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Forms to capture child consent to surgical procedures: Time to focus on function rather than form

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It is uncontroversial that no form of treatment, including a surgical operation, can be undertaken without the consent of the patient/proxy. The Children's Act deals expressly with consent to 'surgical operations' on children. Section 129 creates a framework based on the principles of child participation and protection. Nevertheless, obtaining consent from children remains complex: firstly, children are legal minors and have limited capacity to act independently. Secondly, there may be risks or longer-term consequences of surgery that distinguish it from medical treatment. Third, a child's capacity to understand risks is not static: it evolves with age, and limited tools exist to access capacity. Fourth, there are at least three parties to the consent procedure – the child, the parent/guardian and the medical practitioner, all of whom may have different interests. Fifth, in some instances there is the added complication of child parents who need to provide consent for their own child. This article aims to provide guidance to surgeons and other medical practitioners performing surgery on children. It does this through setting out the legal norms relating to child consent to an operation. It critically examines the *pro forma* consent forms (forms 34 and 35) found in the regulations issued in terms of the Children's Act that are to be used to document the consent process, and identifies key gaps and weaknesses. It concludes with recommendations for the adaptation of these forms through the use of a checklist to ensure that all the requirements for valid consent are documented, protecting children and medical practitioners.

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It is uncontroversial that consent is a positive right, and no form of treatment, including a surgical operation, can be undertaken without the consent of a patient or an authorised proxy.[1] The legal principles relating to consent have their roots in the common law defence of *volenti non fit injuria* (no harm is done to the one who consents).[2] In order to rely on this defence, medical practitioners must show that the patient (*i*) had knowledge of the nature and extent of the harm or risk involved in the procedure; (*ii*) had an appreciation of this information; and (*iii*) agreed to go ahead, accepting both risks and consequences.[3] In the post-1994 period, Parliament has passed several pieces of legislation that deal with consent to various health interventions.[1,4-6] These laws build on the common law norms setting out who has the capacity to consent, when and how consent ought to be obtained and whose responsibility it is to ensure these conditions have been met.

One of these new pieces of legislation is the Children's Act No. 38 of 2005,[5] which deals expressly with consent to 'surgical operations' on children. Section 129 of the Act[5] set a framework that is based on the principles of both child participation and child protection. Although the law provides clarity on when consent to an operation on a child is lawful, obtaining consent from children remains complex for a number of reasons, including, firstly, that children are legal minors and have limited capacity to act independently.[7] Secondly, there may be risks or longer-term consequences of surgery that distinguish it from medical treatment. Third, a child's capacity to understand these risks is not static: it evolves with age and stage of development,[8] and limited tools exist to access capacity. Fourth, there are at least three parties to the consent procedure: the child, the parent/guardian and the medical practitioner, all of whom may have different interests. Fifth, in some instances there is the added complication of child parents (parents <18 years old) who need to provide consent for an operation on their own child.

This article aims to provide guidance to surgeons and other medical practitioners performing surgery on children. It does this through setting out the legal norms relating to child consent to an operation. It critically examines the *pro forma* consent forms (forms 34 and 35) found in the regulations issued in terms of the Children's Act, which are to be used to document the consent process,[5,9,10] and identifies key gaps and weaknesses. It concludes with recommendations for the adaptation of these forms through the use of a simple checklist to ensure that all the requirements for valid consent are appropriately documented, protecting children and medical practitioners.

Requirements for consent to a surgical operation as set out in the Children's Act, its regulations, the Choice of Termination of Pregnancy Act, the Sterilisation Act and the National Health Act

In terms of the common law, valid consent can only be provided by a person with capacity who has been properly informed, has understanding and has given their agreement to the procedure.[3] Each of the these elements of consent are dealt with separately.

Capacity

The Children's Act recognises the capacity of children to self-consent to a number of health interventions.[11] Operations are one of these, where the Act provides that children aged >12 who have sufficient capacity can self-consent to a surgical procedure.[5] However, children must be 'assisted' in the consent process by a parent or legal guardian.[5]

The legislative framework as set out in the Children's Act and various other pieces of legislation has a number of nuances. It envisages eight different consent scenarios. In each, either the child or a proxy consenter has the capacity and/or authority to provide consent or to assist the child with the consent process. They are:

(*i*) a girl child, of any age, may consent independently to surgery if the procedure is a termination of pregnancy;[6]

(*ii*) no-one may consent to the sterilisation of a child (male or female) under the age of 18;[4]

(*iii*) if the child is aged >12 years, has 'sufficient maturity' and the 'mental capacity' to understand the risks, benefits, and social and other implications of the surgery, (s)he must provide consent to the operation, but be 'assisted' by a parent or legal guardian;[5]

(*iv*) if the child is <12 years or >12 but lacks capacity, then consent must be provided by a parent or legal guardian;[5]

(*v*) if the operation is both urgent and necessary and there is no-one to assist the child, the superintendent or person in charge of the hospital may provide consent;[5]

