Age of Consent for HIV Testing, Counseling and Treatment in Uganda

AIDS LAW BRIEF
BACKGROUND PAPER
SEPTEMBER 2015

I. Introduction

This AIDS Law Brief Background Paper assesses the legal environment in Uganda relating to the age of consent for HIV-testing and counseling (HTC) and HIV treatment and compares Uganda's existing legal framework with the World Health Organization's report *HIV and Adolescents: Guidance for HIV Testing and Counselling and Care for Adolescents Living with HIV*. This Background Paper also identifies ambiguities and conflicts of law that could pose barriers to children's and adolescents' access to HTC and HIV treatment services in Uganda, and possible legal reforms to facilitate children's access to HTC and HIV treatment services.

This Background Paper was prepared by the University of Washington and Makerere University and provides support for an AIDS Law Brief on Age of Consent for HIV Testing, Counseling and Treatment in Uganda. This Background Paper does not constitute legal advice and should not be relied on for the purposes of complying with Ugandan law.

II. Summary

- The HIV and AIDS Prevention and Control Act governs the age of consent for HTC in Uganda
- A child 12 years of age or older may independently consent to HTC
- HTC for children younger than 12 may only be done with the consent of the child's parent, guardian, next of kin, caretaker or agent
- Pre and post-test counseling must be provided in connection with HIV-testing
- A child's HIV status may not be disclosed without the child's consent, unless an exception applies
- Ugandan law does not expressly allow children to independently consent to HIV treatment

III. Background

In 2014, approximately 150,000 Ugandan children aged 0–14 were HIV positive,[1] with a prevalence rate for Ugandans aged 15–49 of 7.3%.[2] Globally, in 2012, approximately 2.1 million adolescents (ages 10–19) were living with HIV.[3] The highest numbers of adolescents living with HIV are found in South Africa, Nigeria, Kenya, Malawi, Mozambique, Tanzania, Zambia, Zimbabwe and Uganda.[4]

Globally, about one-seventh of all new HIV infections occur during adolescence.[5] Between 2005 and 2012, HIV-related deaths among adolescents increased by 50%, while the global number of HIV-related deaths fell by 30%.[6] Adolescents are the only age group in which HIV-related deaths have risen between 2001 and 2012.[7]

According to UNAIDS, this increase in adolescent AIDS deaths is a result of "poor prioritization of adolescents in strategic plans for scale-up of HIV treatment and lack of testing and counselling."[8] Use of HTC is significantly lower for adolescents than for adults.[9] In sub-Saharan Africa, survey data suggest only 10% of young men and 15% of young women (15–24 years) were aware of their HIV status.[10]

HTC is an essential component of the package of care included in voluntary medical male circumcision (VMMC) programmes, which are typically aimed at adolescents.[11] Approximately 16 million adolescent women give birth every year,[12] and the WHO has found HIV-positive adolescent girls have less access to prevention of mother-to-child transmission (PMTCT) interventions than do adult women.[13]

Scaling up antiretroviral therapy (ART) coverage for children and adolescents also remains challenging. As of 2012, about 630,000 children below the age of 15 worldwide had been started on ART, representing a 28% coverage rate among children who need ART.[14] Globally, HIV treatment coverage for children is just more than half that of adults.[15]

The right of every child to enjoy the "best attainable standard of physical, mental and spiritual health" is protected under international and regional law.[16] Uganda's National Objectives and Directive of Principles of State Policy requires the State to "endeavour to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that… all Ugandans enjoy rights and opportunities and access to…health services."[17] Article 34 of the Constitutional Bill of Rights states that "no child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reason of religious or other beliefs."[18]

IV. Key Findings

1. A child 12 years of age or older may independently consent to HTC

The HIV and AIDS Prevention and Control Act governs the age of consent for HTC in Uganda. The Act provides "A person may take a voluntary HIV test if he or she gives his or her informed consent."[19] The Act further provides that a person is not capable of giving consent if he or she is a "minor" and defines minor as "a person who is below the age of 12 years."[20] The Uganda HIV Testing and Counseling Policy adopted by the Ministry of Health similarly states, "[c]hildren 12 years and above can assent on their own for HTC. Approval of the parent or guardian shall not be mandatory."[21]

2. HTC for children younger than 12 may only be done with the consent of the child's parent, guardian, next of kin, caretaker, or agent

The HIV and AIDS Act mandates a "parent, guardian, next of kin, caretaker, or agent" to provide informed consent for children younger than 12.[22] The Act defines "guardian" as a "person who has the legal responsibility for providing the care and management of a person who is incapable…due to age."[23] The Act does not define "next of kin," "caretaker," or "agent."

