

Caught by Ideology

HIV Providers in the Era of the Protecting Life in Global Health Assistance Policy (PLGHA)

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SOUTHERN AFRICA
LITIGATION CENTRE



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Authors report no conflicts of interest

Overview

- Basic Provisions of PLGHA
- Questions for Assessing the Local Application of the Affirmative Defense

Resources

PAI, *What you Need to Know about the Protecting Life in Global Health Assistance Policy* - <https://pai.org/reports/need-know-protecting-life-global-health-assistance-restrictions-u-s-global-health-assistance/>

CHANGE/amfAR, *The Implications of the Expanded U.S. Mexico City Policy in South Africa* (Webinar) - <https://vimeo.com/243673529>

CHANGE/amfAR, *Protecting Life in Global Health Assistance – What to Know in South Africa* – http://www.genderhealth.org/files/uploads/GGR_South_Africa_2017.pdf

CHANGE/PAI, *American Attitudes on the Global Gag Rule* - <https://pai.org/reports/american-attitudes-on-the-global-gag-rule/>

Foreign NGOs may not “perform or actively promote abortion as a method of family planning” while receiving Global Health Assistance Funding (including PEPFAR)

Includes:

- NGOs
- FBOs
- Private Entities

Excludes:

- Multilaterals
- National governments
- Parastatals including Public Universities

PLGHA, (a)(i)(1)

The recipient agrees that it will not, during the term of this award, **perform or actively promote abortion as a method of family planning** in foreign countries or provide financial support to any other foreign non-governmental organization that conducts such activities. For purposes of this paragraph (a), a foreign non-governmental organization is a for-profit or not-for-profit non-governmental organization that is not organized under the laws of the United States, any State of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

USAID, Glossary of ADS Terms

Parastatal entities

Government-funded or-owned organizations that are often otherwise independent of government and whose debt obligations are generally not backed by the full faith and credit of the sovereign government.

Active Promotion of Abortion as a Method of Family Planning includes:

- Counseling on the existence of abortion as a method of family planning;
- Counseling on the risks/benefits of abortion as a method of family planning;
- Referring for abortions as a method of family planning;
- Lobbying for increasing access to abortion as a method of family planning;
- Public information campaigns on benefits and availability of abortion as a method of family planning

PLGHA, (a)(i)(10)(iii)

“To actively promote abortion” means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.

(A) **This includes**, but is not limited to, the following activities:

- (I) Operating a service-delivery site that provides, as part of its regular program, **counseling, including advice and information, regarding the benefits and/or availability of abortion as a method of family planning;**
- (II) **Providing advice that abortion as a method of family planning is an available option** or encouraging women to consider abortion (passively responding to a question regarding where a safe, legal abortion may be obtained is not considered active promotion if a woman who is already pregnant specifically asks the question, she clearly states that she has already decided to have a legal abortion, and the healthcare provider reasonably believes that the ethics of the medical profession in the host country requires a response regarding where it may be obtained safely and legally);
- (III) Lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and
- (IV) Conducting a public information campaign in foreign countries regarding the benefits and/or availability of abortion as a method of family planning.

Abortion as a Method of Family Planning:

- “For the purpose of spacing births”
- Includes:
 - Abortions for the physical or mental health of the woman;
 - Abortions due to fetal abnormalities;
- Excludes:
 - Rape;
 - Incest;
 - Life of the woman would be endangered

PLGHA, (a)(i)(10)(i)

Abortion is a method of family planning when it is **for the purpose of spacing births**. This **includes**, but is not limited to, **abortions performed for the physical or mental health of the mother** and **abortions performed for fetal abnormalities**, but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest.

Affirmative Defense

- Where Policy restrictions on counseling and referral for abortion as a method of family planning conflict with local law, it is NOT a violation to counsel and refer

PLGHA, (a)(i)(13)

For the avoidance of doubt, in the event of a conflict between a term of this paragraph (a) and an affirmative duty of a healthcare provider required under local law to provide counseling about and referrals for abortion as a method of family planning, compliance with such law shall not trigger a violation of this paragraph (a).



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Patients' Rights to Informed Consent Matters



Assessing the Local Application of the Affirmative Defense



Assess Abortion Legality

Is abortion legal in cases other than:

- Rape;
- Incest;
- Life endangerment of the woman?

Yes

No

Assess Constitutional, Statutory, Case Law, and Professional Ethical Guidelines

Determine the confines of informed consent law:

- Does informed consent require patients be informed of alternative treatment options than the treatment specifically prescribed by a physician?
- Do bodily integrity laws protect women's rights to determine reproductive choices?

No

Assess Conscientious Objection Requirements

What are the confines of health care workers claiming conscientious objection?

- Do patients have a right to be informed and referred to an alternative provider if their health care worker has a conscientious objection to otherwise legal care?
- Is conscientious objection limited to healthcare workers (HCWs) in their individual capacity?
- Can conscientious objection be mandated in HCW contracts?

