

To: File

From: Brian Honermann, Researcher, SECTION27, incorporating the AIDS Law Project

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Subject: Legality of elective neo-natal male circumcision under the Children's Act of 2005

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## Question Presented

Does the Children's Act 38 of 2005 ("Children's Act") prohibit elective neo-natal medical male circumcisions for medical reasons?<sup>1</sup>

## Short Answer

No. Section 12(8)(b) of the Children's Act expressly allows for circumcision of males under the age of 16 when such circumcisions are conducted for medical reasons on the recommendation of a medical practitioner.<sup>2</sup>

Given the ample scientific evidence that medical male circumcision substantially reduces the risk of contracting HIV<sup>3</sup> and other sexually transmitted diseases<sup>4</sup> and that neo-natal medical male circumcision carries a lower risk of complications than child or adult medical male circumcision,<sup>5</sup> a medical practitioner is well within the law to recommend elective neo-natal male circumcision to parents of new born boys.

As with any medical procedure involving a child, informed consent for the procedure must be obtained as prescribed in section 129 of the Children's Act, sections 6 – 8 of the National Health Act 61 of 2003 ("The National Health Act") and utilising current practice for obtaining consent to perform surgical procedures on children below the age of 12.

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<sup>1</sup> While the Children's Act provides for additional exemptions, this memo will only focus on the exemption provided for medical reasons.

<sup>2</sup> "Medical practitioner" is defined in the Children's Act as "a person registered or deemed to be registered as a medical practitioner under the Health Professions Act, 1974 (Act 56 of 1974) and includes a dentist so registered or deemed to be registered". Thus, the recommendation must come from a physician and not a nurse or a midwife who are registered in terms of the Nursing Act of 2005.

<sup>3</sup> See RC Bailey, et al., "The protective effect of adult male circumcision against HIV acquisition is sustained for at least 54 months: results from the Kisumu, Kenya trial", Presentation at XVIII International AIDS Conference (AIDS 2010). Vienna, July 18-23, 2010. Abstract FRLBC101; R. Gray, et al. "Male circumcision for HIV prevention in men in Rakai, Uganda: a randomised trial", *The Lancet*, Volume 369, Issue 9562, Pages 657-666; Auvert B et al., "Randomized, Controlled Intervention Trial of Male Circumcision for Reduction of HIV Infection Risk: The ANRS 1265 Trial", *PLoS Med* 2(11): e298. doi:10.1371/journal.pmed.0020298.

<sup>4</sup> AAR Tobian et al. "Male circumcision for the prevention of HSV-2 and HPV infections and syphilis", *New England Journal of Medicine*. DOI: 10.1056/NEJMoa0802556 (2009) showing reduction in risk of heterosexual men from contracting herpes simplex virus type 2 (HSV-2) and human papillomavirus (HPV) but not bacteria which causes syphilis.

<sup>5</sup> Weiss HA, et al., "Complications of circumcision in male neonates, infants and children: a systematic review", *BMC Urol*. 2010 Feb 16;10:2. Review.

## Long Answer

### *Introduction*

Much confusion has been generated recently regarding the legality of performing medical male circumcision on boys below the age of 16. This confusion seems to be based on a poor reading of the Children's Act. At present, there is no legal limitation – beyond standard informed consent requirements – that prohibits the provision of elective neo-natal medical male circumcision.

### *Applicable law*

Section 12(8) of the Children's Act regulates circumcision of male children under the age of 16. It states in full:

- (8) *Circumcision of male children under the age of 16 is prohibited, except when –*
- (a) *circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or*
  - (b) *circumcision is performed for medical reasons on the recommendation of a medical practitioner.*

As is clear, section 12(8)(b) allows for circumcisions to be conducted on male children below the age of 16 if such circumcision is performed for medical reasons on the recommendation of a medical practitioner.

Neither the Children's Act nor the General Regulations Regarding Children<sup>6</sup> ("General Regulations") under the Children's Act provide a definition of "medical reasons". In the absence of a definition, and based on the evidence that male circumcision reduces the risk of HIV infection by up to 64%,<sup>7</sup> reduces the risk of HSV-2 and HPV infection<sup>8</sup> and that neo-natal circumcision carries a lower risk of complications than childhood or adult circumcisions, any reasonable interpretation of "medical reasons" will be sufficiently broad for a medical practitioner to recommend elective neo-natal medical male circumcision to the parents of infant boys and remain within the ambit of the Children's Act. In addition – while not inherently necessary for obtaining the protective benefits of medical male circumcision – it is best for circumcision to be done prior to the onset of sexual activity to avoid transmission prior to circumcision.

### *Consent*

As with any medical intervention, informed consent must be provided prior to performing a medical procedure. For infants, consent is governed by section 129 of the Children's Act as well as sections 6 – 8 of the National Health Act of 2003. Section 129 of the Children's Act states in relevant part:

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<sup>6</sup> GN R261 in GG 33076 of 1 April 2010

<sup>7</sup> RC Bailey, supra note 3.

<sup>8</sup> Ibid.

### **129 Consent to medical treatment and surgical operation**

(1) *Subject to section 5(2) of the Choice on Termination of Pregnancy Act, 1996 (Act 92 of 1996), a child may be subjected to medical treatment or a surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), (3), (4), (5), (6) or (7).*

...

(5) *The parent or guardian of a child may, subject to section 31,<sup>9</sup> consent to a surgical operation on the child if the child is –*

*(a) under the age of 12 years; or*

*(b) over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the operation.*

While Chapter 8 of the General Regulations provides forms and additional requirements for obtaining consent for medical procedures on children in certain circumstances,<sup>10</sup> no additional forms or guidance is provided regarding consent for children under the age of 12 to undergo medical treatment or surgical procedures. As such, consent must be given according to current practice for obtaining consent for surgical procedures on children below the age of 12.

In order to obtain informed consent, the medical practitioner recommending neo-natal male circumcision must explain the risks of complications as a result of the circumcision as well as the potential benefits of circumcision.<sup>11</sup>

### *Conclusion*

So long as all informed consent requirements are met by obtaining consent from a parent or guardian of a newly born boy prior to performing a neo-natal male circumcision, there is no legal impediment to a medical practitioner recommending and performing elective neo-natal male circumcisions.

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<sup>9</sup> Section 31 of the Children's Act requires a parent of a child making a major decision involving a child to take into consideration the "views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development".

<sup>10</sup> Specifically, for the Minister of Social Development to provide consent for medical treatment to children, for obtaining consent for surgical procedures on children over the age of 12, and for obtaining consent for a medical procedure on a child from a parent who is below the age of 18.

<sup>11</sup> National Health Act sections 6 – 8. For additional information see, Hassim A, et al., *The National Health Act: A Guide* at fn 25.