

CHAPTER 11

The rights
of children

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Why are children's rights important?

HIV/AIDS affects children through:

- Living with their own HIV infection.
- Living with the infection, illness and loss of their parents.
- Living with the infection, illness and loss of those around them, such as friends, teachers or other family members.

In this environment, we need to ensure that children **living with HIV or AIDS, or affected by HIV or AIDS**, are not discriminated against, are protected from harm and are given the opportunity to develop and learn like all other children.

In South Africa, children living with HIV or AIDS, or affected by HIV/AIDS face many forms of discrimination and human rights abuses.

DISCRIMINATION AND ABUSES FACED BY CHILDREN

- *Children are often tested for HIV without their consent, or the consent of their parent or guardian.*
- *Young boys and girls are denied access to adequate sexuality education and sexual health care services.*
- *Children orphaned by AIDS struggle to find suitable care-givers.*
- *Children living with HIV or AIDS are sometimes denied access to pre-schools.*

EXAMPLES



Children are a special group in our society because they often cannot take care of themselves. For this reason, they have been identified as a group in need of special protection.

This Chapter will look at:

- Children's rights under our **Constitution** and law, especially health care, welfare and education rights.
- Identifying the types of discrimination we will have to fight against when children are living with HIV or AIDS, or affected by HIV or AIDS.

11.1.1 CHILDREN'S RIGHTS AND THE LAW

Children are protected by the Constitution of South Africa and the United Nations (UN) *Convention on the Rights of the Child* that South Africa signed and agreed to on 16 June 1995.

The Constitution sets out the human rights of all people. Children also have these general rights, for example:

- The right to equality and non-discrimination
- The right to privacy and dignity.

The Constitution also recognises that children need special protection. Section 28 of the Constitution sets out special rights just for children:

- Every child has the right to family care or parental care.
- If a child is taken away from his or her family, the child has a right to have other appropriate care.
- Every child has a right to basic health care services.
- Every child has a right to basic social services.
- Every child has a right to be protected from abuse or bad treatment that ignores his or her needs.
- Every child has a right to be protected from child labour.

11.1.2 THE BEST INTERESTS OF THE CHILD



WHAT THE CONSTITUTION AND THE CONVENTION ON THE RIGHTS OF THE CHILD SAY

Whenever a person does something that concerns and affects a child, this must be done in the best interests of the child.

The 'best interests of the child' standard is a very important standard that we must use to measure everything that is done for a child. Sometimes it is difficult to decide what a child's best interests are, as you often have to weigh up different issues carefully.

DECIDING ON A CHILD'S BEST INTERESTS

It is difficult to decide if it is in the interests of a child who has AIDS to:

EXAMPLE

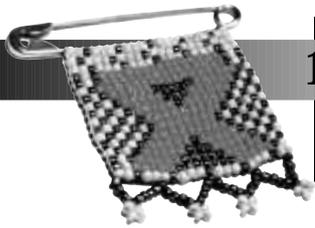


- *Be at school where they can socialise with other children, or*
- *Learn at home where they will not come into contact with infections such as flu or tuberculosis.*

To find the Convention on the Rights of the Child, see References and resource materials on page 269.

In deciding what is in a child's best interests in this situation, you should consider all factors, including the child's right to socialise (mix with other children), to live a 'normal' life, to remain healthy and to learn and develop with other children.





11.2

Identifying children in need of care

If a child is identified as being in need of care by the law, then the Children's Court must hold an enquiry to decide how to protect the child.

The *Child Care Act* identifies children to be in need of care when:

- They have been abandoned or their parents or care-givers cannot support them.
- They have no parents.
- They are in a state of physical or mental neglect.
- They have parents or guardians that are unfit to care for them. The law can declare a person unfit (legally unsuitable) to look after a child if they have done one or more of the following things:
 - Neglected the child (eg the person did not make sure that the child was properly fed or got proper medical treatment).
 - Abandoned the child (eg the person left the child alone and moved to another place).
 - Injured or hurt the child (eg the person beat or burnt the child).
 - Had no money to feed or clothe the child.
 - Has a habit that is not good for the child (eg drugs or alcoholism).

Just because a child or parents and care-givers are living with HIV or AIDS, this does not mean that the child is in need of care and should be placed in alternative care. It depends on the circumstances.

