choice.
- MHCU refuses treatment.
- Can only hold for 24 hours, must report to the Review Board.

Valid Informed Consent Requirements

1. Competence-capacity to understand information
2. Information Disclosure- adequate information provided
3. Comprehension- Understanding of information
4. Voluntariness- No coercion or deception
5. Consent- Agreement to the proposed treatment

MENTAL CAPACITY

Age or decisional capacity

S Situation: Does the person know and remember the facts of the situation?

O Options: Is the person aware of the options available to him or her?

C Consequences: Is the person aware of the consequences of each option?

C Consistency: Is the person consistent in his or her choice or opinion?

O Opinion: What is the opinion/ collateral of the other persons involved?

U Undue influence: Is the person under any undue influence to make a particular choice?

R Reasons: What are the person's reasons for his or her decision?

CASE DEVELOPMENT OF INFORMED CONSENT

- *Minister of Safety and Security v Xaba*- refusal to remove bullet to be used as evidence as contrary to bodily and psychological integrity
- *Stoffberg v Elliot*- penile amputation without informed consent, action for assault
- *Esterhuizen v Administrator Transvaal*- superficial radiation for Kaposi's sarcoma consented by parents, not radical radiation therapy leading to amputation of limbs
- *Castell v De Greef*- consolidated doctrine informed consent in SA Law:
 - shift from medical paternalism to patient autonomy
 - shift 'reasonable doctor standard' to 'prudent patient' standard
 - material risk standard- what a reasonable patient would consider pertinent before making a decision

MATERIAL RISK

The criterion of material risk is if, in the circumstances of a particular case:

1. A reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it OR
2. The doctor is, or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.

This obligation is subject to therapeutic privilege.

If risk or danger is extremely uncommon or remote, doctor cannot be held liable for not disclosing

If uncommon or remote risks are serious, must divulge to patient

If patient enquires after uncommon or remote risks, must divulge

INFORMED CONSENT AND COUNSELLING

VRM v Health Professions Council of SA

C v Minister of Correctional Services

PRE-TEST COUNSELLING	POST-TEST COUNSELLING
Reason for test.	Meaning of result, including false-negative.
Express concern and uncertainty	Protection against infection
What and how test is done	Medication options and costs
How long it will take before will have the result.	How HIV affect future medical care, death, policies
Who will provide result and patient responsible for obtaining the result.	Disclosure to others and implications
Meaning of a positive or a negative	Religion, culture and beliefs affecting choices and behaviour
Possibility or necessity of a test	Lifestyle changes
Where counselling and support services can be obtained.	<p>Ongoing referral for counselling</p> <p>Klinck, E. (2003). HIV legal and ethical issues. <i>Southern African Journal of HIV Medicine</i>, 4(1), p.25. doi:https://doi.org/10.4102/sajhivmed.v4i1.551.</p>

INFORMED CONSENT

- Advance Directive by patient
- Proxy mandated in writing
- A person authorised by law or a court order.
- The patient's spouse or partner
- Parent.
- Grandparent.
- Adult child.
- Brother or sister.
- Health Care Practitioner- “Best Interests Principle”

“BEST INTERESTS” PRINCIPLE

- Guidelines for Good Practice in the Health Care Professions: Seeking Patients’ Informed Consent: Ethical Considerations Booklet 4
- Clinically indicated options for investigation and treatment
- Previously expressed preferences
- Background factors
- Constitution provides that “a child’s best interests are paramount in every matter concerning a child”
- Views or preferences of patient as obtained from knowledgeable third party/collateral history
- Least restrictive option for patient’s future choices, where more than one option (including non-treatment) seems reasonable in the patient's best interests

INFORMED CONSENT

- Guidelines for Good Practice in the Health Care Professions: General Ethical Guidelines for the Health Care Professions: Booklet 1
 - Provide information about condition, treatment and prognosis.
 - Information provided in understandable manner.
 - Refrain from withholding information, investigation, treatment or procedure.
 - Act in the patient's best interests.
 - Apply the principle of informed consent as a continuing process.
 - Allow patients access to their medical records.

Guidelines for Good Practice in the Health Care Professions: Seeking Patients' Informed Consent: The Ethical Considerations Booklet 4 Information Requirements

Practitioner's name	Diagnosis and prognosis
Uncertainties about the diagnosis	How monitor and re-assess condition
Options to treat or not	Whether students involved and right to refuse
Purpose proposed intervention	Can change decision at any time
Benefits versus serious adverse effects	Second opinion
Experimental	Determine individual needs and priorities

INFORMED CONSENT

- The National Health Act 61 of 2003:
 - Patient's health status divulged except in circumstances contrary to the best interests of the patient.
 - The range of diagnostic procedures and treatment options generally available to the patient.
 - The benefits, risks, **costs** and consequences generally associated with each option.
 - The patient's right to refuse health services and explain the implications, risks and obligations of such refusal.
 - Information provided in language user understands, considering literacy level

CONFIDENTIALITY

- **Constitution** guarantees right to privacy
- **The Promotion of Access to Information Act 2 of 2000/ Protection of Personal Information Act 4 of 2013:** Access to records
- **Children’s Act 38 of 2005:** Access to information on health status and treatment and Right to confidentiality
- **Mental Health Care Act 17 of 2002**
- **Council’s Ethical Guide Rule 13**
- *Jansen van Vuuren v Kruger* and *NM v Smith*
- *Tarasoff* Principle- “Duty to Warn”

DUTY TO WARN

Duty to protect third parties from serious harm, as per the South African Medical Association (SAMA):

