

I. Introduction

This AIDS Law Brief Background Paper assesses the legal environment in Nigeria for HIV testing and counseling (HTC) for children and adolescents and compares the 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 may pose barriers to children's and adolescents' access to HTC services in Nigeria and suggests possible legal reforms to facilitate their access.

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

II. Summary

- The age of consent for health care services in Nigeria is 18
- Nigeria's national guidelines for HTC allow children to independently consent to HTC if they are married, pregnant, parents, or sexually active and if a provider determines the child is mature enough to independently consent and the test is in the best interest of the child
- Nigeria's national guidelines for HTC require consent of a parent or legal guardian for children who do not qualify as mature minors (consent of a caregiver who is not a legal guardian is not sufficient)

III. Background

UNAIDS estimated that in 2014, 380,000 children aged 0-14 were living with HIV in Nigeria.¹ In 2013, HIV prevalence among Nigerians aged 15-24 was approximately 4.2 percent.² About one out of every three people between 15 and 24 newly infected with HIV in 2009 was from Nigeria or South Africa.³

Globally, in 2012, approximately 2.1 million adolescents (aged 10-19) were living with HIV.⁴ About one-seventh of all new HIV infections occur during adolescence.⁵ HIV treatment coverage for children is a little more than half that of adults.⁶ Between 2005 and 2012, HIV-related deaths among adolescents increased by 50%, while the global number of HIV-related deaths fell by 30%.⁷ Adolescents are the only age group in which AIDS deaths have risen between 2001 and 2012.⁸

According to UNAIDS, the increase in AIDS deaths among adolescents is a result of "poor prioritization of adolescents in strategic plans for scale-up of HIV treatment and lack of testing and counselling."⁹ Use of HTC by adolescents is significantly lower for adolescents than for adults.¹⁰ In sub-Saharan Africa, survey data suggests only 10% of young men and 15% of young women (15-24 years) were aware of their HIV status.¹¹ HTC is also an essential component of the package of care included in voluntary medical male

circumcision (VMMC) programs – of which adolescents are a key target group.¹² The WHO has identified age of consent policies as a “key barrier” to uptake of HIV/AIDS services by adolescents, including HTC.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 fifteen had been started on ART, representing a 28% coverage rate among children who need ART.¹⁴ Approximately 16 million adolescent women give birth every year,¹⁵ and the WHO has concluded that adolescent girls with HIV have less access to prevention of mother-to-child transmission (PMTCT) interventions than adult women.¹⁶

III. Key Findings

1. Nigeria’s National Guidelines for HIV Counselling and Testing permit certain “mature minors” to independently consent to HTC

Under Nigeria’s 2011 National Guidelines for HIV Counselling and Testing (“National HTC Guidelines”), children under 18 must have permission from a parent or legal guardian to undergo an HIV test.¹⁷ The National HTC Guidelines do not permit a caregiver, who is not a legal guardian, to consent to an HIV test on behalf of a child. The National HTC Guidelines state that children under 18 who are “married,¹⁸ pregnant, parents, or sexually active” can independently consent to an HIV test after a counselor makes an “independent assessment of the minor’s maturity to undergo an HIV test.”¹⁹ Moreover, counselors may refuse testing if they determine it is not in the child’s best interest.²⁰

2. Nigeria’s National Health Act protects the confidentiality of health information, but confidentiality of a minor’s health information is less clear

Nigeria adopted a National Health Act in 2014 that contains provisions relevant to issues surrounding HIV testing and age of consent, but it does not directly address age of consent for HTC. Under Section 26, “all information concerning a user, including information relating to his or her health status, treatment, or stay in a health establishment is confidential.”²¹ The section also states, however, that in the case of a minor a parent or guardian may request disclosure of health information.²² The National Health Act does not clarify whether a parent or guardian may independently request the disclosure of health information of children who qualify as mature minors under the National HTC Guidelines.

3. Nigeria’s AIDS Anti-Discrimination Act does not appear to specify the age of consent for HTC

In 2014, Nigeria adopted an HIV Anti-Discrimination Act for the purpose of eliminating all forms of discrimination facing people living with HIV and AIDS. We were not able to obtain a copy of the final bill text as adopted, but prior versions of the bill did not include provisions specifying the age of consent for HTC or other HIV-related services.