WHEN CHILDREN AFFECTED BY HIV/AIDS MAY BE IN NEED OF CARE

GUIDELINES



1 When the child is living with HIV or AIDS – for example: the parents are not able to care for the child's health needs properly or have abandoned the child.

2 When the child is affected by HIV or AIDS – for example: a parent or care-giver has AIDS, and because of this they are not able to take care of the child properly. The child may also be taking on the role of care-giver, and may have to leave school early to look after an ill parent or to earn money to support the family.

3 When the child is orphaned – for example: parents or care-givers have died of AIDS, and the child has no parents.



A MOTHER LIVING WITH HIV

In 1999, a mother living with HIV asked the AIDS Law Project (ALP) for help. A social worker had removed the mother's 3 year-old twin children. She said the mother was living with HIV, wasn't looking after the children properly and was a bad mother.

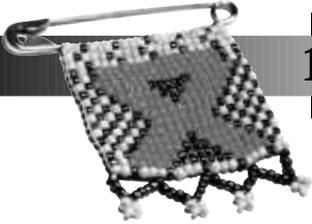
The ALP represented the mother in the Children's Court and showed that she was healthy, was earning money through informal work, and that the children were well cared for.

The Department of Welfare made it clear that removing a child should be a last resort.

The case shows that, when decisions are made about removing a child, discrimination and prejudice about HIV/AIDS should not be a deciding factor.

The law places a responsibility on all people who care for or treat children (like teachers, social workers, doctors, nurses and psychologists) to report any suspicion that a child has been ill-treated or injured in any way. This information must be given to:

- A social worker at the Department of Social Development, or
- A magistrate at the Children's Court, or
- A police officer at the nearest police station, or
- The medical superintendent at the hospital.



11.3 Models of care

GUIDELINES



DIFFERENT WAYS OF PLACING CHILDREN IN NEED OF CARE UNDER THE CHILD CARE ACT

1. Placement with their family, but under supervision (checking) by a social worker.
2. Placement with another family in **foster care**.
3. Placement in institutional (residential) care, such as a children's home.
4. Permanent placement with another family, known as adoption.

11.3.1 SUPERVISION



KEY POINT

HIV STATUS NOT A REASON FOR REMOVAL

If a parent has HIV, this is not a legal reason to remove their children or to place them under the supervision of a social worker.

What is supervision of a child?

Supervision of a child is when the Children's Court decides that the child is in need of care, but the Court does not need to remove the child from its parents. Here the Court will allow the parent or guardian to take the child home, on certain conditions.

What conditions will the Court place on the parent or care-giver?

The most common condition is that a social worker must supervise the relationship, and check that the child is being given enough care. If the parent does not care for the child or meet the conditions set by the Court, the child may be removed from the parent.

11.3.2 FOSTER CARE

What is foster care?

Foster care or **fostering** is when a person or people agree to look after a child on a temporary basis.

FOSTER CARE SITUATIONS

- When a child loses his/her natural parents (eg they die).
- When a child is taken away from his/her natural parents for some reason (eg if the parents are unable to care for the child or do not have a care-giver).

EXAMPLES



The period that the child lives with the foster parents is supposed to be short and because of this, the rules for fostering are not as strict as for adopting.

A person may foster up to 6 children at a time.

Are children tested for HIV before being placed in foster care?

No. Children are not tested for HIV before being fostered. When a child's **HIV status** is known and the child is under 14, this may be told to the foster parents if it is in the child's best interests, for example: the child needs special medical care.

Foster care grants

Foster care in South Africa is generally a long-term arrangement. This is because the adoption process is a legal and formal process, and once the child is adopted, the parents do not get a foster grant for the child any more. Many foster parents prefer to foster a child because they cannot afford to lose out on the foster grant.

For more on foster care grants, see 12.4.1 on page 280.

11.3.3 INSTITUTIONAL CARE



The Child Care Act allows a police officer to remove a child from a parent or any other person if he/she believes that the child is in need of care (eg if the child is neglected) and to take the child to a place of safety.

After this, the Children's Court will decide what is in the best interests of the child. Where no person can be found to take care of the child, the child may be sent to a children's home until he/she is placed with a family or reaches the age of 18.

The Child Care Act allows a police officer to remove a child if he/she believes that the child is in need of care.

11.3.4 ADOPTION

Adoption is when people (or a single person) agree to permanently take care of a child who is not their own. The law then treats the child as the child of the new parent or parents. The adoptive parents (the new parents) become the child's **legal guardians**.

