

# Human rights obligations in health care

*Human rights issues are not uniquely South African, but our past history makes it doubly important that we all understand our duty of care to patients.*

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One of the central lessons arising from the South African Truth and Reconciliation Commission (TRC)'s examination of the health sector was the need to address the human rights obligations of health professionals. Under apartheid, human rights abuses committed by agents of the state were often aided by some health professionals who, through either passive or active collaboration, failed to defend the human rights of vulnerable patients. For example, during a TRC hearing in the Western Cape, a former detainee described how he overheard a district surgeon advising the security police to place porridge in the detainee's nostrils so as to cover up his torture should he die as a result of his injuries.<sup>1</sup>

Such concerns are not uniquely South African. The involvement of health care professionals in abuses of detainees has been widely documented in countries such as Uruguay, Chile and Kuwait, and most recently evidenced in accounts of torture by US military forces in the Abu Ghraib and Guantanamo Bay detention centres.<sup>2</sup> As a result, concerns for how best to ensure that health professionals respect the human rights of vulnerable patients have been increasingly engaging national and international associations of health professionals. For example, the British Medical Association has issued a call to members of the medical profession to place human rights at the centre of their professional obligations,<sup>3</sup> and ethical codes are increasingly highlighting the need for a human rights

framework as central to acceptable standards for a range of professions.

While collaboration in the abuse of detainees represents perhaps the most egregious situation in which health care professionals may act in ways that violate the rights of their patients, the TRC findings also pointed to the daily abuses that occurred under apartheid, which were the product of health systems that did not respect peoples' freedom, dignity and equality. Although legal apartheid has ended, social transformation to a more egalitarian and just society in South Africa is slow. Circumstances that give rise to violations of patients' rights are likely to continue to confront health care providers, particularly as new challenges are posed by the exploding HIV epidemic in the face of human resource shortages and the difficulties of transformation.<sup>4</sup> Because we are healing professionals, our ethical commitments to maximise the wellbeing of those in our care implies a unique responsibility to be advocates for the protection and promotion of human rights.

## WHAT IS A HUMAN RIGHT AND HOW DOES HEALTH RELATE TO RIGHTS?

Human rights may be thought of as universally applicable social or material entitlements, essential to fulfil fundamental needs, which individuals can claim from society on the basis of their humanity. Generally codified in national and

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international law, they represent a form of global consensus on what standards should be used to hold governments and, increasingly, private sector parties, accountable in protecting vulnerable people from harm.

Health is recognised as one of a range of socio-economic rights, including housing, education and water and is framed as such by the Alma Ata Declaration on Primary Health Care. However, because no government can guarantee everyone's absolute health status (e.g. biological differences between individuals can never be eliminated), the right to health is usually described in terms of creating opportunities for people to reach their full health potential, either through a right of access to health care, or through rights to the underlying conditions necessary for health, such as clean water and adequate food.

Human rights are typically obligations placed on states. However, health care providers, either as government actors or as private providers of services for which government has a social responsibility, at the very least carry obligations to ensure that they are not responsible for violations of human rights. Indeed, in a positive sense, health professionals can act as advocates to promote and fulfil human rights.

**THE SOUTH AFRICAN CONSTITUTION AND THE HUMAN RIGHT TO HEALTH**

Ratified in 1996, the Bill of Rights in the South African Constitution establishes a range of health rights (Table I). Firstly, the specific right to receive health care services; secondly, a host of rights related to the underlying conditions needed for health which, through their fulfilment, enhance health; thirdly, rights for vulnerable groups; and lastly,

Table I. **Categories of Health Rights in the South African Constitution**

Category	Provision	Section
Health care services	To have access to health care services, including reproductive health care	Section 27.1(a)
	To emergency health care	Section 27.3
Underlying conditions needed for health	To access information	Article 32
	To an environment that is not harmful to health or well-being	Article 24
	To freedom and security of person, including freedom from all forms of violence from either public or private sources	Article 12
	To freedom of religion, belief and opinion	Article 15
	To be free from medical experimentation without their informed consent	Article 12.2(c)
	To have access to adequate housing	Article 26
	To a basic education, including adult basic education; and progressive realisation of further education	Article 29
Special populations	To have access to sufficient food and water	Article 27.1(b)
	To have access to social security	Article 27.1(c)
	Children have the right to basic nutrition, shelter, basic health care services and social services	Article 28
Foundational rights affecting health	Prisoners have the right to conditions of detention consistent with human dignity, including the provision of nutrition and medical treatment	Article 35
	To dignity	Article 10
	To equality (non-discrimination)	Article 9
	To life	Article 11
	To lawful, reasonable and procedurally fair administrative actions	Article 33