(*vi*) if the operation is not urgent and the parent or guardian is incapable of assisting the child, cannot be found or has passed away, the Minister of Social Development may provide the necessary consent or assistance, as required in terms of the Children's Act;[5]

(*vii*) if the parent of the child is a child him- or herself, consent is to be provided by the child parent's guardian;[5] and

(*viii*) the High or Children's Court may provide consent or assist a child if other proxies listed in the section are unable to act.[5]

Information

The Children's Act provides that children must be informed of the risks, benefits, social and other implications of the surgery.[5] In addition, the National Health Act No. 61 of 2003[1] requires disclosure of the child's condition, the range of 'diagnostic procedures and treatment options', the nature of the 'specified health service' they are to receive and of their right to refuse medical treatment.[1]

In Castell v de Greef the court held that when providing patients with information on the risks of the procedure, only 'material risks' need to be disclosed.[2] Remote risks are not regarded as material.[2] Social and other implications could include, for example, community disapproval relating to a termination of pregnancy, or the potential for being excluded from a school sport team if the operation affects physical mobility for a period.

Understanding/appreciation

Appreciation of this information must be established, with courts stating that 'the patient or their proxy must also comprehend and understand the nature and extent of the harm or risk'.[12] It has been suggested that understanding means that the child should be able to appreciate the nature of the procedure and its risks and consequences, make a choice and articulate reasons for his or her choice.[8] None of the new pieces of legislation address assessing understanding in any detail.

Agreement

With regard to agreement, the law does not expressly require written consent for surgery unless the procedure is a sterilisation (which cannot be done on children). Agreement must be provided by the child him- or herself unless (s)he is <12 years old or it is a child whose parent is a child him- or herself.[4,5,8,10] In the last two instances, regulations issued in terms of the Children's Act require forms 34 or 35, or similar documents, to be completed in order to record the consent process.[9,10]

Linked to the act of agreeing to the procedure is the right to refuse treatment, which is founded in the National Health Act.[1] In the case of children, however, this right is limited. Where the child or the proxy consenter unreasonably refuses to consent, this may be overridden by the Minister of Social Development,[5] even if it is contrary to the wishes of the child. In this regard the Children's Act has confirmed the earlier position taken by the courts when considering the conflict between a parent's right to religious freedom and a child's right to life.[13] The Children's Act allows doctors to approach the minister directly for such consent.[5] If the child or his or her parent/legal guardian wishes to challenge the overriding of their decision to refuse treatment, they would have to approach the High Court to review the minister's decision.[14]

There is limited guidance on when it would be considered 'unreasonable' if a child >12 years old refuses to consent to surgery. To date, cases have all related to refusals on religious grounds.[13,15] Here the courts have held that refusing to consent or to assist a child with the consent process on religious grounds is unreasonable unless alternative treatment exists.[13-15]

Capturing the legal norms in consent forms

Regulations issued in terms of the Children's Act contain forms 34 and 35, which are to be used as templates for documenting child consent to an operation.[9,10] Form 34 deals with child consent and form 35 with consent by a child parent and parent or guardian of the child parent.

The forms have three parts. The first part captures the detail of the child who will be undergoing the operation, the institution where the procedure will be performed and information on the parent or guardian. The second part requires the surgeon to confirm the information that has been provided to the child and the parent or guardian. The final part captures the child's consent and the assent of the parent or legal guardian. There are no significant differences between the two forms except that form 35 requests the details of the child parent and the parent or guardian assisting the child parent to give consent. The signature of the child parent is required as evidence of consent, and the parent or guardian of the child parent has to declare that (s)he has duly assisted the child parent to furnish consent.[9,10]

Discussion

There is a comprehensive legal framework addressing child consent to operations. A strength of the approach is that it is consistent with one of the core principles underpinning the Children's Act, that of a child's right to participate in decisions that affect him or her, as it