GUIDELINES



ADOPTION

Under the Child Care Act, adoption will be allowed if:

- The child has no parent or guardian.
- The parent or guardian does not want to look after the child.
- The law declares the parent or guardian to be unable to take care of the child.
- The adoption is in the best interests of the child.

To adopt a child, you must also show that you are a suitable person and are able to maintain and educate the child.

Before the Constitutional Court's decision in *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC), 31 May 2001, you also had to be a South African citizen to adopt a child. Fitzpatrick's case declared this requirement unconstitutional and therefore invalid.

Who can adopt a child?

The Child Care Act says these people can adopt a child:

- A husband and wife together.
- A widow or widower (person whose husband or wife has died).
- An unmarried or divorced person.
- A married person whose husband or wife is the parent of the child.

Historically, adoption laws have not allowed two unmarried people to adopt a child together, making it impossible for **lesbian** or **gay** couples to adopt jointly. Despite this, the law allowed an unmarried, divorced or widowed person to adopt, so one partner in a lesbian or gay couple could adopt a child, but this meant that both partners would not be the legal guardians of the child.

The Constitutional Court decision in *Du Toit and Another v Minister of Welfare and Population Development and Others*, 2002 (10) BCLR 1006 (CC), 10 September 2002, now makes it possible for people in a permanent same-sex life partnership to adopt jointly. Unmarried heterosexual partners are however still not able to adopt jointly.

The Du Toit case also allows for second-parent adoptions. The partner of the legal parent can now also become a legally recognised parent by adoption, without the legal ties to the first parent being severed.

Does a child have to be tested for HIV before it is adopted?

The Child Care Act does not say whether or not HIV testing should take place before an adoption. This means that different welfare organisations may have different HIV testing policies.

But Child Welfare's policy is that everyone involved in an adoption arranged through a Child Welfare Agency is tested for HIV, in other words:

- The adoptive parent or parents
- The child
- Where possible, the **natural parents** (the parents who gave birth to the child).

If an adoptive parent tests HIV positive, Child Welfare does not allow the couple to adopt the child.

If the child tests HIV positive, this information is given to the possible future parents and they can decide whether or not to adopt the child.

HIV TESTING BEFORE ADOPTION

- *The practice of compulsory HIV testing of parents and children before an adoption violates the right to privacy.*
- *The results of the HIV test are usually used to discriminate, either against the adoptive parents or against the child to be adopted.*
- *This practice should be challenged in the Constitutional Court, so that our courts can decide whether to allow compulsory HIV testing for adoptions. The courts will consider the rights of all the people involved in an adoption, but the best interests of the child will be the most important factor.*



Child Welfare's policy of HIV testing for adoptive parents can be challenged in the Constitutional Court.

GUIDELINES



**ADOPTION AGENCIES
AND HIV TESTING**

Some adoption agencies do not test possible future parents for HIV – find out if there are any of these agencies in your area.

Can an adoption be cancelled?

It is very unusual for an adoption to be cancelled – but this can happen for one of these reasons:

- There was no consent from the child's natural parents for the child to be put up for adoption, or
- The adoptive parents were deceived or something was hidden from them at the time of the adoption, eg the child had a chronic illness (long-term sickness) which the adoptive parents were not told about.



**KNOWING THE HIV STATUS
OF AN ADOPTED CHILD**

One of the reasons that children being adopted are tested for HIV is to make sure that, if they test HIV positive, this is known at the time of the adoption. After that, it is not possible to cancel the adoption because a child is living with HIV or AIDS.

**11.3.5 PROBLEMS WITH EXISTING
MODELS OF CARE**

These models of care do not always meet the needs of children living in an HIV positive world, for these reasons:

- These options for child care are limited, and take a long time to put in place because they are formal processes.
- Many communities do not know who the social workers are or where to find them. Therefore they cannot access the Children's Court.
- As more parents become infected, there will be increased numbers of children who are orphaned. Our society may not be able to provide enough formal care for these children.
- Some children may be better off staying in their extended families and communities, rather than being removed from the community into children's homes or foster care.

In many cases, the models of care don't reflect the reality of what is actually happening in many communities. Orphaned children are often simply taken in by relatives or other members of the community as part of extended families. In other cases, older children are forced to become the parents of their younger sisters and brothers, without adult supervision in the home. These children are forced to leave school and find work to support the other children.