Before the HIV and AIDS Act was enacted, the Ugandan Ministry of Health promulgated guidelines indicating that, where a parent or guardian provides consent for a child, "the testing must be done in the best interest of the child."[24] However, the "best interest of the child" standard is not expressly incorporated into the HIV and AIDS Act. Moreover, in 2005 the Ugandan Ministry of Health promulgated guidelines indicating, if a child below the age of 12 asks for HIV testing, the provider should determine whether the

child is capable of understanding the results; if so, the child should be "counselled, tested and given their results."[25] The HIV and AIDS Act does not expressly incorporate this exception.

3. Pre- and post-test counseling must be provided in connection with HIV testing

The HIV and AIDS Prevention and Control Act states that pre- and post-test counseling must be provided in connection with an HIV test. Section 3 of the Act states that a "health unit which carries out an HIV test shall in all cases provide pre and post-test counselling to a person undergoing an HIV test."[26] The same section states that a "health unit may where necessary and with the consent of the person tested require the attendance of any other person likely to be affected by the results of such test."[27]

4. A child's HIV status may not be disclosed without the child's consent, unless an exception applies

The HIV and AIDS Prevention and Control Act also regulates disclosure of HIV test results. The Act provides that "results of an HIV test shall be confidential and shall only be disclosed or released by a medical practitioner or other qualified officer to the person tested."[28] This provision, however, is qualified by several exceptions. For one, the Act permits disclosure to the parent or guardian of a minor (i.e., within the meaning of the Act, a child younger than 12).[29] The Act also permits disclosure to a parent or guardian of a person of "unsound mind," a legal administrator or guardian (with the consent of the person tested), a person's sexual partner, and medical practitioners.[30] Moreover, although the Act does not require persons older than 12 to disclose test results to a parent or guardian, the 2010 Uganda Testing and Counseling Policy recommends providers encourage children and adolescents to disclose results to "significant persons for support."[31] In addition, the 2009 National Antiretroviral Treatment and Care Guidelines for Adults, Adolescents, and Children states "Every effort should be made by the counselor to convince the minor about the need to involve the parents/guardians."[32]

5. A child may only be tested for HIV without consent under limited circumstances

The HIV and AIDS Prevention and Control Act permits medical providers to test for HIV without obtaining consent if consent is "unreasonably withheld."[33] Testing without consent is also permissible "in an emergency due to [a patient's] grave medical or psychiatric condition," where the provider "reasonably believes that such a test is clinically necessary or desirable in the interest of that person."[34] Moreover, the Act states that certain people "shall" or "may be subjected" to HIV tests, including alleged perpetrators of sexual offenses, victims of sexual offenses, pregnant women, partners of pregnant women, and those required to be tested pursuant to a court order.[35]

6. Ugandan statutory law does not expressly allow children to independently consent to HIV treatment

The standard age of majority in Uganda is 18.[36] Although the HIV Prevention and Control Act names 12 as the age of consent for HTC, the Act does not expressly allow children younger than 18 to independently consent to HIV treatment.

In addition, the HIV Prevention and Control Act does not expressly indicate who may provide consent for HIV treatment for children younger than 18. Other statutes offer some guidance on who may consent to a child's medical treatment. For instance, the Ugandan Children Act states a "parent, guardian or any person having custody of a child" has a duty to "maintain that child," which includes fulfilling the child's right to "medical attention."[37] The Children Act also states that, if a child's parents die, "parental responsibility" transfers to either parent's relatives, or, by way of a care order, to a foster parent or the guardian of an approved home.[38] Moreover, the warden of an orphanage or a foster parent "shall ensure that the child's development while in the approved home or with a foster family, particularly his or her health…is attended to."[39]

7. WHO guidance discusses the importance of laws facilitating children's access to HTC and HIV treatment

The WHO has promulgated guidance and recommendations relating to HIV services for adolescents ("WHO Guidance").[40] WHO Guidance defines adolescents as persons aged 10–19,[41] and notes "[p]olicies related to age of consent to testing can pose barriers to adolescents' access to HTC and other health services."[42] The Guidance cites age of consent policies as one reason "adolescents are less likely than adults to be tested, access care, remain in care and achieve viral suppression."[43] Age of consent laws are intended to protect adolescents, but the WHO has observed that age of consent policies in many countries "are a key barrier to uptake of services by adolescents."[44] In particular, studies have shown that requiring parental consent to HIV services may reduce adolescent access, because "children want to avoid telling their parents about their health problems and sexual activity."[45]

a. Age of consent for HTC should be lower than age of majority

While recognizing countries "should consider how best to address these issues within their own legal and social context," the WHO Guidance states that in general the age of consent should be lower than the standard age of majority.[46] According to the WHO, countries that have lowered the age of consent to twelve have seen an increase in HTC participation without adverse effects.[47] The WHO also notes that, in establishing an age of consent, countries should avoid prescribing it in a manner that does not allow medical providers to use their best judgment about a patient's capacity for consent.[48] Uganda's HIV Prevention and Control Act aligns with these recommendations by establishing 12 as the age of consent for obtaining an HIV test. It is not clear, however, whether Ugandan children younger than age 12 are ever permitted to independently consent to HTC.