Table II. **Core obligations of the state to realise the right to health**<sup>6,7</sup>

Functioning public health and health care facilities, with programmes available in sufficient quantity
Health facilities and services that are accessible (physically, economically and information-wise) without discrimination
Services that are respectful of medical ethics and culture
Services that are scientifically appropriate and of good quality
Services that recognise the special needs of vulnerable groups

foundational rights that acknowledge our common humanity and principles of equality.

**The right of access to health care**

Article 27 frames a right ‘to have access to health care services, including reproductive health care’ (1996). As part of its obligation, the state must therefore engage health professionals, whether working in public or private arenas, as partners to facilitate such access. Health professionals, for example, cannot act as barriers to people seeking care. The Choice on Termination of Pregnancy Act (ToP) (1997) binds health professionals to provide information on the availability of ToP to a client, even when they have personal objections to the procedure. Here we see the state balancing the health care provider’s right to conscience with that of the patient’s right of access to health care, through regulating health professional behaviour in order to avoid obstructing a woman’s right to access a full range of reproductive health services.

International guidance on what constitutes access to health care suggests that the right to health must be further understood as a duty for the state to provide a range of facilities, goods, services and conditions necessary for the realisation of the *highest attainable standard of health*,<sup>5</sup> which are also itemised as core obligations (Table II).

The South African state has four duties in relation to the right to access health care services: to respect, protect,

promote and fulfil that right. *Respect* implies that the state and its surrogates, including health professionals, must refrain from doing anything that interferes, directly or indirectly, with the enjoyment of the right to health. Thus, shouting at an adolescent attending a clinic for contraception who is then discouraged from seeking further care may interfere with her right to access health care, and is therefore a failing on the part of the professional to meet constitutional obligations.

*Protecting* the human right to health implies taking steps to ensure that no third party interferes with a person’s access to health care. Having patients queue from the early hours of the morning at a clinic, exposed to gang-related criminal violence, might constitute a failure on the part of health professionals at the clinic to prevent a third party, the local gangs, from interfering with the person’s right of access to health care. Employers who refuse workers time off, or farmers who dictate when and where farm workers can attend health services, also present scenarios where the health worker may have to take active steps to protect the person’s right to health care.

*Promoting* human rights is a uniquely South African state obligation. In order to claim their rights, people must first know about them. Access to information enables patients to make informed decisions about their health. Education about entitlements (e.g. to medication, to a second opinion, or to a termination of pregnancy) is key to promoting the human right to health.

Lastly, the *fulfilment* of health rights entails positive measures and active intervention by the state, requiring for example, the full extent of appropriate budgetary, judicial and administrative policies towards the realisation of the right. This commits the state to building clinics, equipping and staffing them appropriately, providing transportation to and between facilities, and addressing the underlying determinants of health such as sanitation, clean water, food, housing and education.

To adequately fulfil the right to health, however, the problem of resource constraints must be dealt with. The right to health is therefore framed in the language of progressive realisation, which implies that a person cannot claim an absolute and immediate right to receive health care; rather, the state must, within its available resources, do its best to provide access, and continually improve that access.

The South African Constitution does not invalidate rationing, since allowing unfettered access to services for one group of patients may occur at the expense of access for others, but it does force the state to be transparent as to how such rationing decisions are made so that these criteria can be examined for reasonableness. In this circumstance, the responsibility of clinicians is to try to maximise access to health care, even when resource constraints expose competing rights and invoke difficult ethical dilemmas around distributive justice. At the very least, health care workers need to be involved in setting fair criteria, which may result in limiting access to services for some, but which ultimately aim to extend health care to those most in need. This is part of health professionals’ obligations in assisting the state to fulfil the right to health care in a non-discriminatory manner, even if it does so progressively over time.

Notably, children’s rights to basic nutrition, shelter, health care and social services (Article 28) are *not* curtailed by any qualification relating to available resources or progressive

realisation. Thus the Bill of Rights provides for far more stringent obligations towards meeting their needs. It is not surprising therefore that the first democratic public policy announced by President Mandela in 1994 was the provision of free health care for children and pregnant women.