IV. Analysis

1. Nigeria's National Guidelines for HIV Counselling and Testing permit certain "mature minors" to independently consent to HTC

The National HTC Guidelines permit "mature minors" to independently consent to HTC if a provider determines the minor is capable of consenting and the test is in the minor's best interest.²³ The National HTC Guidelines provide standards for all public and private organizations that provide HIV counseling and testing services in the country.²⁴ These guidelines define "children" as anyone below the age of 18.²⁵ They state that "a parent's or legal guardian's consent is required before testing children below the age of 18 years," but also allow "mature minors" to independently consent to HIV testing and counseling.²⁶ The guidelines define mature minors as "young people below 18 years of age, who are married, pregnant, parents or sexually active."²⁷ The guidelines call on counselors to make "an independent assessment of the minor's maturity to undergo an HIV test" and ensure proper follow-up services.²⁸ They also state the welfare of the child should be the primary consideration when testing for HIV,²⁹ and counselors should determine the reason for testing and have the "right to refuse" testing if it is not in the child's best interest.³⁰

The National HTC Guidelines define three types of counselors. The first is counselor supervisors who must have a college degree, have received counseling and testing and supervisor trainings, and have at least five years of counseling experience.³¹ The second is basic HIV testing and counseling counselors, who must have a certificate from secondary school and undergo a 10-day training and a 3-month supervised service delivery and evaluation period.³² The third is community-based HIV testing and counseling counselors, which includes community workers and volunteers who undergo a 10-day training.³³

The National HTC Guidelines discuss children in other contexts as well. They state that children infected with HIV may have delayed development and that medical providers should therefore ensure that parents and legal guardians are "intimately involved with all issues pertaining to the child's illness including the disclosure process."³⁴ Providers should also ensure that parents and guardians who want to know their children's HIV status are not requesting a test for impermissible reasons, such as to determine their own status.³⁵

Additionally, the National HTC Guidelines discuss human rights and ethical principles including the right to privacy, nondiscrimination, and the highest attainable standard of physical and mental health, as well as the principles of counseling, confidentiality, and consent.³⁶ They define informed consent as meaning "intentional permission given by a client to a health care provider to proceed with the proposed HIV test procedures. The permission is based on an adequate understanding of the advantages, risks, potential consequences and implications of an HIV test result which could be negative or positive."³⁷ The guidelines further stress that testing should be voluntary and non-coercive and the various choices clients make must be respected.³⁸ Finally, consent of the patient is required for disclosure of HIV test results to third parties.³⁹

2. The Child's Rights Act does not address age of consent for HTC

Spurred on by the Convention on the Rights of the Child,⁴⁰ Nigeria passed the Child's Rights Act in 2003. Section 1 of the Child's Rights Act requires that every action taken concerning a child, regardless of whether it is taken by a private or public body, must primarily consider the child's best interest.⁴¹ The Child's Rights Act does not expressly address the age at which children should be allowed to independently consent to HTC or other health care services.

3. Nigeria's National Health Act does not address age of consent for HTC

Nigeria adopted a National Health Act in 2014 that contains provisions relevant to issues surrounding HTC, but it does not directly address age of consent for HTC. Section 1 of the National Health Act states that one of the purposes of the law is to "protect, promote, and fulfill the rights of the people of Nigeria to have access to health care services."⁴² Under Section 26, "all information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment is confidential."⁴³ Furthermore, under the same section, no one is permitted to disclose health care information unless: (a) the user consents in writing; (b) a court order requires disclosure; (c) in the case of a minor, with the request of a parent or guardian; (d) in the case of a person who is otherwise unable to grant consent upon the request of a guardian or representative; or (e) non-disclosure of the information is a serious public health threat.⁴⁴ The National Health Act does not clarify whether a parent or guardian may independently request the disclosure of health information of children who qualify as mature minors under the National HTC Guidelines. Finally, Section 27 allows disclosure between health care workers within the scope of their official duties and when it is in the best interest of the patient.⁴⁵

4. Nigeria's AIDS Anti-Discrimination act does not appear to address age of consent for HTC

Recently, Nigeria adopted an HIV Anti-Discrimination Act.⁴⁶ We were not able to obtain a copy of the final Act as adopted, but versions of the bill under consideration did not specify the age of consent for HIV services. Pursuant to Nigerian case law and the Constitution, children's rights issues are solely reserved for Nigerian states to legislate.⁴⁷ Thus, the HIV Anti-Discrimination Act is only in effect in the Capital Territory, Abuja, until adopted by other Nigerian states. Each of the 36 Nigerian states would have to separately adopt the bill for it to be in effect across Nigeria.