b. Children legally authorized to independently consent to HTC should also have the legal right to independently consent to HIV treatment

The WHO Guidance also states that children and adolescents who are able to independently consent to HTC should also be able to independently consent to HIV and AIDS care and treatment.[49] The Guidance states it is "essential to make it easier for adolescents to start treatment once they have been diagnosed."[50] Moreover, the Guidance provides that "an adolescent who possesses the legal right to access HTC should

have autonomous access to HIV prevention and treatment modalities as part of linkage to comprehensive care."[51]

The Ugandan Ministry of Health has stressed the importance of facilitating access to both testing and treatment, noting "HIV testing and counseling without linkage to treatment confers little or no benefit."[52] While Uganda's HIV Prevention and Control Act permits children 12 and older to independently consent to HTC, Ugandan law does not allow children younger than 18 to independently consent to HIV treatment.

c. Age of consent laws should recognize role of caregivers

WHO Guidance states legislation should facilitate access to HTC for orphans and vulnerable adolescents. Adolescents considered vulnerable include, but are not limited to, homeless children, adolescent sex workers, adolescents with multiple sex partners, and those in child-headed households.[53] Specifically, WHO Guidance discusses the importance in South Africa of age of consent legislation recognizing the role of surrogate decision-makers who may not have legal guardian status.[54] Allowing caregivers to consent to HTC services for children not able to independently consent can ensure that children without clear legal guardians and children estranged from their legal guardians can access HTC services. According to the WHO Guidance "[t]he recognition of a caregiver as a surrogate decision-maker for children in relation to HIV testing recognizes that the absence of a parent or guardian should not serve as a barrier to a child accessing HTC."[55] Uganda's HIV Prevention and Control Act aligns with this guidance by permitting a minor's "parent, guardian, next of kin, caretaker, or agent" to provide informed consent for HTC. The Act does not, however, expressly state who may consent to HIV treatment on behalf of a minor.

d. The guiding principle for age of consent laws should be the "best interest of the child"

Finally, the WHO Guidance notes the importance of adopting laws and guidelines that meet those obligations imposed on state parties by the 1989 Convention on the Rights of the Child. Article 3 of the Convention requires actions "concerning children […] undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies" have as a primary consideration the 'best interests of the child.'"[56] The Ugandan HIV and AIDS Prevention and Control Act does not expressly incorporate the "best interest" standard for HIV services.

V. Considerations

In light of the WHO Guidance, Uganda could consider adopting reforms to facilitate children's and adolescents' access to HIV testing, counseling, and treatment. First, however, it should be acknowledged that Uganda has set the age of independent consent to HTC well below the normal age of majority, which should facilitate adolescents' access to HTC. Uganda could consider adopting legislation that expressly permits children older than 12 to independently consent to HIV treatment. Uganda could also consider further clarifying who may provide consent for a child's HTC and HIV treatment when the child cannot independently consent. Related to these considerations is the need to widely disseminate these laws as well as to ensure that they provide for channels of redress when individuals' rights are violated.

VI. Research Methods

To assess the legal landscape relating to age of consent for HTC and HIV treatment in Uganda, the research collaborators searched numerous databases for relevant statutes, case law, and articles. Databases searched include, but are not limited to, the Uganda Legal Information Institute, Google Scholar, and the University of Washington WorldCat service (which runs searches across approximately 95 databases worldwide, including PubMed and Academic Search Complete). The search terms used include, but are not limited to, "HIV Prevention and Control Act 2014," "HIV testing and children in Uganda," "consent to medical treatment by minors in Uganda," "consent to ART by minors in Uganda," and "health care providers and HIV testing for children in Uganda." Research limitations included limited access to potentially relevant materials.

Authors: Jeff Lane, Maddie Haller, Amy Hagopian, Sallie Sanford, Zahara Nampewo, and Aaron Katz.

This AIDS Law Brief Background Paper was prepared by the University of Washington and Makerere University and has been supported by the President's Emergency Plan for AIDS Relief (PEPFAR) through the Centers for Disease Control and Prevention (CDC) under the terms of Cooperative Agreement Number U48-DP001911. The findings and conclusions are those of the authors and do not necessarily represent the official position of the Centers for Disease Control and Prevention. This AIDS Law Brief does not constitute legal advice.

