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**OPINION**

**SCREENING**

**EN**

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## OPINION REGARDING CONSENTMENT TO SCREENING FOLLOWING INCIDENTS OF ACCIDENTAL EXPOSURE TO BLOOD INVOLVING ADULT PROTECTED PATIENTS

The National AIDS Council has learned of difficulties encountered by the staff of a institution for the mentally handicapped following incidents of accidental blood exposure (ABE) suffered by care-givers (needle-stick injuries, scratches or severe bites). Following current regulations,<sup>1</sup> when a caregiver who suffers ABE is exposed to risk of transmission of HIV, this must be dealt with urgently. A screening test should be available and must be proposed to the source person, in order to learn his or her serological status as quickly as possible. If the HIV serology is positive, there is proven risk of HIV transmission and prescription of post-exposure prophylaxis should be envisaged.

The staff of this institution object that in most cases the screening test cannot be proposed, since patients are not competent to consent to such a test because of severe handicaps (mental retardation, communications disorders) or because they are sedated.

The National AIDS Council wishes to clarify the rules relative to screening in exceptional circumstances. In doing so the Council seeks to conciliate the right of patients to consent to screening and the benefit of such screening to staff exposed to risk, who may wish to avoid post-exposure treatment because of the constraints and the side-effects it involves.

### THE PRINCIPLE OF FREE AND ENLIGHTENED CONSENT

The Council firstly wishes to emphasize that screening in France is based on principles of patient choice and confidentiality. The persons to be screened must be informed and their consent must be given. The Council is firmly committed to these principles, and in the past has opposed all forms of systematic and obligatory screening, out of concern for law and ethics as well as simple efficacy<sup>2</sup>.

Beyond the specific question of screening, the Council observes that no medical act or treatment can be practiced without the free and enlightened consent of the person concerned, and that this must be sought in all cases<sup>3</sup>. The right to be informed about treatment, and to consent to it, is recognized for all, including vulnerable adults. The consent of an adult, including an adult ward of court, must systematically be sought if he or she is able to express himself and participate in the decision<sup>4</sup>.

This principle of consent by vulnerable adults is confirmed by the Chart of Rights and Freedoms of Protected Adults<sup>5</sup>. According to Article 7, regarding the right to autonomy, acts whose nature implies an entirely personal consent cannot be undertaken by guardians or representatives. The protected person should take his or her own decisions to the extent his condition permits.

Although the law establishes the principle of protected adults' free consent to care, it also considers that consent to care may be impossible because of the patient's condition.

#### VULNERABLE AND LEGALLY PROTECTED ADULTS

When consent to care is impossible, the law permits recourse to a third person who is charged with giving advice or authorisation regarding care, depending on the circumstances. Whether or not this consultation is obligatory depends on the legal

<sup>1</sup> *Circulaire interministérielle n°DGS/R12/DHOS/DGT/DSS/2008/91 du 13 mars 2008 relative aux recommandations de prise en charge des personnes exposées à un risque de transmission du virus de l'immunodéficience humaine (HIV).*

<sup>2</sup> National AIDS Council, *Rapport suivi d'un avis sur le dépistage obligatoire ou systématique du VIH*, December 18, 1991 ; *Avis sur le dépistage de l'infection par le VIH au cours de la grossesse et prévention périnatale de la contamination de l'enfant*, March 14 2002.

<sup>3</sup> Article L 1111-4 of the *Code de la santé publique* and article 36 of the *Code de déontologie médicale*, included in the *Code de la santé publique* as reference R4127-36.

<sup>4</sup> Article L1111-4 of the *Code de la santé publique*.

<sup>5</sup> *Charte des droits et libertés de la personne majeure protégée* adopted with the law of March 5, 2007, reforming the legal protection of adults.

status of the protected adult. For reasons stipulated in Article 425 of the French Civil Code<sup>6</sup>, the protected adult may be placed under temporary guardianship (*sauvegarde de justice*)<sup>7</sup>, or two types of guardianship (*curatelle*<sup>8</sup> and *tutelle*<sup>9</sup>).

In certain cases, the protected adult may designate a trusted person (*personne de confiance*), whose role will be advisory. In other cases the protected adult will be represented by a tutor or guardian who is charged with protecting the financial interests and personal well-being of the adult, and whose advice must be followed.

## THE 'PERSONNE DE CONFIANCE'

In French law, all adults may designate a "trusted person" (*personne de confiance*), with the exception of adult wards of court who have not designated such an individual prior to being placed under the care of a legal guardian. A *personne de confiance* must be proposed on arrival in a medical institution, and will be consulted if the adult is not in a condition to express himself or formulate decisions. No treatment or investigation may be undertaken, except in cases of emergency or impossibility, prior to consultation with the *personne de confiance*, or at least family members or close friends<sup>10</sup>.

However, recourse to a *personne de confiance* currently remains unusual. Few people designate such a person, either because this is not systematically proposed to them on entry into a medical institution or because they refuse to envisage a situation in which they may not be able to express their own decisions. Often, even when a *personne de confiance* is designated, doctors are reluctant to follow his or her decision because the law stipulates only an advisory role. The role of the *personne de confiance* may (and indeed should) increase in the future, notably because of regulations setting up a new legal framework, the *mandat de protection futur*<sup>11</sup>. This status stipulates that the guardian, known as the *mandataire*, will take on the missions of a *personne de confiance*<sup>12</sup>.

