THE POPI ACT vs MEDICAL RECORDS

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Family Medicine at TUKS

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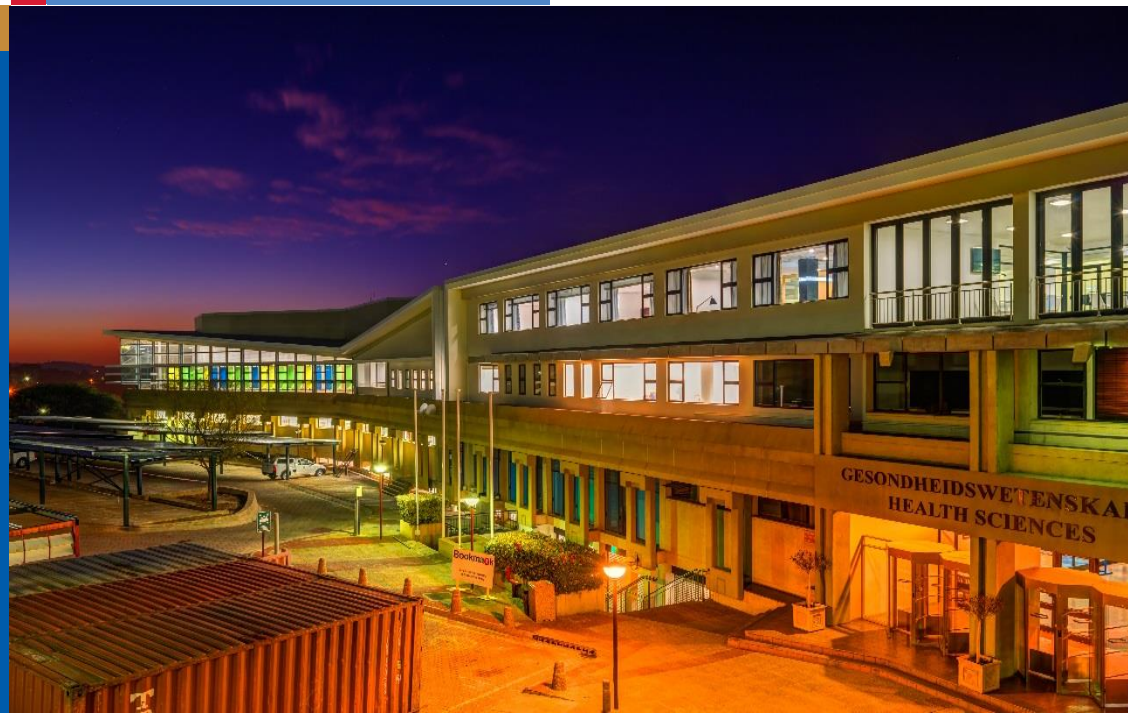
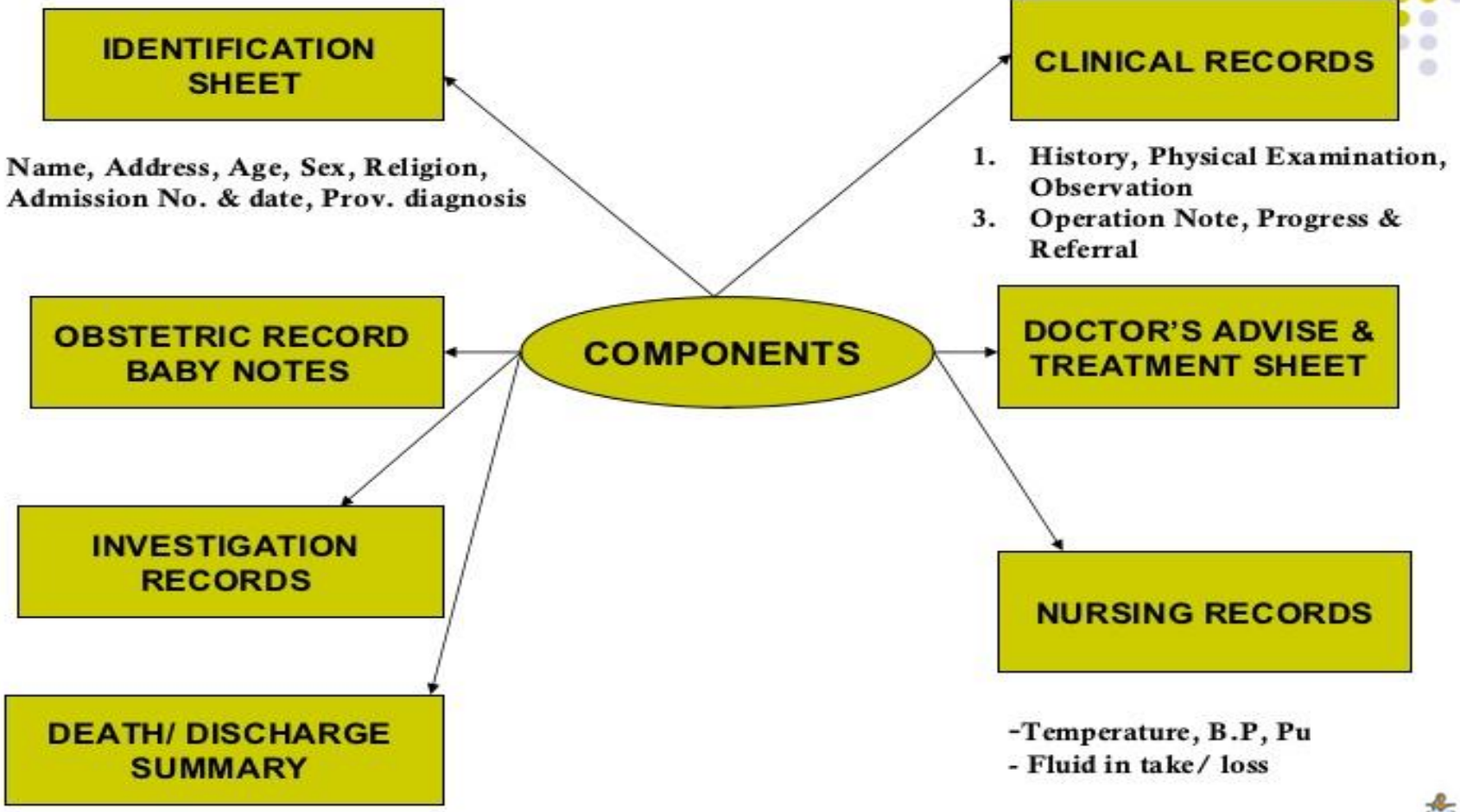
Make today matter



