

# The National Health Act: some implications for family practice

*The National Health Act will have a major impact on health services across South Africa and particularly on family medicine.*

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The National Health Act<sup>1</sup> became law on 23 July 2004, and will be brought into effect in stages once the necessary regulations have been published. It will have a major impact on health services in the country and will also affect the practice of family medicine, so all family practitioners should have a basic knowledge of the Act. This article does not discuss the use of human tissue (Chapter 8) and the contentious certificate of need (Chapter 6). These issues will be fleshed out in regulations that are to be published for comment in the near future.

The National Health Act provides a framework for a uniform health system in South Africa based on the obligations imposed by the Constitution<sup>2</sup> and other laws on the national, provincial and local governments with regard to health services.<sup>3</sup>

## HEALTH CARE PERSONNEL AND USERS

The Act defines 'health care personnel' as including health care providers and health workers. Health care providers are defined as those providing health services in terms of any law, including the Allied Health Professions Act, 1982,<sup>4</sup> Health Professions Act, 1974,<sup>5</sup> Nursing Act, 1978,<sup>6</sup> Pharmacy Act, 1974<sup>7</sup> and Dental Technicians Act, 1979.<sup>8</sup>

Health workers are defined as those who provide health services to users, but do not include health care providers. Family practitioners clearly fall under health care providers.

A user is a person receiving treatment in a health care establishment, including receiving blood or blood products, or using a health service – in other words a patient. Therefore, for the purposes of the Act patients of family practitioners are users. If the user receiving treatment or using a health service is below the age of consent for medical treatment (14 years) and operations (18 years),<sup>9</sup> the term user includes the person's parents or guardian or another person authorised by law to act on their behalf (e.g. a curator).<sup>10</sup>

## RIGHTS AND DUTIES OF USERS AND HEALTH CARE PROVIDERS

The rights of users of health services and the reciprocal duties imposed on health care providers are set out in the Act. The rights of users are dealt with in terms of emergency treatment; participation in decision-making; providing informed consent; consent in respect of incompetent persons and in emergency situations; confidentiality; protection of health records and access to information; and the right to

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complain. All of these are relevant to family practice.

### **Emergency medical treatment**

The Act specifically mentions the right not to be refused emergency medical treatment.<sup>11</sup> This is in line with the Constitution.<sup>12</sup> Emergency medical treatment has been interpreted as 'a dramatic, sudden situation or event which is of passing nature in terms of time' and not a chronic terminal illness such as kidney disease requiring dialysis.<sup>13</sup> For example, this would apply if a person seriously injured in a motor collision, or stabbed in the chest during an assault, presents at a family practitioner's rooms requesting help. If the doctor is in private practice he or she would have to stabilise the person – regardless of whether or not the patient could afford to pay the fees – before making arrangements for the person to be moved to a public hospital.

### **Informed consent**

The Act provides that a health care provider must inform a user of the following:

- the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best

- interests of the user
- the range of diagnostic procedures and treatment options generally available to the user
- the benefits, risks, costs and consequences generally associated with each option, and
- the user's right to refuse health services and explain the implications, risks, obligations of such refusal.<sup>14</sup>

The provisions are designed to ensure that the autonomy of patients is respected and to avoid a paternalistic approach by doctors when obtaining consent. Family practitioners, like other colleagues in the profession, will need to ensure that the above criteria are complied with by adopting a patient-centred approach to decision-making when soliciting consent from patients.

The provisions of the Act are in line with the approach by the courts regarding consent. The courts have held that for informed consent the patient must have:

- knowledge of the nature and extent of the harm or risk
- an appreciation and understanding of the nature of the harm or risk
- consented to the harm or assumed the risk, and
- consent that is comprehensive (i.e. extends to the entire transaction, inclusive of its consequences).<sup>15</sup>

The courts have held that doctors must warn patients of 'material risks' inherent in the proposed treatment or procedure. Risks are regarded as material if (a) a reasonable person in the position of the patient, if warned of the risk, would attach significance to it, and (b) the medical practitioner concerned should have been reasonably aware that the patient, if warned of the risk, would attach significance to it.<sup>15</sup>

### **Capacity to give consent**

Any person giving consent must be legally capable of doing so. Thus children of 14 years or more may consent to medical treatment,<sup>16</sup> those of 18 years or more may consent to operations,<sup>16</sup> and children of any

age may consent to termination of pregnancy.<sup>17</sup> In all instances, however, the child must be sufficiently mature to understand the nature and effect of the proposed treatment or procedure. Family practitioners can test the level of understanding of children by getting them to paraphrase their knowledge of the proposed treatment or procedure, their appreciation of the consequences of the proposed treatment or procedure, and their willingness to accept all the harm or risks involved in such treatment or procedure.

