Sinead Helyar 30th April 2024

Under the Health and Social Care Act 2008, a clinician or carer is legally required to gain the consent of the patient before treatment, test, examination or care. The Nursing and Midwifery Council – the national regulator of nurses and midwives - states consent is the 'right of a person to determine what happens to their own body or what shapes the care and support that they receive'. It is fundamental to good practice, and an explicitly required standard of behaviour and practice'. Other clinical regulators have the same standards for care.

Medics and carers must obtain consent from patients any time they wish to initiate an examination, treatment, or any other intervention – with a few exceptions, such as in an emergency situation. Proceeding with treatment or care without valid consent can put the patient at risk of exposes both staff and patients to boundary breaches and violations.

To provide consent, a patient must have the capacity to make the decision, been offered sufficient information to make an informed decision, be acting voluntarily, free from undue pressure to accept or refuse treatment; and be aware that they can refuse. Consent can be explicit, such as in writing or implied, as in offering your arm for a blood pressure. Importantly, consent to care is not irrevocable. It can be withdrawn and can be context specific.

In addition to consent, CQC Regulations state that service users must be treated with dignity and respect. These requirements serve to ensure patients are offered services that are appropriate and are given the right to choose. Single sex care – when desired, by men and women – is central to consent, dignity and respect. Many patients, particularly women, have a marked preference for any intimate care, examination or discussion to be conducted by a female clinician. Failing to provide same sex care undermines consent.

Unfortunately, there is currently no statutory right in health or social care for a patient to have their care delivered someone of their own sex. The government has recently announced rights to request same sex care. This must include social care. There are many areas within health and social care to underdo to ensure same sex care.

CQC regulations state: "when providing intimate or personal care, providers must make every reasonable effort to make sure that they respect people's preferences about who delivers their care and treatment, such as requesting staff of a specified gender", The use of the word gender here explicitly fails to support same sex care and is at direct odds with the stipulations to ensure consent and provide dignified care for patients. It has been used by hospitals, such as South London and the Maudsley to say that they provide same sex care, but what they means is 'anyone who identifies as a woman, including men'. Women patients do not have these protections for consent, dignity and privacy.

A report by the Policy Exchange highlighted, for example, that North Bristol NHS Trust will not guarantee same-sex intimate care for patients,. At another Trust, one woman found that her request for a female mamographer led to her being described as a 'transphobe' and used as an example of 'transphobia' in guidance issued to NHS staff. Many employers and health regulators, such as the NMC and General Medical Council no longer ask for the sex of staff and will state that men are women

Patients have a right to bodily autonomy, with informed decision-making regarding how and by whom their care is delivered. The principle of consent, if that requires same-sex care, rests upon the notion that patients, predominantly women, can only consent to a treatment if it is based on sex, not gender (which has multiple meanings) and when they know the sex of the clinician treating them. In contrast, Trusts are instead actively supporting staff to go against the ethos of their own professions, undermining the boundaries of women and effectively removing rights to consent to treatment and

intimate care. The preferences of males who say they are women are being prioritised over and above the needs of women patients. Clinical actions (such as cervical screening or the washing of intimate areas) is likely to amount to sexual or criminal assault if attempted without the full consent of the patient (e.g not under duress) and could be classed as state sanctioned/permissive assault if same sex care is not provided.

Same sex care protects vulnerable women. A 2019 report by Professor Rosalind Searle for the Professional Standards Authority underlined much higher rates of sexual misconduct in male health professionals compared to females. The report examined fitness to practice hearings, across medical, nursing and allied health regulators between 2014 and 2016 in which sexual misconduct was proven This related to 81 doctors, 101 nurses and 50 allied health professionals. 88% of total perpetrators were men. 100% of the doctor case perpetrators were male, despite accounting for only 54% of doctors), 84% of Allied Professionals were male, despite accounting for only 30% of the allied professional workforce, and 80% of the nurse perpetrators were male, despite only 11% of nurses being male.

The targets for abuse were mainly patients. 82% of male perpetrators targeting someone who is vulnerable. E.g. younger, infirm or with mental health issues. Unfortunately there is no data on the sex of victims which is a significant omission. Targeting of the vulnerable in healthcare is found in prior studies.

Therefore ensuring same sex care is about safety, particularly important for women and girls who are very vulnerable, particularly those without capacity, often requiring care at home and who can't vocalise or fend for themselves. Further policies, such as the Mental Capacity Act (2005), Equality Act (2010), Best Interest Decisions process and Safeguarding Vulnerable adults underline that everything must be done in that person's best interests and that organisational and professional structures of consent, dignity, privacy and safety are given to them. Same sex care is central to this and failure to provide this for those patients, who cannot ask for themselves, will be discriminatory.

Patients have protections in law and in codes of practice. This must be realised in their care. The NHS, regulators and care providers must be clear what same sex care actually means and ensure that all patients receive sex appropriate care and support as needed. This includes ensuring the appropriate sex of a carer is an occupational requirement, (permitted in the Equality Act 2010) where relevant and for regulators and employers to be required to accurately record whether staff are male and female. The influence of internal and external agencies that undermine this, such as Stonewall, still dominant in organisations such as the NMC and GMC, must be removed from healthcare.