Confidentiality: providing and protecting information

- Health care practitioners hold information about patients that is private and sensitive.
- The National Health Act (Act No. 61 of 2003) provides that this information must not be given to others, unless the patient consents or the health care practitioner can justify the disclosure.
- Practitioners are responsible for ensuring that clerks, receptionists and other staff respect confidentiality in their performance of their duties.

COMPONENTS OF MEDICAL RECORD



Time limits on POPI

- The Protection of Personal Information (POPI) Act, which was signed into law in 2013
- The purpose of the POPI Act is to protect people from harm by protecting their personal information and will be implemented by the newly established Information.
- This regulator should be fully operational by December 2017 and from that time institutions would have a 12-month grace period in which to become fully compliant.
- BUT NOT YET FULLY ACCEPTED
- This means there is limited time left to comply with the comprehensive requirements of the POPI Act.

Storage of medical records

- Often the biggest liability in any system is the individuals using it.
- The most advanced systems and controls to protect personal information are useless if the **people using the systems are negligent**.
- This is what makes education so important. Not just for new employees, but regular reminders for existing staff.

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Storage of medical records

Hard copies

1. If all your patients' information is kept in one folder, are you the only one who has access to the files?
2. It would not be ok for your receptionist or accounts staff to have access to the full file.
3. They should only have access to the information that they need in order to complete their duties.
4. This would include contact numbers, address, and amount owing. It would not include diagnosis or medical history.

Storage of medical records

Mobile devices

1. Cell phones, iPads, laptops, what devices are connected to your system?

2. It might be convenient to download a patient's records to your mobile device, or forward an email to your private email, but how safe is your mobile device?

3. How accessible will the information be if your laptop is stolen?

4. What kind of tracking software and pass codes do you have in place to protect the information in the event of it being lost or stolen?

Storage of medical records

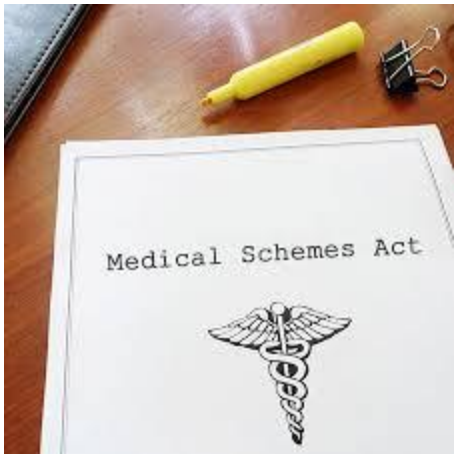
Digital storage

1. Where are your digital records stored? On servers onsite? In the cloud?
2. Wherever they are stored you need to be able to prove that you've taken all the necessary steps to ensure the information cannot be lost, damaged, or accessed unlawfully.
3. Who has access to your data and can they effectively monitor and control this? Many cloud providers cannot.