THE TRANSFORMATION OF THE CHILD AND YOUTH CARE SYSTEM

The Department of Social Development and other child care organisations are looking at:

- Ways to strengthen and support families so that:
 - Problems can be prevented or identified early.
 - Families can be helped to take care of their children, rather than removing these children.
- Different ways of removing children from their families (eg placing them with care-givers in the community, rather than in a children's home).
- New community-based models of care to learn how the community is taking care of children.
- Better training and development of child and youth care workers.

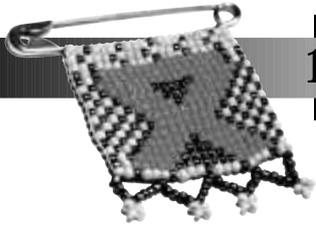


For more on the SALC's review of the Children's Act, see References and resource materials on page 269.

We expect that there will be a new Children's Act by 2003.

Older orphaned children are often forced to leave school to become parents to their younger siblings.



**11.4.1 SOCIAL WELFARE GRANTS**

There are a number of special grants for children and their care-givers:

- The child support grant
- Foster care grants
- Care dependency grants.

For more on these grants, see 12.4 on page 280.

11.4.2 OTHER TYPES OF SOCIAL ASSISTANCE

Children in need of care may be assisted with school fees and health care.

School fees

The *South African Schools Act* says that some parents do not need to pay school fees or can pay less fees:

- Parents and care-givers, when the school fees are higher than 10% of the yearly household income, for example: if the school fees are more than R300 a child each year, then parents who together earn less than R3 000 a year, do not have to pay fees.
- Parents and care-givers, when the school fees are between 3,3% and 10% of the yearly household income, for example: if the school fees are between R33 and R300, then parents who together earn less than R3 000 a year, only have to pay part of the fees.
- Foster parents or people who take care of children in a place of safety do not have to pay school fees.

In these situations, the parent, care-giver or foster parent must apply to the school for a full or partial exemption (a release from paying school fees).



EXAMPLE

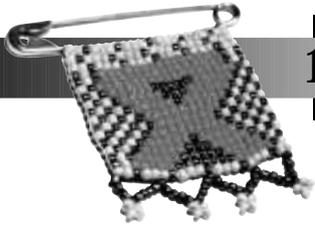
APPLYING FOR EXEMPTION FROM SCHOOL FEES

Where neighbours look after children who have been orphaned, the neighbours can explain that they cannot afford the fees to the school.

Health care

Children under 6 have a right to free medical care in government clinics and hospitals.

For more on children's health rights, see 11.5 on page 262.



11.5

Children's health rights

The Constitution gives every child the right to basic health care services.

The United Nations Convention on the Rights of the Child (CRC), which South Africa ratified in 1995, says the State has a duty to:

- Recognise the right of the child to the highest possible standard of health.
- Take steps to lower infant and child mortality, ensure that all children receive necessary medical assistance and health care, and ensure suitable pre-natal and post-natal care for mothers.

For more on recent developments in MTCT, see *Introducing this manual* on page iii.



For more on access to treatment, see 6.4 on page 146.

WHAT THE CRC MEANS

- All children, including children with HIV or AIDS, have a right to basic health care services. Children with HIV or AIDS may not be discriminated against in providing and distributing health care services.
- Government must take steps to prevent **mother-to-child transmission** of HIV – for example: providing **anti-retroviral therapy** and formula feed to pregnant mothers living with HIV.
- Government must provide medical treatment and care for children living with HIV or AIDS.

11.5.1 CONFIDENTIALITY AND HIV TESTING

Who should know the HIV test results of a child who is 14 or older?

If a child is 14 or older, the child has the same rights to confidentiality as an adult. This means that a child of 14 or older who consents to an HIV test has the right to keep his/her result private. Nobody is allowed to **disclose** (tell anyone) the HIV status of someone who is 14 or older without their consent.

Who should know the results of a child younger than 14?

When a child is younger than 14, the child cannot consent to an HIV test alone. The consent of a parent or guardian is necessary.

The parent or guardian has a right to decide whether to disclose the results of the test to the child. A lot depends on:

- Whether the child is old enough to understand the results, and
- What is in the child's best interests.

When can children consent on their own to an HIV test?

A child of 14 or older may consent on their own to an HIV test. The parent or guardian of a child under 14 must consent to the test on their behalf.

