

I. Introduction

This AIDS Law Brief Background Paper assesses the legal environment in Tanzania regarding the age of consent for HIV/AIDS testing and counseling (“HTC”), compares the current legal framework for age of consent for HTC services in Tanzania with World Health Organization (WHO) recommendations, and identifies ambiguities and conflicts of law that may pose barriers to children’s access to HTC services in Tanzania. This paper was prepared by the University of Washington and the Tanzania Women Lawyers Association and provides support for an AIDS Law Brief on Age of Consent for HIV Testing, Counseling and Treatment in Tanzania. This Background Paper does not constitute legal advice and should not be relied on for the purposes of complying with Tanzanian law.

II. Summary

- The statutory age of consent for independently consenting to HTC and HIV treatment in Tanzania is 18
- Tanzania Ministry of Health & Social Welfare (“MOHSW”) and National AIDS Control Programme guidelines permit minors who are married, parents or sexually active to independently consent to HTC
- Tanzanian law is not clear regarding what types of non-legal guardians can consent to HTC on behalf of a minor
- Tanzania statutory law permits disclosing health information of minors to the minor’s parents/guardians

III. Background

In Tanzania, around 5.3% of people aged 15 to 49 are HIV positive.¹ UNAIDS estimates that of the approximately 1,400,000 persons living with HIV in Tanzania, more than 230,000 are younger than 15.²

In 2012, approximately 2.1 million adolescents (ages 10-19) were living with HIV worldwide.³ About one-seventh of all new HIV infections occur during adolescence.⁴ Globally, between 2005 and 2012, HIV-related deaths among adolescents increased by 50%, while the global number of HIV-related deaths fell by 30%.⁵ Adolescents are the only age group in which AIDS deaths have risen between 2001 and 2012.⁶

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.”⁷ Use of HTC by adolescents is significantly lower for adolescents than for adults.⁸ 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.⁹ HTC is also an essential component of the package of care included in voluntary medical male circumcision (VMMC) programmes – of which adolescents are a key target group.¹⁰ The WHO has identified age of consent policies as a “key barrier” to uptake of HIV/AIDS services by adolescents, including HTC.¹¹

Scaling up antiretroviral therapy (ART) coverage for children and adolescents also remains challenging. HIV treatment coverage for children is a little more than half that of adults.¹² As of 2012, about 630,000 children below the age of 15 had been started on ART, representing a 28% coverage rate among children who need ART.¹³ Approximately 16 million adolescent women give birth every year,¹⁴ 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.¹⁵

IV. Key Findings

1. The statutory age of consent for HTC and HIV treatment is 18, with no statutory exceptions

The age of majority in Tanzania for independently consenting to medical care, including HIV treatment, is 18.¹⁶ The 2008 HIV & AIDS (Prevention and Control) Act (“HIV & AIDS Act”) provides that every “person residing in Tanzania may on his own motion volunteer to undergo HIV testing.”^{17,18} The HIV & AIDS Act does not define whether the term “person” refers to all people, or just to persons who have reached the age of 18 (the age of majority in Tanzania).¹⁹ The HIV & AIDS Act also states that “a child or person with inability to comprehend the result may undergo HIV testing after a written consent of a parent or recognized guardian.”²⁰ The statute does not define the term “recognized guardian.”

The WHO report titled “HIV and adolescents: guidance for HIV testing and counselling and care for adolescents living with HIV” has concluded that the HIV & AIDS Act establishes 18 as the age at which a person may independently consent to HTC in Tanzania.²¹ As described below, guidelines issued by the Government of Tanzania permit certain mature minors to consent to HTC.

