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The new Consumer Protection Act and the GP anaesthetist

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This article gives a brief overview of the influence/impact of the new Consumer Protection Act 68 of 2008¹ and the Regulations on the practising of medicine by the general practitioner (GP) anaesthetist. The Act came into force/operation on 1 April 2011. Aspects such as the purpose of the Act, the rights of patients, obligations/responsibilities of the medical practitioner (who is the supplier of services and/or goods), no-fault liability and recourse available for the consumer, are discussed.

The purpose of the Consumer Protection Act¹ is to:

- Promote a fair, accessible and sustainable marketplace for consumer products and services
- Establish national norms and standards relating to consumer protection
- Provide for improved standards of consumer information
- Prohibit certain unfair marketing and business practices
- Promote responsible consumer behaviour
- Promote a consistent legislative and enforcement framework relating to consumer transactions and agreements
- Establish the National Consumer Commission.

This protection therefore includes the supply of all healthcare services and goods in the Republic of South Africa. The Act¹ applies to every transaction unless it is exempted by section 5 of the Act. In addition, we must remember that the Constitution of the Republic of South Africa² of 1996 and the National Health Act 61 of 2003,³ as well as the common law, also protect the patient/consumer's rights and interests.

The Consumer Protection Act of 2008

Definitions

There are a few definitions in section 1 of the Act¹ that we must take note of, namely consumer, goods, services, business and complainant.

The consumer, in respect of any particular goods or services, means:

- a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business*
- a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3)*
- if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services*
- a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).*

The consumer is thus the patient or the healthcare user who is actively making use of the services/goods supplied by the GP anaesthetist.

The definition of goods includes:

- anything marketed for human consumption*
- any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded.*

Service includes, but is not limited in terms of the Act to:

- any work or undertaking performed by one person for the direct or indirect benefit of another*
- the provision of any education, information, advice or consultation, except advice that is subject to*

regulation in terms of the Financial Advisory and Intermediary Services Act 37 of 2002.

Services thus refer to any work performed by a particular person to the direct or indirect benefit of another, and they also include:

- Providing of information
- Giving of advice and consultation
- Performing of medical interventions, such as anaesthesia, operations, etc.
- Medical aid/schemes cover and the services provided under risk-share arrangements.

A service provider means a person who promotes, supplies or offers to supply any service. The Consumer Protection Act applies to all service providers in the healthcare sector and to the healthcare professionals/workers.

The definition of a business is very wide and means the continual marketing of any goods or services. It is therefore also clear from the definition that the type of business, be it a sole enterprise, a partnership, an associate or shared room agreement, or limited private company, is included under the definition of business.

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A complainant means a person who has filed a complaint with the Commission in terms of section 71.

A single comprehensive framework for consumer protection is established by the Act.¹ The Act provides in particular for vulnerable consumers in the South African community. The Consumer Protection Act may come into conflict with other concurrent legislation, e.g. the Constitution,² National Health Act,³ Mental Health Care Act,⁴ etc.; in such an instance the Act which is offering the consumer greater protection will apply.

The rights of consumers/patients/health-care users

The Consumer Protection Act¹ establishes certain fundamental rights for consumers (consumers are for the purpose of this discussion, the patients of the GP anaesthetist), namely:

- **The right of equality in the consumer market.**⁵ Equality and non-discrimination between consumers/patients are emphasised in sections 8 to 10. All patients are equal and therefore must receive equal treatment. In terms of the Constitution² every citizen of

the Republic of South Africa is equal before the law^{2,6} and this is therefore also applicable to the supply of goods and services.

- **The consumer/patient's right to privacy.**⁵ In addition to this consumer's right every person has a common law right,⁷ as well as a constitutional right,² to privacy. The National Health Act³ provides for a patient's privacy.
- **The consumer/patient's right to choose.**⁵ Sections 13 to 21 make provision for patients to decide freely on a service provider/GP anaesthetist of choice. In terms of the common law, as well as the statutory law, every person has the right to self-determination²/autonomy.^{7,8} The National Health Act³ also provides for a patient's ability to make decisions.
- **The consumer/patient's right to disclosure and information.**⁵
- **The right to fair and responsible marketing.**⁵
- **The consumer/patient's right to fair and honest dealing.**⁵
- **The consumer/patient's right to fair, just and reasonable terms and conditions.**⁵ In deciding whether the terms/conditions of a specific agreement/contract are fair, just and reasonable, there are several factors which may play a role or influence the decision, namely
 - the parties' relationship (doctor-patient relationship, the so-called relationship of trust)
 - the capacity of the patient
 - the patient's level of education
 - the social background of the patient
 - experience of similar situations
 - the patient's sophistication
 - the bargaining position of the parties.

Section 48 stipulates that the terms of the contract/agreement must not be unfair, unreasonable or unjust.

Section 48(1)(c) clearly stipulates:

'... require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer -

- (i) to waive any rights;*
- (ii) assume any obligation; or*
- (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms*

as a condition of entering into a transaction.'