GUIDELINES



CHILDREN UNDER 14 WITHOUT A PARENT OR GUARDIAN

If the child does not have parents or a guardian, the parents or guardian are not available or they cannot be found in time, then consent to general medical treatment or operation (which is not risky to the child's life or health) can be given by one of these people:

- A person with parental power over the child (eg a teacher or relative)
- A person who has custody of the child (eg a foster parent or the head of a children's home)
- The Minister of Social Development.

In an emergency

When there is an emergency where the child's life or health is in serious danger, there may not be time to consult the parents or guardian, or the Minister for consent. Then the Child Care Act says that one of these people can consent to the treatment or operation:

- The person with parental power or custody
- The medical superintendent of the hospital.

For more on consenting to medical treatment and operations, see 6.3 on page 132.

Should a children's home or place of safety have information on a child's HIV status?

A children's home or place of safety does not have a right to have information on a child's HIV status.

Children with HIV/AIDS often face discrimination and some children are even excluded from children's homes because of their HIV status. This is why HIV/AIDS activists often argue that a children's home or place of safety should not be told of a child's HIV status.

Universal precautions should be followed by all staff at places of safety and children's homes. This is why there is no need to know the HIV status of a child, in order to protect staff and other children. But sometimes it may be in the best interests of the child if the care-giver knows a child's HIV status.

With children who are 14 or older, these children can decide who to tell about their HIV status.

CHILDREN UNDER 14

With children under 14, we recommend that a children's home or place of safety can be informed of a child's HIV status if:

GUIDELINES



- *The child's HIV status is already known because of previous HIV testing, and*
- *It is in the best interests of the child, and*
- *The children's home or place of safety does not discriminate on the basis of HIV, and*
- *The children's home or place of safety has policies on confidentiality.*



A children's home should only be told about a child's HIV status if this is in the best interests of the child.

Can a children's home refuse to admit a child who has HIV?

A children's home, place of safety, or any other institution (including schools and pre-schools) may not refuse to admit a child simply because of the child's HIV status. This is unfair discrimination.

Can schools request information on a child's HIV status?

Confidentiality is a common law right, and also protects children. The law does not say that a child's HIV status must be disclosed to a school. We recommend that parents or care-givers carefully think about what is in the child's best interests before deciding whether to disclose this information.

For more on steps to challenge unfair discrimination, see 17.2 on page 399.

11.5.2 REPRODUCTIVE HEALTH

Does a child have a right to reproductive health?

The Constitution says that all children have a right to health. The right to health includes a right to reproductive health.

Reproductive health is the health of your body's reproductive system – your body parts which are used for having sex and giving birth to babies.

Contraception

The Child Care Act says that a child of 14 or older can consent to medical treatment. This means that a 14-year-old girl can agree to take an oral contraceptive (the pill) to control her reproductive system.

Some contraceptives, like the male or female condom, are not "medical treatment". This means that a child of under 14 can ask for condoms at a clinic or family planning centre.

Termination of pregnancy

The *Choice on Termination of Pregnancy Act* governs the law about terminations of pregnancy – often referred to as 'abortions'.

Who may consent to a termination of pregnancy?

A girl of any age can consent. The *Choice on Termination of Pregnancy Act* says that where the person wanting an abortion is under 18, the doctor or midwife must advise them to speak to her parents or other family members before having the abortion. But the girl does not need to follow this advice and she does not need their consent for the procedure.

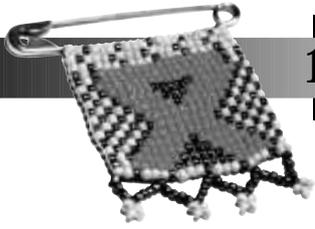
For more detailed discussion on this law, see 8.3 on page 187.



KEY POINT

CONSENTING TO ABORTION WHEN UNDER 18

The Choice on Termination of Pregnancy Act is a big change from the general laws about consent to medical treatment – these say that children can only consent to an operation if they are 18 years of age.



11.6 Access to education

11.6.1 CAN A CHILD WITH HIV BE EXCLUDED FROM A SCHOOL?

No. The South African Schools Act says that schools must admit all learners and must not discriminate against any learner. Thus a child cannot be excluded from a school only because of his/her HIV status. This is the law for private and government schools.

The Constitution also says that everyone has the right to a basic education. If a child is stopped from going to school because of his/her HIV status, this can also be challenged in court.