2. The results of a child’s HIV test may be disclosed to the child’s parent/guardian and to the child’s spouse or sexual partner

The HIV & AIDS Act states that the “results of an HIV test shall be confidential and shall be released only to the person tested,”²² but this general rule has certain key exceptions. Notably, “the results of an HIV test may be released [...] in the case of a child, [to] his parent or recognized guardian.”²³ In addition, the results of an HIV test may be disclosed to a “spouse or a sexual partner of an HIV tested person.”²⁴

3. Age of consent for sexual activity is less than 18 under some circumstances

The HIV & AIDS Act establishing 18 years old as the age of consent for HTC is problematic, because statutes governing age of consent to sexual activity permit an adolescent to consent to sexual activity before she or he can consent to HTC. Sexual assault in Tanzania is defined by §129A and §130 of the Penal Code. Those sections define the circumstances under which a “male person commits the offense of rape” in part as “sexual intercourse with a girl or woman [...] with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the

man”.²⁵ Thus, a woman who is 15, but less than 18 years old, can legally have sexual intercourse with her husband. Yet that same woman, under Tanzanian statutory law, cannot independently consent to HTC. Similarly, under the same provisions, it appears that a 17 year-old boy can consent to sex with an 18 year-old girl without either being subject to criminal charges, but that same 17 year-old male could not independently consent to HTC.

4. HTC guidelines adopted by different agencies of the Government of Tanzania may conflict with the HIV & AIDS Act

The Tanzania Ministry of Health & Social Welfare’s “Standard Operating Procedures for HIV Testing and Counselling” (“MOHSW HTC Standards”) may conflict with the HIV & AIDS Act by allowing persons under 18 to independently consent to HTC if the child: (1) is married; (2) has children; or (3) is sexually active.²⁶ The “National Guidelines for the Management of HIV and AIDS,” published by the Tanzania National AIDS Control Program, distinguishes between age of consent for voluntary counseling and testing and provider-initiated counseling and testing, and also may conflict with the statutory age of consent in the HIV & AIDS Act. Both sets of guidelines are described in greater detail below.

a. The Ministry of Health & Social Welfare’s Guidelines for HIV Testing and Counselling permit HTC for “mature minors”

The MOHSW HTC Standards are intended to “guide the provision of HTC services at all levels of the health system.”²⁷ The MOHSW HTC Standards may conflict with the HIV & AIDS Act by allowing persons under 18 to independently consent to HTC if the child: (1) is married; (2) has children; or (3) is sexually active.²⁸ The Standards specify three categories of individuals who “may participate in testing for HIV”²⁹: (1) persons over 18 capable of informed consent; (2) children under 18 where parents or guardians have provided consent; and (3) “[m]ature minors, i.e., adolescents who are married, have children, or [are] sexually active irrespective of their age.”³⁰ In addition, draft 2013 MOHSW “National Comprehensive Guidelines for HIV Testing and Counselling” allow mature minors to independently consent to HTC and define mature minor as “any person below 18 years of age who is married, pregnant, sexually active, or otherwise believed to be at risk for HIV infection.”³¹

The HIV & AIDS Act does not include the “mature minor” category provided for in the MOHSW HTC Standards. The apparent conflict between the MOHSW HTC Standards and the HIV & AIDS Act may be causing confusion among providers and adolescents regarding the age of consent for HTC in Tanzania and may deter providers from offering HTC to adolescents. However, it is possible that the MOHSW has interpreted the HIV & AIDS Act to allow for such mature minor standards given the Act’s aforementioned provision that every “person residing in Tanzania may on his own motion volunteer to undergo HIV testing.”

b. National AIDS Control Programme's Guidelines permit mature minors to independently consent to HTC

The National AIDS Control Programme has issued two sets of guidelines bearing on the ability of minors to independently consent to HTC: (1) “National Guidelines for Voluntary Counseling and Testing” (2005), and (2) “National Guidelines for the Management of HIV and AIDS” (2012). Both sets of guidelines permit certain “mature minors” to independently consent to HTC. The 2012 guidelines state that minors must receive consent from a “guardian or close relative” for provider-initiated counseling and testing, but provide an exception for “mature minors.”³² The 2012 guidelines do not define “mature minor” or state whether mature minors can independently consent to Voluntary Counseling and Testing. The 2005 guidelines, however, state that adolescents who are “married, have children or practice unsafe sex shall be categorised as ‘mature minors’ and permitted unrestricted access to [Voluntary Counseling and Testing] programmes.”³³ When read together, the National AIDS Control Programme guidelines establish a mature minor exception for voluntary and provider-initiated HTC, which is not recognized in Tanzanian statutory law.