5. WHO HTC Guidance emphasizes the importance of adopting policies that permit competent minors to consent to HTC

The WHO has promulgated guidance for HIV-related testing, counseling, and care of adolescents ("WHO HTC Guidance").⁴⁸ The WHO HTC Guidance defines adolescents as persons aged 10-19,⁴⁹ and notes that "[p]olicies related to age of consent to testing can pose barriers to adolescents' access to HTC and other health services".⁵⁰ The WHO HTC 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."⁵¹ On average

only 10% of men and 15% of women in this age bracket in sub-Saharan Africa are aware of their status.⁵² 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.”⁵³ In particular, studies have shown that requiring parental consent to HTC services might reduce adolescent access because “children want to avoid telling their parents about their health problems and sexual activity.”⁵⁴

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

While recognizing that countries “should consider how best to address these issues within their own legal and social context,” the WHO HTC Guidance states that in general the age of consent should be lower than the standard age of majority (usually 18).⁵⁵ According to the WHO, countries that have lowered the age of consent to 12 (e.g., Lesotho and South Africa) have seen an increase in HTC participation without adverse effects.⁵⁶ The WHO also notes that lawmakers should take care when establishing an age of consent to avoid prescribing it in a manner that does not allow health care providers to use their best judgment about a patient’s capacity for consent.⁵⁷ Nigeria’s National HTC Guidelines allow some minors to independently consent to HTC (i.e., minors who are married, pregnant, parents, or sexually active). However, minors who do not fit into one of the above categories, but have potentially been exposed to HIV (e.g., minors who have injected drugs or received a blood transfusion), are not permitted to independently consent to HTC. Other Nigerian policies suggest that when there is no parent or legal guardian available to consent on behalf of a minor, health care providers should seek consent from a substitute decision-maker who has “authority under the law” to make decisions based on a child’s best interest.⁵⁸

b. Access to HTC should entail access to care

The WHO HTC Guidance also states that minor patients who are able to consent to HTC should also be able to consent to HIV and AIDS care.⁵⁹ The WHO HTC Guidance expressly state 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.”⁶⁰ Nigerian statutory law is not clear regarding the age of consent for medical care, which may prevent some children who learn they are HIV-positive from accessing ART.

c. Age of consent laws should recognize role of caregivers

WHO HTC Guidance states that legislation should facilitate access to HTC services 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.⁶¹ Specifically, WHO HTC Guidance discusses the importance of age of consent legislation recognizing the role of surrogate decision-makers who may not have legal guardian status.⁶² 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 HTC 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.⁶³ Nigeria's National HTC Guidelines do not appear to allow non-legal guardians to consent to HTC 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 HTC Guidance states that legislation and guidelines should be created to meet those obligations imposed on countries by the 1989 Convention on the Rights of the Child.⁶⁴ Article 3 of the Convention on the Rights of the Child requires that 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.”⁶⁵ Nigeria's National HTC Guidelines acknowledge the importance of this standard by granting HIV counselors the authority to determine whether an HIV test is in the best interest of the child.

