July 24, 2019

The importance of obtaining consent in terms of the POPI Act

Compliance with the Protection of Personal Information (POPI) Act will become increasingly important for all organisations.

As the Information Regulator develops the POPI regulations further, the requirements will become clearer. One of the conditions of the Act specifically relates to consent.

In this article we will discuss the different types of consent and what elements should be included in a consent form. *When a Healthcare professional collects personal information, privacy legislation requires that those individuals consent to their information being collected, used and disclosed.* Depending in the privacy legislation to which the organisation is subject, there may be exceptions to the rule.

Different types of consent

- **Explicit consent**, also known as direct consent, means that the patient is presented with a clear option to agree or disagree with the collection, use or disclosure of information. For example, when the Healthcare professional requires photos of patients for marketing material, the direct consent of the patient is required. This consent form should include the specific reason why the Healthcare professional requires photos, which photos will be taken, and where the photos will be used.
- **Implicit consent,** also known as indirect consent, means that the patient voluntarily provides information that will clearly benefit him/her, and the Healthcare professional's motives are reasonable. For example, if a patient attaches a list of references, family members' contact numbers, or medical history, it is implied that, by providing the information, the patient consents to the the information being processed.

Important aspects to consider for valid consent

Capacity

Legal capacity has two components, namely age and decisional capacity. The legal age in South Africa is 18 years, unless there is good reason to believe that the patient has a mental impairment that compromises their ability to make decisions, in which case a parent or guardian's written consent will be required.

In the case of minors, consent should be obtained from one parent or guardian if the results entail minimal risk or direct benefit for the child, and the consent of both parents if there is a greater risk and no direct benefit to the child. If possible, evidence of a child lacking the capacity to consent should also be obtained.

When a patient lacks decisional capacity, the following people may make medical decisions on their behalf:

- A person previously mandated by the patient to act as his/her proxy;
- A person authorised by law or court order;
- A member of the patient's family; or
- A healthcare professional (only in extreme circumstances).

A proxy consent form should include the capacity of the person who is consenting on behalf of the patient, and the reason why consent is necessary, for example in terms of the Mental Health Act.

When a patient's discretionary or volitional capacity is in doubt, an assessment should be carried out and a detailed process documented. For example, when a patient's volitional capacity fluctuates over time or during the day, the time of consent is crucial. A patient with cognitive impairment should be assisted as far as possible to exercise their own discretional capacity, meaning Healthcare professionals should provide information in a form they can understand by using the following pointers:

- Visuals
- Avoid asking "yes" or "no" questions
- Rephrase questions to obtain the patient's full response by using open-ended questions, for example "what", "how", "why", "tell me what you understand by…".

Information

The Health Professions Council of South Africa (HPCSA) offers guidelines regarding the context in which the information should be presented. It is the Healthcare professional's responsibility to ensure that the patient can give informed consent and that the information is provided in a detailed, clear and understandable language, bearing in mind the level of literacy of the patient.

Voluntariness

Patients are often forced to undergo treatment for which they may rightly claim their "consent" was not given freely and is therefore not valid. These are rare circumstances, but there are situations in which patients may feel that they have been forced into accepting treatment they would prefer not to have had. Healthcare professionals should ensure that patients are aware that they may refuse treatment if they so wish.

In cases where a mental Healthcare professional deems a patient to be incapable of consenting to treatment or an operation due to mental illness or intellectual disability, a curator appointed by court or a family member may consent on the patient's behalf. If none of these people are available, the head of the institution may grant consent. Treatment of mental illnesses may take place without the patient's permission only where failure to treat the patient would result in death or irreversible harm, or in instances where the patient inflicts serious harm to him/herself, others or to property.

A few other considerations

Who should obtain consent?

Consent should include the process, the benefits, side effects and potential complications of proposed treatments and procedures. The person who obtains consent must also be able to provide all necessary information to the patient, therefore the person obtaining consent should be the same person providing the medical care to the patient. Although not always practicable, obtaining consent may be delegated to others, provided that they comply with the HPCSA's guidance on obtaining consent and other privacy legislation.

Healthcare professionals who delegate responsibility for obtaining consent remain ultimately responsible for ensuring that their patients had been given sufficient time and information to make an informed decision, and that their consent to proceed is valid.

When should consent be confirmed?

It is good practice to confirm consent prior to the procedure, using this as an opportunity to determine whether there have been any material changes since consent was initially obtained, and to ask the patient if he/she has any further questions.

The fact that consent had been confirmed should be documented, either in the patient's medical record or as a supplementary note on the original consent form.

Refusing consent

Patients have the right to refuse treatment, even when the refusal will result in disability or death or could jeopardise the well-being of a patient. Healthcare professionals may not override a patient's refusal of treatment and may not disregard the wishes of patients who choose not to take their advice. If the patient does not give clear reasons for refusing the proposed treatment, it may be appropriate to assess the patient's discretionary capacity. Any such discussion, however, must be conducted sensitively, and the patient should be given all material information to ensure that the refusal is truly informed. Available alternatives should then be offered, with a reminder that the patient may withdraw consent.

Withdrawing consent

Patients may also withdraw consent for continuing treatment. If, during a procedure, a patient indicates that she/he wants to discontinue treatment, the healthcare professional should stop the procedure.

In conclusion

Obtaining a patient's valid consent can be a dilemma for Healthcare professionals, as circumstances may involve conflicting principles that have to be resolved in challenging situations.

Consent must be seen as a communication process and not just a signature on a consent form.

Proper consent will include an assessment of the patient's discretionary capacity, a description and discussion of the risks, benefits and costs and, most importantly, a reminder that consent may be withdrawn at any time, especially when delays occurs between authorisation and procedures, in which case the patient's willingness to proceed should be confirmed. The principle here is respect for human dignity and the right of any person to determine their own destiny and well-being, even where such decision is not agreed with or may even prejudice or compromise an individual.

SERR Synergy assists Healthcare professionals in compiling a valid consent form according to the HPCSA guidelines and the POPI Act. Our qualified team of professionals will throughout the process, provide ethical and legal guidelines to which the Healthcare professional should adhere to in order to minimise overall liability.

About the Author: Retha van Zyl completed her BCom Hons (Economics and Risk Management) studies at the North West University. She joined our team in January 2016 and currently holds the title 'Information Compliance Advisor'. She specialises in POPI and PAIA compliance, which includes compiling and submitting PAIA manuals to the Human Rights Commission. She also compiles the Data and Information Protection Report to identify risks associated with information security and drafts Information security policies for procedural compliance in each department within an organisation.

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