Affirmative Defense May Apply

- Get formal legal advice;
- Consider providing USG Managing Agency with legal assessment;
- Instruct all HCWs that they must continue to counsel and/or refer for abortion services;

Affirmative Defense Unlikely to Apply

Health Care Workers may/must still:

- Provide emergency contraceptives;
- Counsel and refer in the case of rape, incest, or life endangerment of the woman;
- Provide post-abortion care services;
- Provide family planning and general contraceptive services.

Orgs not bound by PLGHA may consider:

- Advocating for changes in informed consent laws and ethical guidelines to clarify a patient's right to information on reasonably available treatment alternatives (including termination of pregnancy services);
- Where counseling and referral services are denied to women seeking abortion services, bringing negligence lawsuits against health care providers to help define the scope of informed consent;
- Seeking clarification from professional medical ethics bodies on the scope of informed consent, individual and organizational applicability, and obligations to inform and refer patients to other providers when conscientious objections are made.

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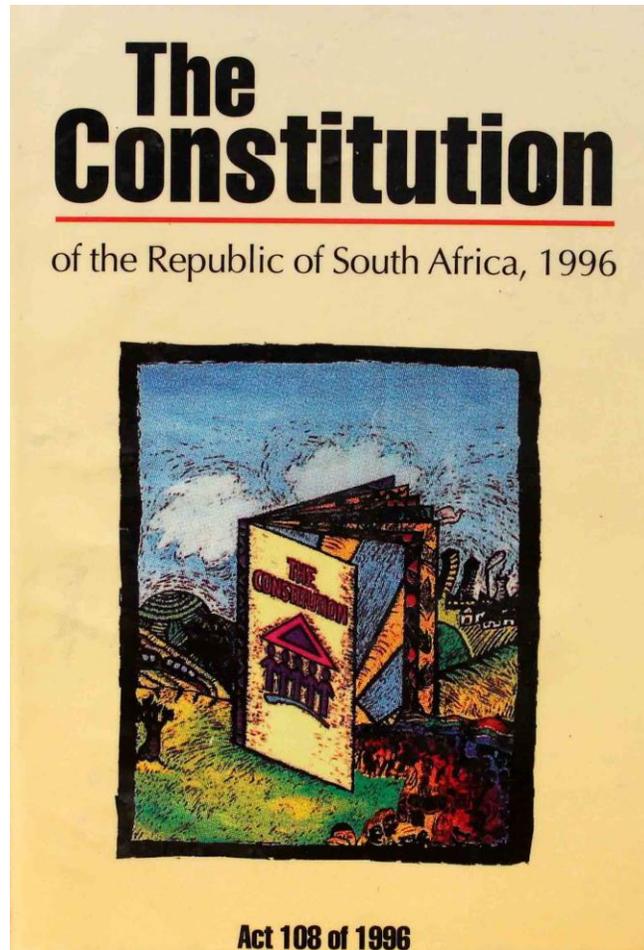
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No

Informed Consent Laws The South Africa Example



Constitutional Provisions



South African Constitution, Section 12

12. Freedom and security of the person

(1) [...]

(2) *Everyone has the right to bodily and psychological integrity, which includes the right –*

(a) To make decisions concerning reproduction;

South African Constitution, Section 27

Health care, food, water and social security

27. (1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

Statutory Provisions



REPUBLIC OF SOUTH AFRICA

GOVERNMENT

STAAT

VAN DIE REP

Registered at the Post Office as a Newspaper



Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 469 Cape Town 23 July 2004 No. 26595

THE PRESIDENCY

No. 869 23 July 2004

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 61 of 2003: National Health Act, 2004.



AIDS HELPLINE: 0800-123-22 Prevention is the cure

National Health Act, Section 6

User to have full knowledge

(1) Every health care provider must inform a user of -

- (a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;*
- (b) the range of diagnostic procedures and treatment options generally available to the user;*
- (c) the benefits, risks, costs and consequences generally associated with each option; and*
- (d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.*

Choice on Termination of Pregnancy Act, Section 6

A woman who in terms of section 2(1) requests a termination of pregnancy from a medical practitioner or a registered midwife, as the case may be, shall be informed of her rights under this Act by the person concerned.

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Case Law



CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between:

H
and
FETAL ASSESSMENT CENTRE

Neutral citation: *H v Fetal Ass*

Coram: Moseneke DCJ, Leeuw AJ, M

Heard on: 28 August 20

Decided on: 11 December

Summary: Section 28(2) considered in compensation
Section 39(1) interpreting the
Section 39(2) law — High Court exception



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 155/15

In the matter between:

AB First Applicant
SURROGACY ADVISORY GROUP Second Applicant
and
MINISTER OF SOCIAL DEVELOPMENT Respondent
and
CENTRE FOR CHILD LAW Amicus Curiae

Neutral citation: *AB and Another v Minister of Social Development* [2016] ZACC 43

Coram: Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mhlantla J, Madlanga J, Nkabinde J and Zondo J

Judgments: Khampepe J (minority): [1] to [236]
Nkabinde J (majority): [237] to [330]