V. Considerations

Our analysis identified four areas of the age of consent for HTC framework in Nigeria that could be clarified or strengthened to better align with the WHO HTC Guidance. First, the age at which a person may independently consent to HTC is unclear. Nigeria has no statutory age of consent for HTC. The National HTC Guidelines state that children under the age of 18 who are married, pregnant, parents or sexually active can independently consent to HTC, if the counselor deems the child sufficiently mature and determines the test is in the child's best interest. The same guidelines state that children who do not qualify as mature minors require consent from a parent or legal guardian. The National HTC Guidelines appear to recognize the lack of clear legal guidance regarding age of consent for HTC by stating “[c]hildren require special consideration; their welfare must be the primary concern when considering testing for HIV. *These considerations can best be protected by laws and policies which should specify the age and circumstances under which minors may consent or assent to HIV testing.*”⁶⁶ Adopting a statutory age of consent framework for HTC that facilitates broad access to HIV testing and treatment could help clarify when a minor can independently access these services. Statutory provisions could also help protect the best interests of children by increasing the number of children who access HTC services. For example, the WHO has reported that after South Africa and Lesotho lowered the age of consent for HTC to 12, both countries saw access and uptake of HTC by minors increase without adverse consequences.⁶⁷ Establishing a lower age of consent for HTC could also help ensure that minors who are potentially exposed to HIV but are not married, pregnant, parents, or sexually active can access HTC. **Nigeria could consider adopting a lower statutory age of consent for HTC or revising the National HTC Guidelines to establish a lower age of consent threshold.**

Second, it is unclear under Nigerian law whether a minor whom health workers determine is sufficiently mature to independently consent to HTC can also independently consent to HIV treatment. To be consistent with the WHO HTC Guidance, **Nigeria could consider clarifying in law or through**

another policy that a child deemed sufficiently mature to independently consent to an HIV test is also sufficiently mature to independently consent to HIV treatment.

Third, the National HTC Guidelines state that a parent or legal guardian’s consent is required for a child under 18 who does not qualify as a mature minor. Requiring a parent’s or legal guardian’s consent, as opposed to a caregiver’s consent, may reduce access to HTC for orphans and vulnerable children who may not have a clear “legal” guardian. To be consistent with WHO guidance, **Nigeria could consider adding caregivers to the list of persons authorized to consent to HTC and HIV treatment on behalf of a child.**

Fourth, the recently passed National Health Act suggests that parents and guardians may be able to unilaterally request the disclosure of a minor’s health information and does not state whether this ability applies to “mature minors” are able to independently consent to HTC. **Nigeria could consider clarifying that a parent or guardian cannot independently request the disclosure of a mature minor’s health information.**

III. Research Methods

To assess the legal landscape in Nigeria, we searched numerous databases for relevant statutes, case law, and articles. Databases searched include, but were not limited to, various Nigerian Government websites, The Foreign Law Guide, Google Scholar, and the University of Washington WorldCat service (which searches approximately 95 databases worldwide, including PubMed and Academic Search Complete). The search terms used include, but were not limited to, “HIV testing and children in Nigeria,” “consent to HIV testing by minors in Nigeria,” “Nigeria Child’s Rights Act,” “age of consent Nigeria,” and “HIV counseling age of consent Nigeria.” Research limitations include limited access to Nigerian case law and certain secondary sources.

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¹ Nigeria, UNAIDS.ORG, <http://www.unaids.org/en/regionscountries/countries/nigeria/> (last accessed September 2, 2015).

² NATIONAL AGENCY FOR THE CONTROL OF AIDS, FEDERAL REPUBLIC OF NIGERIA: GLOBAL AIDS RESPONSE COUNTRY PROGRESS REPORT, Table 2 – Global AIDS Response Program Indicators (2014), *available at*

http://www.unaids.org/sites/default/files/en/dataanalysis/knownyourresponse/countryprogressreports/2014countries/NGA_narrative_report_2014.pdf.

³ UNICEF, OPPORTUNITY IN CRISIS: PREVENTING HIV INFECTION FROM EARLY ADOLESCENCE TO YOUNG ADULTHOOD, 6 (2011), *available at*

http://www.unicef.org/media/files/Opportunity_in_Crisis_LoRes_EN_05182011.pdf.

⁴ UNAIDS, GLOBAL REPORT: UNAIDS REPORT ON THE GLOBAL AIDS EPIDEMIC, 18 (2013).

⁵ WHO, HIV AND ADOLESCENTS: GUIDANCE FOR HIV TESTING AND COUNSELLING AND CARE FOR ADOLESCENTS LIVING WITH HIV – RECOMMENDATIONS FOR A PUBLIC HEALTH APPROACH AND CONSIDERATIONS FOR POLICY-MAKERS AND MANAGERS, viii (2013).

⁶ UNAIDS REPORT, *supra* note 4, at 48.

⁷ *Id.*; WHO HTC Guidance, *supra* note 5, at viii.