References:

[1] *Uganda: HIV and AIDS Estimates (2014)*, UNAIDS.ORG, http://www.unaids.org/en/regionscountries/countries/uganda (last accessed August 10, 2015).
[2] *Id.*
[3] UNAIDS, GLOBAL REPORT: UNAIDS REPORT ON THE GLOBAL AIDS EPIDEMIC 2013, 18 (2013).
[4] GLOBAL COMMISSION ON HIV AND THE LAW, REGIONAL ISSUES BRIEF: CHILDREN, HIV, AND THE LAW, 8 (2012).
[5] WHO, HIV AND ADOLESCENTS: GUIDANCE FOR HIV TESTING AND COUNSELING AND CARE FOR ADOLESCENTS LIVING WITH HIV – RECOMMENDATIONS FOR A PUBLIC HEALTH APPROACH AND CONSIDERATIONS FOR POLICY-MAKERS AND MANAGERS, viii (2013).
[6] *Id.*
[7] UNAIDS REPORT, *supra* note 3, at 48.
[8] *Id.*
[9] WHO HTC GUIDANCE, *supra* note 5, at viii.
[10] *Id.*

[11] *Voluntary medical male circumcision for HIV prevention*, WHO.INT., http://www.who.int/hiv/topics/malecircumcision/fact_sheet/en/index.html (last accessed August 10, 2015).
[12] WHO, PREVENTING EARLY PREGNANCY AND POOR REPRODUCTIVE OUTCOMES AMONG ADOLESCENTS IN DEVELOPING COUNTRIES, ix (2011).
[13] WHO HTC GUIDANCE, *supra* note 5, at 5.
[14] WHO, UNICEF, UNAIDS, GLOBAL UPDATE ON HIV TREATMENT 2013: RESULTS, IMPACT AND OPPORTUNITIES, 13 (2013); *see also* WHO HTC GUIDANCE, *supra* note 5, at 2.
[15] UNAIDS REPORT, *supra* note 3, at 48.
[16] African Charter on the Rights and Welfare of the Child art. 14(1) (1999); African (Banjul) Charter on Human and Peoples' Rights art. 16(1) (1986).
[17] Uganda Const. XIV(b) (1995).
[18] *Id.* § 34(3).
[19] HIV and AIDS Prevention and Control Act 2014 § 9 (Uganda).
[20] *Id.* §§ 10(2)(c), 1.
[21] UGANDA MINISTRY OF HEALTH, UGANDA COUNSELLING AND TESTING POLICY (3d ed.), § 6.2(e) (2010), *available at* https://www.k4health.org/sites/default/files/HCT%20Policy_%20Final%202010.pdf.
[22] HIV and AIDS Act, *supra* note 19, § 10(1).
[23] *Id.* § 1.
[24] UGANDA COUNSELLING AND TESTING POLICY, *supra* note 21, § 6.2(d).
[25] UGANDA MINISTRY OF HEALTH, UGANDA NATIONAL POLICY GUIDELINES FOR HIV TESTING AND COUNSELING, 22 (2005), *available at* http://www.who.int/hiv/pub/guidelines/uganda_art.pdf.
[26] HIV and AIDS Act, *supra* note 19, § 3(1).
[27] *Id.* § 3(2).
[28] *Id.* § 18(1).
[29] *Id.* § 18(2)(a).
[30] *Id.* § 18(2)(b)–(e).
[31] UGANDA COUNSELLING AND TESTING POLICY, *supra* note 21, § 6.2(e).
[32] Uganda Ministry of Health, NATIONAL ANTIRETROVIRAL TREATMENT AND CARE GUIDELINES FOR ADULTS, ADOLESCENTS, AND CHILDREN, 5 (2009), *available at* http://www.who.int/hiv/amds/uganda_moh_treatment_guidelines.pdf.
[33] HIV and AIDS Act, *supra* note 19, § 11(a).
[34] *Id.* § 11(b).
[35] *Id.* § 12–14.
[36] UGANDA NATIONAL POLICY GUIDELINES, *supra* note 25, at 22.
[37] Children's Act 1997 § 5(1)(6) (Uganda).
[38] *Id.* § 6(2).
[39] *Id.* § 31(3).
[40] WHO HTC GUIDANCE, *supra* note 5.
[41] *Id.* at viii.
[42] *Id.* at x.
[43] *Id.* at 2, 20.
[44] *Id.* at 20.

[45] *Id.*
[46] WHO HTC GUIDANCE, *supra* note 5, at 20.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 12, 50.
[50] *Id.* at 7.
[51] *Id.* at 12.
[52] UGANDA COUNSELLING AND TESTING POLICY, *supra* note 21, § 6.5.
[53] WHO HTC GUIDANCE, *supra* note 5, at 12.
[54] *Id.* at 13.
[55] *Id.*
[56] Convention on the Rights of the Child art. 3, Nov. 20, 1989, 3 U.N.T.S. 1577.