11.6.2 NATIONAL POLICY

The *National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions* (1999) sets out some important policy issues on children with HIV or AIDS in schools.

IMPORTANT PRINCIPLES IN NATIONAL POLICY ON HIV/AIDS

- *Learners and students with HIV or AIDS should live as full a life as possible and should not be denied an opportunity to receive education that fits their ability.*
- *No learner or educator can be forced to disclose his/her HIV status.*
- *If anyone knows about the HIV status of a learner or educator, this information must be kept confidential.*
- *No learner or educator may be asked to have an HIV test.*
- *Learners and educators should not be discriminated against. For example, this means that no learner or educator can be refused to join or stay at a school because of his/her HIV status.*
- *If a learner become **incapacitated** through illness, the school must take steps to arrange home study for the learner.*



For the National Policy on HIV/AIDS, see A6 on page 529.



HOW TO PROVIDE A SAFE ENVIRONMENT

In providing a safe environment, the National Policy on HIV/AIDS says:

- *All open wounds, sores and breaks in the skin should be completely covered.*
- *All learners should be taught not to touch any wounds, blood or sores.*
- *No learner should play contact games or sports with an open wound, sore or break in the skin.*
- *If there is any bleeding during sport, the learner must be removed from the sport.*

All schools must develop their own HIV/AIDS policies to deal with their special circumstances.

11.6.3 RIGHT TO SEXUALITY EDUCATION

What is sexuality education?

Sexuality education includes teaching about safer sexual practices to prevent the spread of HIV.

Children can only be taught about safer sex if they have an understanding of things like:

- What sex is.
- Their physical anatomy (what their body parts are and how to use them).
- How they can respond to feelings for another person.
- Having a right of control over their own body.

Do children have a right to sexuality education?

In 1995, South Africa signed the United Nations (UN) *Convention on the Rights of the Child* (CRC). This means that South Africa agreed to implement the Articles in the CRC.

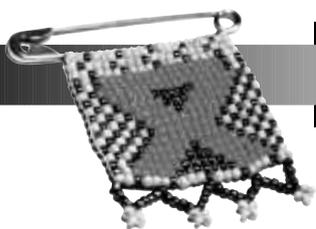
Article 17 of the CRC says that a child should have access to information that will help the child to develop his/her physical and emotional well-being. Sexuality education and information on HIV/AIDS will certainly help a child to develop his/her physical and emotional well-being. South Africa has thus agreed to ensure that children have access to this type of education.

The National Policy on HIV/AIDS also encourages the teaching of children about the prevention of HIV/AIDS through sex. Because many young people are sexually active, learners need to know how HIV is transmitted.

To find the CRC, see References and resource materials on page 269.

For the National Policy on HIV/AIDS, see A6 on page 529.

For more on how sexuality education should also cover issues for gay and lesbian youth, see 10.3.2 on page 232.



Talking points



1 The HIV epidemic will mean that many thousands of children will be in need of care.

- *Do you think our courts can cope with all the children who will need to be placed in care?*
- *How can we change our child and youth care system to make sure that children in need of care are identified, and best taken care of?*

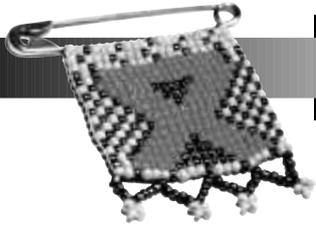
2 Gay and lesbian couples often find that there is still a lot of prejudice among social workers. As a result, a social worker decides a gay or lesbian person is not a 'suitable person', or that it is not 'in the best interests of the child' for the gay or lesbian person to adopt.

- *What do you think the approach of adoption agencies should be?*
- *What should the law say about adoption policy?*

3 Do you think that adoptive parents and children who will be adopted should be tested for HIV? Why?

4 The Termination of Pregnancy Act has removed the usual age limit for consenting to a medical operation, for terminations of pregnancy (abortions). Some countries have removed the age limit for other sexual health issues too. In California in the USA, a minor of any age can consent to medical care to prevent pregnancy (like oral contraceptives).

- *Do you think we should remove the age limit for consenting to medical treatment for sexual health issues in South Africa?*



References & resource materials

LAWS

Child Care Act, No 74 of 1983.

Choice on Termination of Pregnancy Act, No 92 of 1996.

Constitution of the Republic of South Africa Act, No 108 of 1996.

South African Schools Act, No 84 of 1996.

POLICY DOCUMENTS

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