Table 1. Checklist for consent forms dealing with children undergoing surgery

	Information required		
Category	**Children <12 years, or >12 without capacity**	**Children >12 years with capacity**	**Child parents >12 years**
Background on child, parent, health establishment and medical practitioner			
	Name of child, parent/legal guardian/medical practitioner	Name of child, parent/legal guardian/medical practitioner	Name of child, parent/legal guardian/ medical practitioner
	Name of health establishment	Name of health establishment	Name of health establishment
	Age of child	Age of child	Age of child
	Addresses of all parties	Addresses of all parties	Addresses of all parties
Confirmation of information having been provided			
	Information provided to parents/ guardians	Information provided to child and parents/guardians	Information provided to child parent and his/her parents/guardians
	Information provided on: diagnosis; treatment options; purpose of surgery; risks; benefits; implications; right to refuse treatment	Age-appropriate information provided on: diagnosis; treatment options; purpose of surgery; risks; benefits; implications; right to refuse treatment	Age-appropriate information provided on: diagnosis; treatment options; purpose of surgery; risks; benefits; implications; right to refuse treatment
	Language used in explanation	Language used in explanation	Language used in explanation
	Name of person having provided the explanation	Name of person having provided the explanation	Name of person having provided the explanation
Confirmation of the consenter demonstrating understanding			
	Questions answered	Questions answered	Questions answered
	Parent/guardian writes out the nature and purpose of the operation to be undertaken on the child	Child writes out the nature and purpose of the operation to be undertaken	Child parent writes out the nature and purpose of the operation on the child
	-	Child demonstrates understanding of the information and its implications	Child parent demonstrates understanding of the information and its implications
Confirmation that there is agreement to the procedure			
	Signature and date by parent or guardian	Signature and date by child	Signature and date of child parent
	-	Signature and date by parent or guardian	Signature and date by parent or guardian of child parent
	-	Confirmation that parent has duly assisted the child	Confirmation that parent has duly assisted the child parent
	Name, signature and date of consent by another person authorised in terms of the Children's Act	Name, signature and date of consent or assistance by another person authorised in terms of the Children's Act	Name, signature and date of consent or assistance by another person authorised in terms of the Children's Act
	Reason for consent by a person who is not the parent or guardian	Reason for consent or assistance by a person who is not the parent or guardian	Reason for consent or assistance by a person who is not the parent or guardian of the child parent
	Nature of relationship between child and parent/guardian: biological mother; adoptive parents; biological father with parental responsibilities and rights; guardian appointed in a will; guardian appointed by a court	Nature of the relationship between the child and parent/ guardian responsibilities and rights: biological mother; adoptive parents; biological father with parental responsibilities and rights; guardian appointed in a will; guardian appointed by a court	Nature of the relationship between the child and parent/guardian: biological mother; adoptive parents; biological father with parental responsibilities and rights; guardian appointed in a will; guardian appointed by a court
	Note on any refusal to consent to the operation, including the reason for the refusal	Note on any refusal to consent to the operation or to be assisted with the consent process, including the reason for the refusal	Note on any refusal to consent to the operation or to be assisted with the consent process, including the reason for the refusal

provides that children with sufficient capacity can self-consent to an operation.[5] However, this focus on autonomy is not unfettered, as the protection of being 'assisted' by a parent or guardian is required. It is submitted that this is an important decisional support, and it provides parents with an opportunity to model good decision-making through asking questions, requesting clarity and engaging with the various factors that ought to be considered in the decision-making process.

A gap is that the framework does not define 'duly assisted'. Kruger[16] suggests that this refers to parental assistance with the consent process. She argues that as one of the parental responsibilities and rights is to care for the child, and 'care' is defined as 'guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development', assisting a child with consent falls naturally within the way in which the Children's Act envisaged the child/parent relationship.[5,16]

Kruger's argument is also supported by the way the term is used in civil proceedings relating to children. In civil law, children do not have the capacity to litigate.[17] However, children >7 years may either be represented or 'duly assisted by' their parent or guardian.[17] In such cases, parents or guardians are required to complete all formalities, such as signing documents. They undertake these functions in consultation with the child and ensuring that his or her best interests prevail. In both instances it appears that the parent or guardian supports child decision-making rather than acting on their behalf.

The weaknesses of the framework are firstly that, although the Children's Act allows caregivers to consent to medical treatment, they do not have the authority to consent to surgery on a child in their care.[5] This disadvantages children who are not living with their parents. Secondly, the law does not specify who must obtain the consent for an operation, and this has led to disputes. Courts have noted that it is common practice for this function to be delegated to a nurse,[19] even though the Health Professions Council of South Africa Guidelines for Good Practice in the Health Care Professions 'Seeking Patient's Informed Consent: The Ethical Considerations' requires surgeons to take final responsibility for ensuring that consent has been properly obtained.[19] Thirdly, the standard consent forms are inadequate on a number of levels:

(*i*) there is no form for consent by parents or legal guardians when the child is aged <12, or is >12 but lacks capacity to self-consent; and

(*ii*) the form misinterprets the concept of a parent duly assisting the child, as instead of the parent or guardian signing that (s)he has assisted the child, (s)he must confirm that the child is ≥12 years old and has the capacity to consent. The form ought to ask the parent to confirm that he or she has assisted the child with explaining concepts, asking questions and weighing up the choices.

Conclusion

In conclusion, we submit that the way the legislator has formulated consent to an operation in the Children's Act appropriately balances the emerging autonomy of older children with child protection. It offers the opportunity to parents to model good decision-making skills when assisting their over-12s with surgical choices. A key weakness, however, is the standard forms that have been gazetted to capture the consent process. These are not fit for purpose and do not appropriately serve as a means of capturing the norms in the Children's Act.

To achieve this objective, it is recommended that the current forms be amended so that they serve the function of appropriately documenting consent from parents or legal guardians for children aged <12 years, or a child >12 without capacity, consent by children >12 with capacity and consent by child parents >12. Table 1 provides a checklist that can be used to ensure the forms meet all the legal requirements.

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