Heard on: 1 March 2016

Decided on: 29 November 2016

Summary: surrogate motherhood agreement — statutory genetic origin requirement — whether irrational — whether limits commissioning parent's rights to equality, dignity, reproductive

1

H v Fetal Assessment Centre (CCT 74/14) [2014] ZACC 34

Prospective parents, who are fortunate enough to have access to that kind of medical care, often obtain medical advice during pregnancy to ascertain whether their child will be born in good health. If they are told that the child will probably suffer from a serious medical condition or congenital disability, the mother may choose not to give birth to the child. That choice is given to her under South African law. Our law also recognises a claim by the parents for patrimonial damages in circumstances where that kind of medical advice should have been given to them, but was negligently not provided. [internal citations removed] [para.1]

AB and Another v Minister of Social Development (CCT155/15) [2016] ZACC 43

Test for violation of section 12(2)(a):

- (a) Does the impugned law or conduct prevent or inhibit a person or group of persons from making a decision?*
- (b) If the answer to (a) is yes, does the decision concern reproduction?*
- (c) If the answer to (b) is yes, does preventing or inhibiting the decision detrimentally affect the psychological integrity of the person or persons concerned?*



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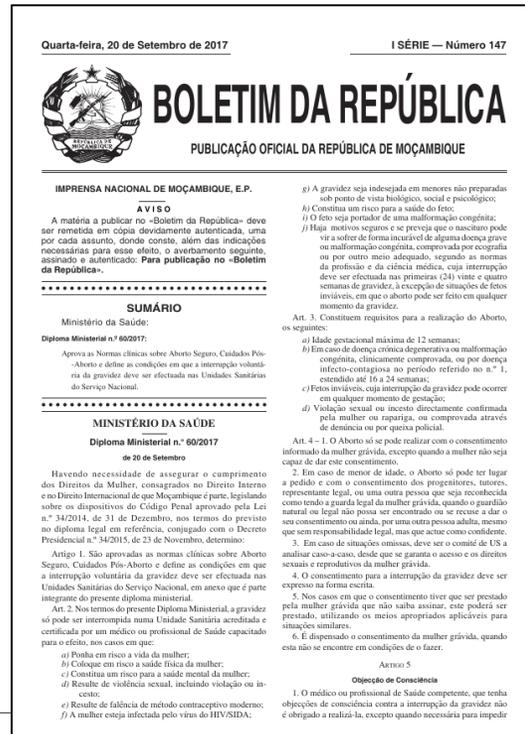
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Informed Consent Laws Mozambique



Ethical Guidelines / Clinical Guideline / Conscientious Objection

- Ethical Guidelines can also establish regulatory requirements for informed consent;
- Set boundaries for Conscientious Objection



Ministerial Diploma n.º 60/2017 – Article 5 Conscientious Objection

- A competent doctor or health care professional who has conscientious objections to termination of pregnancy is not forced to carry it out, except when necessary to prevent the risk of death of the pregnant woman, save the life of the woman or prevent serious risks or harm to her health.
- The right to conscientious objection may be exercised by any doctor or health care professional trained to provide termination of pregnancy services.
- The competent doctor or health care professional who has conscientious objections to termination of pregnancy shall refer the pregnant woman to another doctor or trained professional that is willing to perform the termination of pregnancy.
- In cases of conscientious objection referred in the previous paragraph, it is the responsibility of the Health Unit Management to indicate another doctor or health care professional available at the same health unit, the patient must be transferred to another unit, following the existing procedures for the transfer of any other patient (pregnant, in emergency situations, etc.) and with no burden to the woman.
- If the conscientious objector is a health authority, in which falls the responsibility of authorizing the performance of the medical act of termination of pregnancy, then he/she should be permanently replaced by another physician or health care professional trained and appointed as a replacement for this purpose.

See also: Health Professions Counsel of South Africa, *General Ethical Guidelines for Reproductive Health*

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Objeção de Consciência
1. O médico ou profissional de Saúde competente, que tenha objeções de consciência contra a interrupção da gravidez não é obrigado a realizá-la, excepto quando necessária para impedir

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WHO Guidelines on Dolutegravir

- Choice is only choice if it's based on full and complete information

WHO Treatment Guidelines

Woman-centered health services involve an approach to health care that consciously adopts the perspectives of women and their families and communities. This means that health services see women as active participants in and beneficiaries of trusted health systems that respond to women's needs, rights and preferences in humane and holistic ways. Care is provided in ways that **respect women's autonomy in decision-making about their health, and services must provide information and options to enable women to make informed choices**. The needs and perspectives of women, their families and communities are central to providing care and to designing and implementing programmes and services. A women-centered approach is underpinned by two guiding principles: promoting human rights and promoting gender equality.

Thank You

PLGHA does NOT apply to:

- **Emergency Contraceptives (Plan B, etc.)**
 - Continue to Provide
- **Post-Abortion Care**
 - Continue to Provide
- **Instances of Rape, Incest, or Life Endangerment**
 - Offer counseling, referral, and provision if necessary
- **If an Already Pregnant Woman states she wants a legal abortion**
 - Refer to facility that can provide