Sharing personal information

- Before you **share** any patients' personal information, be it with service providers or business partners, you need to make sure that it is in the best interest of your patient and obtain their **consent**. Ideally written consent.
- When it comes to sharing information with a **medical scheme, you should have informed consent** of the patient (or the person authorised to consent) for all information shared with the scheme.
- While there might be exceptions, it is best to ensure appropriate and proper consent.

- It is advisable to **share information** of patients, other than the submission of accounts, which usually have specified e-mail addresses or fax numbers for submission, **with a named individual** at scheme/administrator level
- It is **not advisable to fax** sensitive information to an ‘open’ fax machine. Sending personal information electronically has inherent security risks unless it is encrypted.”



- **In the case of a family, where the husband is the principle member responsible for payment of the account**
  - Does he have a right to know that his wife is on antidepressants?
  - And what about a daughter over the age of 18, where her father is still responsible for the **payment of the account**, does he have a right to know that she is on birth control?

These are some of the situations where the POPI Act is likely to come into play.

- It seems for the moment, in respect of consent (and especially dealing with children's information) at least, the Act poses more questions than answers and it will be interesting to see how things unfold.

- **ICD-10 Coding**
- Previously the HPCSA "strongly recommends" getting a **patient's written consent** before disclosing information to a medical scheme.
- Such written consent can be a "once-off" applying to patient contact concerning the same or a similar clinical condition, but subject to verbal reminders and confirmation (which should be documented in the patient's records).
- When the patient presents **with a new condition**, it will be necessary to obtain **new written consent.** The 2008 booklet makes no such recommendation.
- THIS IS NOT PRACTICAL BUT WRITE IN GENERAL CONSENT

- The patient's consent must be fully informed, based on a full and frank discussion about who will be accessing the information and for what purpose, and the implications of disclosure versus non-disclosure.
- The patient should be informed that the medical scheme has the discretion to reject claims with a U 98.0 code (Patient refused to disclose clinical information).
- Doctors who provide services that do not involve direct contact with the patient (pathologists, for example) should confirm with the commissioning doctor that the patient has consented to his/her medical information being accessed and to clinical information being disclosed to his/her medical scheme.

POPI

With personal information becoming more accessible and easier to manipulate, POPI legislation is imperative for the protection of businesses and individuals.

POPI

- The Protection of Personal Information (POPI) Bill – soon to be passed as an Act – has implications for all medical practitioners
- It is important to note that POPI does not replace the HPCSA's existing guidance on safeguarding confidential patient data
- POPI affects all private and public organisations that process information such as names, addresses, email addresses, health information and employment history, and must be complied with if outsourcing data to third parties.

POPI

A specific new obligation created by POPI is that once personal information has been collected from another source, the medical practitioner must take reasonable steps to inform the patient of this, together with the source of the information and the purpose for which it has been collected. This can be relayed to the patient either orally or in writing.

POPI

- Any personal information you hold must be protected from loss, damage or unauthorised destruction, and unlawful access – you will be expected by law to implement reasonable technical and organisational measures to ensure this protection is in place.
- However, POPI does make provision for the resources of your organisation, as well as the nature of the information itself, stating that this will be taken into account when deciding what technical and organisational measures are reasonable.

POPI

Health information processors have been invited to comment on the amendments to the POPI Act and to indicate whether there should be prescribed rules for processing health information and what those rules should be. *Ensure that your business is compliant* and that the privacy of your patients, customers and clients is respected.

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Consent

- "Consent" in terms of the National Health Act means consent for the provision of a specified health service given by a person with legal capacity.
- A person older than 12 years may consent to medical treatment subject to being sufficiently mature to provide the consent, (Children's Act (Act No. 38 of 2005) and a female of any age may consent to a termination of pregnancy (Choice on Termination of Pregnancy Act (Act No. 92 of 1996)).
- "Express consent" means consent which is expressed orally or in writing (except where patients cannot write or speak, when other forms of communication may be sufficient).

Age to consent

- The age of full legal capacity in South Africa is 18 in terms of consent to clinical treatment, this means that people of 18 and older should be assumed to have the decisional capacity to make choices on their own
- Children of 12 or older who have the maturity to understand the implications of a proposed treatment may consent on their own behalf
- Surgical procedure is being proposed, the child consent must be accompanied by a parent or guardian's written assent.