In terms of section 49 certain terms of the contract/agreement must be pointed out by the supplier, i.e. the GP anaesthetist, to the consumer/patient before entering into the specific agreements or before payment for services/goods. Notice must be given to the consumer/patient of any terms purporting to limit the risks or the liability of the supplier/GP anaesthetist that impose an obligation on the patient to indemnify the supplier/GP anaesthetist. Acknowledgement of this fact by the consumer/patient is required.

Section 49 stipulates that notice must be given to the patient if the procedure concerns an activity, e.g. the administering of an anaesthetic or a pain block procedure, which is subject to any risk of an unusual character or nature – that is when '... the presence of which the consumer/patient could not reasonably be expected to be aware or notice, or which an ordinary alert consumer/patient could not reasonably be expected to notice or contemplate in the circumstances'.

The section further stipulates that the supplier/medical practitioner must specifically draw the attention of the patient to the nature and the effect of the risk, and that the patient must sign the document. The notice must be written in plain language that the patient will understand. Adequate opportunity/time must be given to the patient to clarify and understand the fact, nature and effect of such notice, provision or condition. (See sections 6 and 8 of the National Health Act.³)

What then about exemption or indemnification clauses? Section 49 of the Act affects them directly. The exemption of liability by healthcare providers as a result of the gross negligence of staff is no longer permitted. All health establishments must take note thereof.

- **The right to fair value, good quality and safety.**⁵ Sections 54 and 55 emphasise the fact that consumers/patients are entitled to good service and safe good-quality goods. Section 56 furthermore creates an implied warranty of the quality of goods

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by the producer, importer, distributor or the supplier.

Section 58 creates an obligation on the supplier to specifically forewarn the consumer/patient of any risk of an unusual nature that could result in serious injury or the death of a patient. This refers to something the patient cannot reasonably be expected to be aware of.

It is therefore very important that the supplier/medical practitioner must specifically draw the patient's attention to the nature and the effect of the risk/s. This fact is already covered by the National Health Act. Section 6 clearly stipulates that a healthcare user must be informed about the nature, consequences and risks of the intervention/treatment, as well as the manner in which it must be done.

From the above it is clear that the Consumer Protection Act sets a new or different standard relating to the type of risk/s that must be disclosed by the medical practitioner. The question can definitely be asked if it will be possible and practical in the supplying of healthcare services to do just that!

Responsibilities for property of patient by service provider

Where a GP anaesthetist, for example, is performing services at a private hospital or

clinic, the Act¹ stipulates in section 65(2) that the provider of services is responsible for the patient's property when such a patient is admitted and, for example, hands over a watch, jewellery or dentures to be placed in safe keeping.

No-fault liability/strict liability

Section 61 of the Consumer Protection Act¹ deals with the liability of the supplier of goods, i.e. the GP anaesthetist. This section creates the so-called no-fault liability or strict liability.⁵ This issue warrants a discussion on its own; we refer only briefly to this aspect.

In terms of section 61 the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of:

- Supplying any unsafe goods
- A product failure, defect or hazard in any goods
- Inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

Recourse for patients

A patient who is not satisfied with the services rendered by a GP anaesthetist has

the following choice of recourse in terms of section 69 of the Act:¹

- to refer his complaint to the National Consumer Tribunal^{1,5}
- to refer his complaint to the National Consumer Commission^{1,5}
- to consult with an alternative dispute resolution officer^{1,5}
- to institute a civil claim in a court with the necessary jurisdiction.^{1,5}

Conclusion

It is clear that the Consumer Protection Act¹ was promulgated to protect the patient/consumer/healthcare user in all treatment procedures and supplying of services, as well as medicine, in the Republic of South Africa. The Act is not without criticism. What we must not forget is that the Constitution² of the Republic of South Africa of 1996, the National Health Act³ 61 of 2003, as well as the common law, also protect the patient/consumer.

Despite all the noble objectives and purposes of the Consumer Protection Act, it creates several practical challenges and uncertainties for the healthcare sector in South Africa.

References available at www.cmej.org.za

SINGLE SUTURE

Fears over incurable TB deepen after re-testing

Fears over incurable strains of tuberculosis in India have just been reinforced.

People diagnosed in January with 'totally drug-resistant TB' (TDR TB) have been independently re-tested at the National Tuberculosis Institute in Bangalore. The tests confirm that the bacteria resist all first- and second-line drugs used to treat TB, although the World Health Organization (WHO) says that limitations in the lab tests mean the bacteria are not yet proven untreatable.

Paul Nunn, head of TB drug resistance at the WHO, lauded stepped-up efforts by India's health ministry to identify and treat cases of multidrug-resistant TB, from which the new strains arose. The ministry plans to quadruple its TB budget and re-open a 200-bed TB sanatorium in Mumbai (*Thorax*, DOI: 10.1136/thoraxjnl-2012-201663).

Zarir Udawadia, the clinician at Hinduja Hospital in Mumbai who identified the original 12 cases of TDR TB, says there have been two new cases. 'Most worrying is one in a girl with no history of past TB and no contact with anyone who has multidrug-resistant TB.'

Three of the first 12 patients have died, six are being treated and three have gone missing.

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