⁸ UNAIDS REPORT, *supra* note 4, at 48.

⁹ *Id.*

¹⁰ WHO HTC GUIDANCE, *supra* note 5, at viii.

¹¹ *Id.*

¹² *Voluntary medical male circumcision for HIV prevention*, WHO.INT.,

http://www.who.int/hiv/topics/malecircumcision/fact_sheet/en/index.html (last accessed July 13, 2015).

¹³ WHO HTC GUIDANCE, *supra* note 5, at 20.

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 WHO, PREVENTING EARLY PREGNANCY AND POOR REPRODUCTIVE OUTCOMES AMONG ADOLESCENTS IN DEVELOPING COUNTRIES, ix (2011).

¹⁶ WHO HTC GUIDANCE, *supra* note 5, at 5.

¹⁷ FEDERAL MINISTRY OF HEALTH: NIGERIA, NATIONAL GUIDELINES FOR HIV COUNSELLING AND TESTING, 36 (2011).

¹⁸ The legal age for marriage in Nigeria is 18. Child's Rights Act (2003), § 21 (Nigeria).

¹⁹ NATIONAL HTC GUIDELINES, *supra* note 17, at 36.

²⁰ *Id.*

²¹ National Health Act (2014), § 26(1) (Nigeria).

²² *Id.* § 26(2)(b)(i).

²³ NATIONAL HTC GUIDELINES, *supra* note 17, at 36.

²⁴ *Id.* at 1.

²⁵ *Id.* at 18.

²⁶ *Id.* at 36.

²⁷ *Id.* at 19, 36.

²⁸ *Id.* at 36.

²⁹ NATIONAL HTC GUIDELINES, *supra* note 17, at 36.

³⁰ *Id.*

³¹ *Id.* at 12–13.

³² *Id.* at 13–14.

³³ *Id.*

³⁴ *Id.* at 18.

³⁵ NATIONAL HTC GUIDELINES, *supra* note 17, at 18, 36.

³⁶ *Id.* at 35.

³⁷ *Id.*

³⁸ *Id.* at 35–36.

³⁹ *Id.* at 38.

⁴⁰ UNICEF, INFORMATION SHEET: THE CHILD’S RIGHTS ACT (2007), *available at* http://www.unicef.org/wcaro/english/WCARO_Nigeria_Factsheets_CRA.pdf.

⁴¹ Child’s Rights Act, *supra* note 18, § 1.

⁴² National Health Act, *supra* note 21, § 1(1)(e).

⁴³ *Id.* § 26(1).

⁴⁴ *Id.* § 26(2).

⁴⁵ *Id.* § 27.

⁴⁶ Nigerian National Assembly, *HIV/AIDS Anti-Discrimination Bill Passed into Law* (Nov. 4, 2014), NASSNIG.ORG, <https://nassnig.org/nass/news.php?id=568> (last accessed September 4, 2015).

⁴⁷ *See, e.g.*, Constitution of Nigeria (1999), § 17(3)(f) (providing that states shall create policies to ensure children “are protected against any exploitation whatsoever, and against moral and material neglect.”); *A.G. Lagos State v. A.G. Federation of Nigeria*, [2003] 111 LRCN 1868A (Nigeria).

⁴⁸ WHO HTC GUIDANCE, *supra* note 5.

⁴⁹ *Id.* at viii.

⁵⁰ *Id.* at x.

⁵¹ *Id.* at 2, 20.

⁵² *Id.* at viii, 4.

⁵³ *Id.* at 20.

⁵⁴ WHO HTC GUIDANCE, *supra* note 5, at 20.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See .e.g.*, FEDERAL MINISTRY OF HEALTH, NATIONAL TRAINING COURSE ON PEDIATRIC HIV AND AIDS FOR DOCTORS, FACILITATORS’ MANUAL, 59 (2009).

⁵⁹ WHO HTC GUIDANCE, *supra* note 5, at 12, 50.

⁶⁰ *Id.* at 14.

⁶¹ *Id.* at 12.

⁶² *Id.* at 13.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Convention on the Rights of the Child art. 3, Nov. 20, 1989, 3 U.N.T.S. 1577.

⁶⁶ WHO HTC GUIDANCE, *supra* note 5, at 13.

⁶⁷ *Id.* at 20.