HCW may breach confidentiality only if:

The partner of that patient is clearly identified

There is a real risk that the partner will be infected

There is no other way to protect the partner other than to disclose the patient's HIV status

Where the patient reasonably believes that disclosure entails a risk of harm, the HCW's primary duty will be to protect the patient and not disclose their status at all

CONFIDENTIALITY

- **Council's Ethical Guide Rule 13**
- Only divulge information without consent when specific circumstances apply:
 - (a) in terms of a statutory provision;
 - (b) at the instruction of a court of law;
 - (c) where justified in the public interest.
- Any information other than the information referred to above shall be divulged only:
 - (a) with the express consent of the patient;
 - (b) Minor under the age of 12 years, with the written consent of parent or guardian;
 - (c) Deceased patient, with the written consent next-of-kin or the executor of estate

CONFIDENTIALITY

- **Mental Health Care Act 17 of 2002**

- A person or health establishment may not disclose any information which a mental health care user is entitled to keep confidential in terms of any other law.
- Information may be disclosed if failure to do so would seriously prejudice the health of the mental health care user or of other people.
- A mental health care provider may temporarily deny mental health care users access to information contained in their health records, if disclosure of that information is likely to
 - (a) seriously prejudice the user; or
 - (b) cause the user to conduct himself or herself in a manner that may seriously prejudice him or her or the health of other people.

HIV AND MENTAL HEALTH

Prevalence HIV infection in mentally ill at similar rates to USA- 5-23% vs 0.3-0.4% of general population

The higher prevalence rate may be attributed to reportedly higher rates of sexual risk behaviour (multiple partners, not using condoms, and history of STDs) among adults with mental illness compared with the general population.

The reasons for risky behaviour include:

- psychiatric symptoms such as hypersexuality and erotomania
- consequences of mental illness, affecting cognitive and communication aspects
- insufficient information, motivation and skill to engage in safe sexual behaviours
- the social drift associated with mental illness -with resultant socio-economic compromise
- hospitalisation
- substance use.

Mental health problems are associated with an increased risk of acquiring and transmitting HIV.
Individuals with mental illness should be tested for the benefit of both individual and public health.

Moosa, M.Y.H. and Jeenah, F.Y. (2013b). Provider-initiated HIV counselling and testing (PICT) in the mentally ill. *South African Journal of Psychiatry*, 19(3), p.5.
doi:<https://doi.org/10.4102/sajpsychiatry.v19i3.408>.

LAW PERTAINING TO CHILDREN

The Constitution

Children have same rights as adults but require additional protection Section 28 Children

- (1)(c) Every child has the right to basic nutrition, shelter, basic health care services and social services;
- (2) A child's best interests are of paramount importance in every matter concerning the child.

Children's Act 38 of 2005

- Section 7 Best interest of child standard.
- Section 9 In all matters concerning the care, protection, and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

INFORMED CONSENT- CHILDREN

- Children's Act 38 of 2005:
 - Children aged 12 or more:
 - Maturity to consent to medical treatment on their own behalf.
 - Surgical procedure “duly assisted by his or her parent or guardian”.
 - Minors of 12 or over who are themselves parents (“child parents”):
 - Maturity to consent to medical examinations and treatment for their child.
 - Consent to surgical treatment for their child with assistance by parental responsibility.
 - Children under 12 or over 12 but lacking the maturity:
 - A parent, guardian or care-giver- medical treatment.
 - A parent or guardian- surgical treatment on the child's behalf.

HIV TESTING FOR CHILDREN

Children's Act 38 of 2005:

Consent for HIV testing may be given by:

Child who is 12 years old or older;

Under 12 years old, with sufficient maturity to understand benefits, risks and social implications

Under 12 years old, not of sufficient maturity:

- Parent or caregiver
- Provincial head of Social Development
- Designated child protection organisation
- Superintendent of hospital, if the above not fulfilled

MATURITY CRITERION

Cognitive, physical, emotional and moral development

Psychiatric assessment entails MSE, collateral information, presence of psychiatric disorder, impact on decision-making capacity

Assessment of mental capacity to understand benefits, risks, social implications of treatment together with abuse and comorbidities

Vineland Social Maturity Scale

Perform simple creative work

Left to care for self or others

Enjoys reading books, newspapers and magazines

Pillay BJ, Singh JA. "Mental capacity", "sufficient maturity", and "capable of understanding" in relation to children: how should health professionals interpret these terms?. South African Journal of Psychology. 2017 Dec 21;48(4):538–52.

Vineland Social Maturity Scale (For Education Purpose). scribd.com. 2024.

REFUSAL OF CONSENT

Children's Act, Section 129 Consent

- General rule: 12 years old, mature and understand risks, implications and consequences may refuse
- The Minister may consent to the medical treatment of or surgical operation on a child if the child unreasonably refuses to give consent.
- A High Court or children's court may consent to the medical treatment of or a surgical operation on a child in all instances where another person that may give consent in terms of this section refuses or is unable to give such consent.
- No parent, guardian or care-giver of a child may refuse to assist a child or withhold consent by reason only of religious or other beliefs, unless that parent or guardian can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned.

Age Requirements

Procedure/Intervention	Age
Medical Treatment	12 + Sufficient Maturity
Operations	12 + Sufficient Maturity + Parental/Guardian Assistance
HIV Testing	12
Access to Contraceptives	12
Termination of Pregnancy	Any Age
Male Circumcision	16
Research	18



Thank You!