
Published by the South African Medical Association’s Human Rights, Law and Ethics Unit in November 2001. It addresses the need to harmonise the rights and interests of individuals and groups in their various capacities. In particular, it provides guidance to medical practitioners dealing with issues relating to human rights and ethics in relation to testing, counselling, and confidentiality when treating HIV-positive patients.

Excerpts

2. Pre-testing counselling

[The] South African Medical Association believes that having a person merely sign a form or reading leaflet before an HIV test does not constitute pre-test counselling. Pre-test counselling should include the following aspects:
- What an HIV test is and the purpose of the test
- How long a test takes and what is actually done (drawing blood, et cetera)
- The need for a test in the particular circumstances, for example in the preoperative setting, the effect the results may have on treatment and the patient’s future health care, et cetera
- The advantages and disadvantages of taking the test and of knowing one’s HIV status
- The meaning of a negative result and the need for or possibility of a second test
- The necessity for lifestyle changes and coping with such changes
- Assessment of personal risk of HIV infection
- Strategies to reduce risk
- Coping with a positive result emotionally, including divulging one’s status
- Where support services are and how to access them, and
- Sufficient space and opportunity to make an informed decision about taking the test

3. Testing for HIV

In principle, a person may only be tested at his or her own request. However, SAMA encourages medical practitioners to urge their patients to undergo HIV testing for the purpose of good patient care. A person may otherwise only be tested if it is authorised by legislation or by court order...

The following have to be considered if an HIV test is to be performed:
- Check for legislative provisions that may prohibit or regulate HIV testing, for example in schools, prisons, in the workplace, for medical aid purposes, insurance policy purposes, et cetera.
- Is the test needed for medical reasons (clinically indicated)? Has this been explained to the patient as part of pre-test and should be wary of testing exclusively for HIV where there could be grounds for performing other tests as well.
- Has pre-testing counselling being done?
- Is the patient informed about the virus, the test window period, et cetera?
- Have all of the principles of informed consent been addressed?
- Has the patient consented in writing to the test?
- Is the confidentiality of the fact that the test is to be undertaken guaranteed?

In terms of the Employment Equity Act of 1998, medical practitioners may not test (prospective) employees at the request of employers. In general, the same principle applies, i.e. no medical testing without the employee’s free and informed consent.

4. Informed consent

It has long been part of South African law that a patient must provide informed consent for all medical treatment (diagnostic or therapeutic) performed on him/her (Stoffberg v Elliot, 1912). Basically, informed consent means that sufficient information is provided to enable the patient to make and informed decision, and that the patient actually understands the information and implications of acting on that information. Informed consent relates to a person’s right to human dignity and autonomy. The medical practitioner has the duty to obtain the consent, as s/he is in a position to answer questions and provide further details.

The following are elements of informed consent:
- Consent must be voluntary and without constraint
- Consent must not conflict with good morals or the Constitution
- The patient must be capable of consenting
- The patient should give the consent personally, unless proxy consent is applicable
- There should be sufficient information on the diagnosis, proposed treatment, expected benefits, risks, alternative treatment, probable results, et cetera.
- The patient must understand the situation clearly. As such, there may be a need for and interpreter, or at least an awareness that the patient may not actually understand everything; arrangements should be made to assist the process of understanding.

5. Post-test counselling

The duty to do post-test counselling falls on the practitioner who commissioned the test. This duty can not be dispensed with by referring a patient to a counselling service, although these services and support groups may be helpful for the patient after the post-test counselling.

Post-testing counselling should also take place where a patient tested negative. Important aspects such as the window-period, a second test two months later, lifestyle changes or how to stay negative, should form an integral part of post-test counselling in this context.

6. Confidentiality

Patient confidentiality is one of the cornerstones of the medical profession. It ensures that a patient divulges all the information relevant to his or her health care to the practitioner, thereby ensuring the best appropriate health care. Apart from the ethical
rule on confidentiality, the South African Constitution protects the right to privacy and confidentiality...

A patient’s HIV status may only be disclosed to a person or group if that patient consents to it being made known to that person or group of persons, for example the team of health care workers.

... Informing sexual partners is an extremely complicated issue, and depends on whether a legal- or an ethical view is taken of the issue. Medical practitioners should be aware of the fact that their decisions in this regard may be measured against the Constitution and/or the relevant ethical guidelines ...

Consideration should be given to the following in this regard:
- During pre- and post-test counselling patients should be told of the need to disclose their HIV status to their partner(s) and how they should protect their partners in this regard.
- The first line of action should be to persuade the patient to consent to disclosure or to self disclose.
- The patient should be encouraged to be responsible in terms of his or her behaviour so as to prevent others from becoming infected. The patient should be made aware that penalties may result in cases of irresponsible (negligent or culpable) conduct.
- If the patient is unwilling, the medical practitioner may offer, with the patient’s consent, to speak with both parties as a matter of good health care to the patient and the partner.
- If the patient is still unwilling, the medical practitioner may choose to disclose the patient’s HIV status only if all the following conditions are met:
  (a) The sexual partner should be a known and identified person. A general suspicion that a number of unidentified people may be at risk is not sufficient.
  (b) The sexual partner should be at risk of being infected. This means that the patient has refused to take the necessary precautions and it is clear to the medical practitioner that the patient is posing a risk to the sexual partner. The medical practitioner may be required in court to show that he was acting on substantial information and not on suspicion. There should not be any other way to protect the partner or spouse.
  (c) The patient should be informed beforehand that the medical practitioner is intending to breach his duty to maintain confidentiality. It may be wise to tell the patient of this intention and allow the patient a specified period of time to tell the partner him/herself.
- Only now may the medical practitioner disclose the HIV status to the partner. Pre-test counselling and/or referral of the person to a facility providing counselling and support should be offered. Remarks in passing about the partner-patient’s HIV status are not sufficient and unethical.
- Where the patient firmly believes that this disclosure to a partner will put his or her life at risk, the medical practitioner’s primary duty is to protect the life of the patient and act in his or her best interest. In some countries people living with HIV are persecuted. SAMA recommends that the patient’s HIV status in not disclosed to the partner in these circumstances.

7. Access to treatment and clinical independence

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SAMA Human rights, Law and Ethics Committee Resolutions
1. The Committee affirms its strong support for the right of medical practitioners to clinical independence and autonomy. This includes the right to treat patients without undue influence, pressure or victimisation from employers or government institutors. Medical practitioners are under an ethical duty to act in the best interests of their patients, who form an exceptionally vulnerable group in South African society. The Committee also supports the right of patients to receive necessary treatment, always with their informed consent.

2. The Committee supports the right of all pregnant women who are HIV-positive to receive the best available treatment that has been proven to reduce mother-to-child transmission. SAMA urges the government to make an unequivocal statement that women who are pregnant and HIV-positive, who have received the necessary counselling and have given their informed consent, will not be denied that treatment. No medical practitioner may refuse to treat a patient who is HIV-positive solely on the basis of that person’s HIV status. A medical practitioner may also not refuse normal standards of treatment to a patient based on the patient’s HIV status. A medical practitioner may also not, by failing to fill out required forms for, for example social assistance grants et cetera., hinder a patient’s right of access to treatment …

HIV and prisons
Apart from the ordinary right such as human dignity and physical integrity, the Constitution, contains a set of rights applicable to arrested, accused and detained persons. One of the crucial elements is the right to medical treatment. Medical treatment includes voluntary HIV testing and counselling.

Medical practitioners working in correctional facilities should also be aware of the fact that segregation of prisoners based on their HIV status is likely to be unconstitutional (unless they have AIDS and suffer from an infectious disease such as TB).