## ADULT WARDS OF COURT

Adult wards of court are excluded from the rules regarding the *personne de confiance*, since their legal guardian is competent to authorize care in the interest of the protected adult<sup>13</sup>. However, adult wards of court must nonetheless be informed and should participate in the decision regarding their care in a manner adapted to their faculties of discernment<sup>14</sup>.

The Council notes that, regarding health-care, the law demands the agreement of the legal guardian but not a specific authorization from the magistrate charged with setting up guardianship (*juge des tutelles*). Two recent texts provide for recourse to the *juge des tutelles* if the protected adult refuses treatment or is unable to express himself, and if there is a serious risk of bodily harm<sup>15</sup>. There is no reason to consider that a screening test includes such a serious risk of bodily harm. In the case of the *mandat de protection futur*, the mission of the legal guardian (here a *mandataire*) may include the tasks of the guardian of a ward of court<sup>16</sup>.

## EXCEPTIONAL CIRCUMSTANCES

Although he must be consulted, the *personne de confiance* who represents an adult in temporary guardianship (*sauvegarde de justice* or *curatelle*) is thus not competent to authorize screening, since his role is only advisory. However, the representative of an adult ward of court (*sous tutelle*) is authorized by the judge to give his agreement regarding medical care.

The representative of the protected adult must be swiftly available to give his opinion, since following ABE, if the source patient does indeed have a positive serology, post-exposure prophylactic treatment must be prescribed without delay. However, in certain

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<sup>6</sup> Following article L425 of the Civil Code, «Any person who is unable to act in his or her interests because of a medically attested alteration of his mental or bodily faculties which prevents the expression of his desires may benefit from measures of legal protection».

<sup>7</sup> Following article L433 of the Civil Code, «The judge may place under *sauvegarde de justice* a person who, for reasons stipulated in article 425, requires temporary legal protection or representation for the accomplishment of certain specific acts».

<sup>8</sup> Following article L440 of the Civil Code, «Persons who are able to act for themselves but who for reasons stipulated in article 425 require continuous assistance or supervision for important acts of civil life may be placed under *curatelle*».

<sup>9</sup> Following article L440 of the Civil Code, «Persons who, for reasons stipulated in article 425, require continuous representation in acts of civil life, may be placed under *tutelle*. This *tutelle* may only be pronounced if it is established that neither temporary *sauvegarde de justice*, nor *curatelle assure sufficient protection*».

<sup>10</sup> Articles L1111-4 et L1111-6 of the Code de la santé publique.

<sup>11</sup> Following article L477 of the Civil Code, «Every adult or emancipated minor who is not the object of a *tutelle* may charge one or several persons, through a mandate, to represent him in case he is no longer able to act in his own interests for reasons stipulated in article 425».

<sup>12</sup> Article L479 of the Civil Code.

<sup>13</sup> «If refusal of treatment by the person with parental authority or the legal guardian risks leading to serious consequences for the health of the minor child or adult ward of court, the doctor may deliver indispensable treatment», article L1111-4 of the Code de la santé publique.

<sup>14</sup> Article L1111-2 of the Code de la santé publique.

<sup>15</sup> See article L459 of the Civil Code and *Charte du patient hospitalisé* annexed to the DHOS/DGS circular of March 9, 2006.

<sup>16</sup> Article L479 of the Civil Code.

cases the *personne de confiance* or legal guardian may not be rapidly available, particularly when the guardianship is not exercised by an individual (under *tutelle en gérance*, where the guardianship is exercised by the administration of the health-care institution or *tutelle d'État*, exercised by an authorized association).

Thus if every attempt to consult the *personne de confiance* or legal representative in a timely manner has been unsuccessful, the Council agrees that exceptional circumstances may authorize screening even when it has been impossible to obtain consent.

However, following the conclusions of a previously published Opinion regarding situations of coma and prolonged loss of consciousness<sup>17</sup>, and considering the specific situation of protected adults, the Council wishes to clarify the exceptional circumstances in which consent may not be obtained.

If a care-giver is accidentally exposed to blood and the HIV serology of the patient is unknown, although the patient has not previously expressed refusal of screening, then when the test is proposed to the protected adult patient, every effort must be made to obtain his consent, or in case of difficulty, to contact his representative as rapidly as possible. If the legal representative, guardian or *personne de confiance* is not able to respond to requests for advice made by the medical institution after the accident, the consent of the source patient or his legal representative has not been obtained.

In such a case, the National AIDS Council considers that the presiding physician may take the responsibility of prescribing a screening test due to exceptional circumstances and the clear benefit of such a test to the persons involved. The physician should note such this decision in writing and attest that every effort has been made to contact the legal representative, guardian or *personne de confiance* of the source patient.

The Council observes that prescription of such a test must be of benefit to the care-giver who has suffered an ABE, but also to the patient at the origin of the ABE. If the test is positive and the risk of transmission is thus established, the care-giver must be offered rapid access to post-exposure treatment, and the source patient and his legal representative must also be given all possible information about treatment for HIV infection for vulnerable adults.

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<sup>17</sup> National AIDS Council, *Avis sur le dépistage en milieu hospitalier en situation d'accident avec exposition au sang (AES) et d'impossibilité pour le patient de répondre à une proposition de test*, October 12, 2000.