Medical treatment

Currently, children can consent independently to medical treatment from the age of 14; those below 14 require consent from a parent, legal guardian or other designated person. **In the future, children will be able to consent to medical treatment from the age of 12, if they have 'sufficient maturity'.**

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HIV testing

- Currently, children can consent independently to an HIV test from the age of 12, when it is in their best interests, and below the age of 12 if they demonstrate 'sufficient maturity'; i.e. they must be able to understand the benefits, risks and social implications of an HIV test.
- This norm is not likely to change in the immediate future.
- PRE AND POST COUNCELLING
- This norm is not likely to change in the immediate future.

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Contraception & TOP

Access to contraceptives

- Currently, children can consent to contraceptives and contraceptive advice from the age of 12. This norm is not likely to change in the immediate future.

Termination of pregnancy

- Currently, girls can consent to a termination of pregnancy at any age. This norm is not likely to change in the immediate future.

Operations

NEW

- Currently, children cannot consent independently to a medical operation until they are 18.
- When s129(3) of the Children's Act comes into operation, **a child over the age of 12 may consent to surgical operations** if he/she (*i*) has 'sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation'; **and (*ii*) is assisted by a parent or guardian.**

Male circumcision

Male circumcision

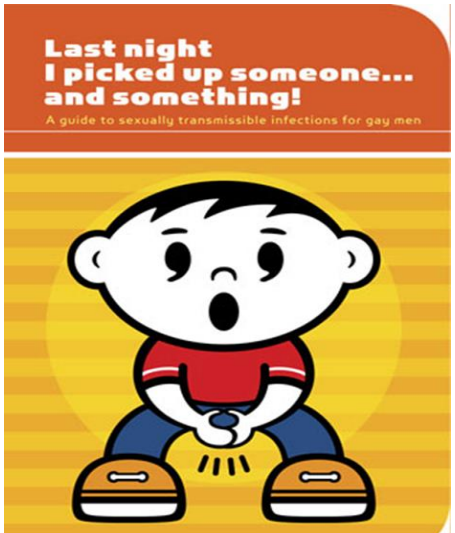
- Currently, boys are able to **consent independently to circumcision only when they are 18** as the procedure is classified as an operation.
- **In the future**, when s12(8) of the Children's Act comes into operation, **boys below age 16 can only be circumcised for 'religious' or 'medical reasons on the recommendation of a medical practitioner' whereas those above 16 may undergo circumcision for any reason.**
- **Boys over 16 must receive counselling prior to the circumcision, and they have the right to refuse** circumcision.

Health research

In the future, when s71 of the National Health Act is implemented, parental/legal guardian consent will be mandatory for **all** health research; **in addition, children will be required to 'consent' alongside their parent if they have 'sufficient understanding'**

Sex

- Currently, it is an offence to have sex below the age of 16, even when sex is consensual.
- This means that if one or both of the persons engaged in consensual sex are below the age of 16, they are committing a criminal offence. This norm is not likely to change in the immediate future.



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Disclosure patient records

- Confidentiality
- Disclosures
- Disclosures without consent
- Access to records
- After death
- Other types of medical information
- Other uses
- Conclusion

Confidentiality

- Patient confidentiality is enshrined in law – the National Health Act 2003 makes it an offence to disclose patients' information without their consent, except in certain circumstances.
- Patients **have a right** to expect that **information** about them will be held in **confidence** by **health care practitioners.**
- **Confidentiality is central to trust** between practitioners and patients.
- Without assurances about confidentiality, patients may be reluctant to give practitioners the information they need in order to provide good care.

Disclosure

Where health care practitioners are asked to provide information about patients, they should:

- **Seek the consent of patients to disclosure of information wherever possible**, whether or not the patients can be identified from the disclosure;
- Comprehensive information must be made available to patients with regard to the potential for a breach of confidentiality with ICD10 coding.

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- **Consent must be obtained** from the patient if access to their record has been requested by the **HPCSA, an insurance company, employer or people involved in legal proceedings**. If no such authority is forthcoming from the patient, no disclosure can be made.
- **Sharing of information within the healthcare team is** usually assumed if the patient, for example, has agreed to being referred to a **specialist.**
- In this case, such sharing should be limited to a **need-to-know requirement.**
- Patients do have the right to request that certain information be withheld from a team.