5. WHO HTC Guidance recommend laws and guidelines permitting competent minors to consent to HTC

The WHO has promulgated recommendations for adolescent HTC and care of adolescent living with HIV (“WHO HTC Guidance”).³⁴ The WHO HTC Guidance define adolescents as persons aged 10–19,³⁵ and note that “[p]olicies related to age of consent to testing can pose barriers to adolescents’ access to HTC and other health services.”³⁶ 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.”³⁷ While persons 15–24 years old comprise around 40% of HIV infected persons in some east African countries, on average only 10% of men and 15% of women in this age bracket are aware of their status.³⁸ 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.”³⁹ 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.”⁴⁰

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 recommends that in general the age of consent should be lower than the standard age of majority (usually 18).⁴¹ 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.⁴² The WHO also notes that countries 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.⁴³ In Tanzania, the HIV & AIDS Act establishes 18 as the age of consent for HTC. Yet standards issued by the Tanzania MOHSW and guidelines

issued by the National AIDS Control Program provide more flexibility to providers and patients regarding when minors can independently consent to HTC.

b. Access to HTC should entail access to care

The WHO HTC Guidance also recommends that minor patients able to consent to HTC also be able to consent to HIV and AIDS care.⁴⁴ Tanzanian statutory law does not specify an age of consent to independent access to health care, which may prevent some children who learn they are HIV-positive from accessing antiretroviral therapy.⁴⁵

c. Age of consent laws should recognize role of caregivers

In addition, WHO HTC Guidance recommends that legislation 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.⁴⁶ Specifically, WHO HTC Guidance recommends that age of consent legislation recognize the role of surrogate decision-makers who may not have legal guardian status.⁴⁷ 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.”⁴⁸ Tanzania’s HIV & AIDS Act states that “a child or person with inability to comprehend the result may undergo HIV testing after a written consent of a parent or recognized guardian.”⁴⁹ The statute does not define the term “recognized guardian,” but includes the term “legal guardian” in other provisions, suggesting that “recognized guardian” may include some non-legal guardians.

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

Finally, the WHO HTC Guidance recommends that legislation and guidelines be created to meet those obligations imposed on state parties by the Convention on the Rights of the Child.⁵⁰ Article 3 of the 1989 Convention on the Rights of the Child requires that in 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.”⁵¹

V. Considerations

Law and policy in Tanzania appear to contain significant conflicts regarding the age of consent for HTC services. The HIV & AIDS Act does not appear to permit a child to consent to HTC services until the child is 18, with no exceptions. The MOHSW HTC Standards and the National AIDS Control Program Guidelines allow certain “mature minors” to independently consent to HTC services. Faced with this legal

conflict, health care providers could prefer to err on the side of caution and refuse to provide HTC to minors.

Aligning the HIV & AIDS Act with the MOHSW's HTC Guidelines and the WHO HTC Guidance could reduce confusion amongst patients, providers, and parents regarding the legal consent requirements for children seeking HTC services. Tanzania could consider taking a number of steps to clarify the age of consent for HTC.

First, to align with WHO recommendations, **Tanzania could consider amending the HIV & AIDS Act to clearly allow children younger than 18 to independently consent to HTC.** If Tanzania takes this approach, it should engage a broad range of stakeholders in the process to establish a legal framework that protects children, while facilitating children's access to HTC.

Second, to ensure that orphans and vulnerable children have access to HTC, **Tanzania could consider amending the HIV & AIDS Act to expressly allow caregivers without legal guardianship status to provide consent for HTC on behalf of children under their care who are not able to independently consent to HTC.** Alternatively, the MOHSW could issue a regulation or other policy guidance clarifying the types of surrogate decision-makers without legal guardian status who may qualify as "recognized guardians" under the HIV & AIDS Act and consent to HTC on behalf of the child.

Third, to ensure that children who learn their HIV status have access to HIV care and treatment, **Tanzania could consider defining in law the age of consent for seeking HIV/AIDS medical treatment and/or medical care generally.** For example, the South African Children's Act allows a child to independently consent to medical care, including antiretroviral therapy, if (a) the child is age 12 or older; and (b) the child is of "sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment."⁵² Tanzania could adopt a similar legal framework to facilitate children who learn that they are HIV positive accessing HIV treatment.