The Act specifies a hierarchy of persons who may give consent where the patient concerned is unable to give consent. It is no longer necessary for persons to authorise others to act on their behalf by means of a power of attorney. The Act allows a person 'mandated by the user in writing to grant consent on his or her behalf ... or authorised to give such consent in terms of any law or court order'.<sup>18</sup> Apart from persons authorised by the court (e.g. a curator), the order of priority is consent by a spouse or partner, parent or guardian, grandparent, or an adult brother or sister.<sup>19</sup> In the family practice context this means that a hierarchy of family members are able to give consent.

### **Participation in decision-making**

The Act also provides that a user has the right to participate in any decision affecting his or her personal health and treatment.<sup>20</sup> This means, for example, that if a child is old enough to understand the nature and effect of the treatment, he or she should be consulted and informed of the procedure even though the child may not be legally competent to give consent. In such a case consent must also be given by the legally competent person authorised to do so on the child's behalf (see above).

### **Refusal of consent and medical emergencies**

Legally competent patients have the right to refuse health services. According to the Act such patients should not be treated without their

consent unless any delay in the provision of the health service might result in their death or irreversible damage to their health, and they have not expressly, impliedly, or by conduct, refused that service.<sup>21</sup> However, this section should be interpreted to apply to legally competent patients who have been rendered incompetent to give consent (e.g. because they are unconscious), and require emergency medical treatment. For example, this might occur in family practice, where a husband or wife has become unconscious and there is no time to contact the spouse or another member of the family, as required by the Act,<sup>22</sup> before beginning a life-saving procedure.

**Confidentiality and access to medical records**

The usual rules regarding confidentiality embodied in the Constitution<sup>23</sup> and the Promotion of Access to Information Act<sup>24</sup> have been incorporated into the Act.<sup>25</sup>

In terms of the Promotion of Access to Information Act, where the patient is less than 16 years, the parent or legal guardian should make the application for access to the patient's records. However, family practitioners should not make information available to a parent or legal guardian regarding the treatment of a patient who is older than 14 years, but under the age of 16 years, without written authorisation of that patient. Fourteen years is the age at which children may independently consent to medical treatment.<sup>26</sup> An exception to this the Choice on Termination of Pregnancy Act,<sup>27</sup> which states that a termination of pregnancy may be conducted on a person of any age without her parent or guardian's consent. This means that a family practitioner should not divulge information about the termination of a pregnancy of a patient to her parents or guardian without the consent of the patient – regardless of her age – provided she is mature enough to

understand the nature and effect of the procedure and its consequences.

The National Health Act provides that disclosure of health records may only be made with the written consent of the patient, unless a court order has been obtained or where non-disclosure of the information would represent a serious threat to public health.<sup>28</sup> Furthermore, patients have the right not to have their medical records examined for the purposes of treatment, study, teaching or research without their consent.<sup>29</sup>

Finally, patients have a right to lay a complaint about the manner in which they were treated at a health establishment and to have the complaint investigated.<sup>30</sup>

**DEATH CERTIFICATION**

In April 2005, the Minister published the Draft Regulations for the rendering of forensic pathology services for comment.<sup>31</sup> This is in terms of the National Health Act.<sup>32</sup> 'Unnatural deaths' have been defined as:

- any death due to the application of force, direct or indirect, and its complications
- any death due to the effects of any chemical or toxic substance, or drug or any death due to an electrical effect
- any death, where another person by negligent act or omission can be held responsible for the death, and
- where the death is sudden and expected or unexplained.

If the Draft Regulations are adopted they will provide useful guidelines for family practitioners and other doctors, because in the past there was no legal definition of an unnatural death, except in the case of so-called anaesthetic deaths, in terms of the Health Professions Act.<sup>33</sup>

**CONCLUSION**

The National Health Act is an attempt to harmonise the legislation governing

health care services with the provisions of the Constitution and currently acceptable professional ethical norms. It has introduced a number of important provisions, particularly those dealing with consent and confidentiality, that are highly relevant to family practice.

*References available on request.*

**IN A NUTSHELL**

Family practitioners need to have a basic knowledge of the National Health Act.

The National Health Act brings health law into line with the Constitution.

Family practitioners are 'health care providers' and patients are 'users' in terms of the Act.

The Act gives people the right not to be refused emergency medical treatment.

The Act sets out the criteria for consent to ensure patient autonomy.

The Act specifies a hierarchy of persons who can give consent if the patient is unable to do so.

The Act requires users to participate in any decision affecting their health or treatment even if they do not have the legal capacity to consent.

The Act states that people should not be treated without their consent unless any delay may result in death or irreversible damage to their health and they have not refused the service.

The Act provides that disclosure of health records may only be made with the written consent of the patient unless a court order has been obtained or non-disclosure would represent a serious threat to public health.

The Draft Regulations for rendering forensic pathology services in terms of the Act provide an extensive definition of unnatural deaths.