HIV/AIDS

Your record-keeping system should have a way of limiting access to information regarding the status of HIV-positive patients. The HPCSA says such information should be treated as highly confidential and specific consideration should be given to sharing this information with other professionals involved in the patient's care

Disclosures without consent

- It is possible to disclose confidential information about a patient without their consent, **if there is a sufficient risk to public health**
- The **public interest outweighs the patient's right** to confidentiality.
- There are circumstances – including a statutory duty to share certain information, such as **reporting notifiable diseases** – when you may have to disclose or allow access to information within a patient's medical record

Access to records

- **Either the patient or someone authorised** to act on the patient's behalf **can request access**
- **Relatives** other than parents have **no automatic right** of access and any requests for information **should only be granted with the consent of the patient.**
- **Parents** and guardians of children **aged under 12** can gain access to their child's medical records if they request it.
- **An exception is if the child has had a termination of pregnancy, which should remain confidential unless the child consents to its disclosure.**

- **Children aged 12 or over,** and who have the maturity to understand the consequences of disclosure, **must give their consent** to the disclosure of their medical records.
- **The police have no special right to access clinical records.** However, they can **be granted access if the patient consents** to the disclosure; if the information has been requested by a court order

Access to records (cont)

- **Lawyers** may also request access to a patient's medical records, in situations where they are **handling a claim** – again, the consent of the patient is needed before any disclosure. If the lawyer is **acting on behalf of the patient**, it is **safe to assume that the request is being made on the instructions of the patient** – although a signed consent form clarifying this is preferable.

After death

- **Confidentiality applies after a patient's death** – generally, information **should only be disclosed to third parties with the consent of the deceased patient's next of kin or executors.**
- Exceptions to this rule include if information is required for an inquest.

Other

- Identifiable information in medical records can **be used for study, teaching or research with the consent of the patient**
- However, if you wish to publish case reports, photographs or other images in a format that the public can access – whether it is identifiable or not – the patient must provide consent.

Protection of Personal Information Act and medical certificates

- An employer is not required to pay an employee in terms of section 22 if the employee has been absent from work for **more than two consecutive** days or on **more than two occasions during an eight-week** period and on request of the employer.
- Where an employee is **regularly off sick** on a Monday or Friday or any other regular interval, the Manager may request a medical certificate for all future absences.

- The medical certificate must be issued and signed by a **medical practitioner** or any other **person who is certified to diagnose and treat patients** and **who is registered** with a professional council established by an Act of Parliament.
- This section in **no manner imposes an obligation on the employee to disclose the exact nature of their illness**;
- The only requirement is that a qualified medical practitioner confirm that the patient were unable to render service on the day in question due to injury or illness, whatever the condition may be
- The **principle is that an employee need not disclose medical facts to the employer** unless it will directly impact on its operations.

- This does not mean that a medical certificate with a vague reference to an unidentified medical condition is beyond question.
- The employer is entitled to investigate the legitimacy of the medical certificate by contacting the relevant physician, who can then be asked to confirm the employee's incapacity for the relevant days.
- Where there is doubt a second opinion may be requested.
- Finally, the employer would be unable to support the argument that they need to know what the medical condition of the employee is to ascertain whether it would affect other employees.

- The fact that a doctor only incapacitates the employee for a certain period of time asserts that the employee is no danger to public thereafter.
- Where it would be unsafe for the employee to resume work, the medical practitioner would not sign them off as fit for duty.
- Where the employee suffers from a dangerous, communicable disease, the medical practitioner would further be obliged to inform all parties that the employee might have come in contact with during the infectious period to prevent further spreading of the disease and to afford treatment to affected individuals.
- Companies are therefore safeguarded against situations where ill employees may cause epidemics.

HR rules of companies

- Basic Conditions Of Employment
  - Maternity Leave
  - Paternity Leave
  - Sick Leave
- Employee Wellness
- Employment Contracts

Employment Equity Act dealing with medical testing

- The provision stipulates that:
  1. **Medical testing of an employee is prohibited**, **unless-**
  (a) **Legislation permits** or requires testing; or
  (b) **It is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.**
- Where an employer so wishes to have an employee tested, they would bear the onus of proving one of the above mentioned grounds to justify why the tests are required.

What the POPI Act means for medical aid schemes

- When implemented, the Protection of Personal Information **(POPI) Act will fundamentally change the way personal data** is managed.
- Corporate South Africa, including medical aid schemes, insurance brokers, financial advisors, marketers and even brands **need to start preparing now for its impact.**
- When all co-morbidities are taken into account it ensures that healthcare providers work together in the **patient's best interest."**

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- **All healthcare providers who interact with patients are generally permitted to have access to their information to a certain extent.**
- However, to conform to POPI regulations, medical schemes need to ensure claims, medical conditions and treatment are only shared if the member chooses for it to be.

Regarding the implementation of POPI

- "we have processes in place to securely store the data we have and are ready for the implementation of POPI and will conform 100% with the final conditions outlined in the Act.
- **Protecting the personal and medical records of our members is a key priority."**

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