Fourth, to facilitate adolescents seeking HTC and HIV treatment, **Tanzania could consider clarifying that health information of minors who can independently consent to HTC and/or treatment cannot be disclosed without the minor's consent.**

VI. Research Methods

Researchers used a wide range of online legal and non-legal resources in the preparation of this brief. LexisNexis and Westlaw were searched for relevant primary and secondary legal sources. The guides to Tanzania at GlobalLex, WorldLII, and Brill Online provided the foundational background information on Tanzania and its legal system. Legislative acts were accessed primarily through either the legislature's website or that of the Law Reform Commission of Tanzania. WHO, UNICEF, and UNAIDS resources were consulted for guidelines and best practices, as well as HIV/AIDS data for Tanzania and East Africa. Non-legal databases included the Library of Congress, PubMed, EBSCO, and the University of Washington

WorldCat service. Primary research limitations were the shortage of secondary research on the topic, the lack of an official edition of the 2002 revision of the Laws of Tanzania online, and lack of access to some Tanzanian case law.

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- ⁶ UNAIDS REPORT, *supra* note 3, at 48.
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- ⁸ WHO HTC GUIDANCE, *supra* note 4, at viii.
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- ¹¹ WHO HTC GUIDANCE, *supra* note 4, at 20.
- ¹² UNAIDS REPORT, *supra* note 3, at 48.
- ¹³ WHO, UNICEF, UNAIDS, GLOBAL UPDATE ON HIV TREATMENT 2013: RESULTS, IMPACT AND OPPORTUNITIES, 13 (2013); *see also* WHO HTC GUIDANCE, *supra* note 4, at 2.
- ¹⁴ WHO, PREVENTING EARLY PREGNANCY AND POOR REPRODUCTIVE OUTCOMES AMONG ADOLESCENTS IN DEVELOPING COUNTRIES, ix (2011).
- ¹⁵ WHO HTC GUIDANCE, *supra* note 4, at 5.
- ¹⁶ Act to Reduce the Age of Majority, 24/1970 (Tanz.).

¹⁷ HIV & AIDS (Prevention and Control) Act, 28/2008 § 15(1) (Tanz.).

¹⁸ Unless otherwise specified, these findings apply only to mainland Tanzania. Zanzibar has a separate legislative and judicial system, and is independent from the rest of Tanzania in matters not designated as “Union Matters” in Schedule 1 of the Constitution of the United Republic of Tanzania.

¹⁹ Age of Majority Ordinance, § 2, TANZ. LAWS [CAP 431 R.E. 2002]; *see also* The Law of the Child Act, 21/2009 § 4(1) (Tanz.).

²⁰ HIV & AIDS Act, *supra* note 20, § 15(2).

²¹ WHO, ANNEX 15: ADOLESCENT CONSENT TO TESTING: A REVIEW OF CURRENT POLICIES AND ISSUES IN SUB-SAHARAN AFRICA (2013), *available at* <http://www.ncbi.nlm.nih.gov/books/NBK217954/>.

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²³ *Id.* § 16(2)(a).

²⁴ *Id.* § 16(2)(c).

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²⁷ *Id.* at iv.

²⁸ *Id.* at 4.

²⁹ *Id.*

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³⁴ WHO HTC GUIDANCE, *supra* note 4.

³⁵ *Id.* at viii.

³⁶ *Id.* at x.

³⁷ *Id.* at 2, 20.

³⁸ *Id.* at viii.

³⁹ *Id.* at 20.

⁴⁰ WHO HTC GUIDANCE, *supra* note 4, at 20.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 12, 50.

⁴⁵ GLOBAL COMMISSION ON HIV AND THE LAW, REGIONAL ISSUES BRIEF: CHILDREN, HIV, AND THE LAW, 9 (2012).

⁴⁶ WHO HTC GUIDANCE, *supra* note 4, at 12.

⁴⁷ *Id.* at 13.

⁴⁸ *Id.*

⁴⁹ HIV & AIDS Act, *supra* note 20, § 15(2).

⁵⁰ WHO HTC GUIDANCE, *supra* note 4, at 13.

⁵¹ Convention on the Rights of the Child art. 3, Nov. 20, 1989, 3 U.N.T.S. 1577.

⁵² Children's Act 38 of 2005 as amended § 129(2) (S. Afr.).