The implications of sub-section 3 of Article 27, which stipulates that no one may be refused emergency medical treatment, are very clear for health professionals in both the private and public sectors. Patients who present in an emergency must receive care, even if they do not come from the designated drainage region, or do not have money or insurance to pay for private services. Only once stabilised may the patient be transferred.

### The right to underlying conditions needed for health

Inasmuch as health care professionals can lobby for provision of adequate housing, basic education, nutrition, water and social security, these are actions which reflect the professional's ability to promote the right to health. It is also important, however, to be cognisant of other, perhaps less visible, roles that medicine plays. Health care itself generates potentially hazardous biological waste. Unless professionals manage such waste with care, they will be exposing people to potential health risks. Uncontrolled dumping of medical waste, for example, reflects a failure of the health system to respect the right to a safe environment.

The right to freedom and security of person implies that health services should neither be sources of violence towards patients, nor permit violence to interfere with patients' freedom. In addition, health workers themselves have human rights to be free from violence, from users or others.

Notably, our Constitution is unusually specific in making informed consent a legal right, in addition to its importance for ethical research practice.

Freedom of religion, belief and opinion imposes on health workers obligations to respect differing world views in their practice, inasmuch as these do not interfere with the rights and freedom of others. Thus, for example, cultural sensitivity toward traditional male circumcision or various belief systems in understanding psychiatric illness might be appropriate responses; participation in virginity examinations that unfairly discriminate against young women would not.

### Foundational human rights that have an impact on health

The right to life provides the rationale for prohibiting health worker participation in carrying out capital punishment (the death penalty). Health care workers have clear obligations to respect the dignity of service users, irrespective of resource constraints or conditions under which health care takes place. This is also at the heart of ethical codes for all health professionals.<sup>8</sup>

The right of access to information also implies that patients are entitled to information contained in their medical records, including that held by private bodies which they might need in order to exercise another right, and health care professionals cannot refuse them this access. These provisions are reflected in the new National Health Act.

Non-discrimination (Article 9) is a central thread to the Constitution. This means that health professionals may not *unfairly* discriminate against users of services on the basis of gender, race, age, disability, sexual orientation and a range of other listed factors. Thus, giving an adolescent or a disabled woman an injectable contraceptive without respecting her capacity for decision making would constitute discriminatory practice. Similarly, providing different and lesser care to HIV-positive patients, purely on the basis of their HIV status, and without reference to their clinical condition, would constitute a breach of the patient's rights to non-discrimination.

Unfair discrimination may also be indirect. For example, language barriers may lead to discrimination in access to health care. In 1998, paediatricians working at a university teaching hospital in Cape Town lodged a complaint with the provincial Human Rights Commission regarding the failure of the health department to assume the costs of running an interpreter service launched by an NGO. They argued that the absence of interpreter services at hospitals was a material barrier to accessing health care and prompted a national investigation by the Human Rights Commission which made explicit the role of language barriers as a form of discrimination that resulted in violation of the right of access to health care.

Note the prohibition of discrimination applies to *unfair* discrimination, as opposed to *fair* discrimination, which is a positive right recognised in the Constitution as essential for redress of past injustice. In the health care setting, positive discrimination is widely applied when we seek to improve care for those with the greatest need, who usually are members of socially vulnerable groups.

Lastly, provision for lawful, reasonable and procedurally fair administrative action (Article 33) has translated into provisions within the Patients' Rights Charter for a complaints procedure to ensure adequate redress of poor treatment. Even procedures for complaint may be subject to oversight. For example, an HIV NGO enlisted the Public Protector's office to investigate the failure of the Health Professions Council of South Africa to act against doctors reported for testing patients for HIV without their consent.<sup>9</sup>

The Constitution does provide for limitations of rights, generally in order to protect others' rights. Thus, breaking confidentiality could be justified if harm to a defined third party could be averted, as may be the case in disclosure of HIV status to a patient's partner without their consent. However, such limitations are only permitted within very strict conditions and subject

to certain procedures to prevent discrimination. Checks and balances would dictate that the patient be first fully counselled and given opportunity to inform their partner, and that no other route of protecting the third party is possible. These measures have been largely incorporated in ethical guidelines for health professionals dealing with HIV.

**CONCLUSION**

Health care providers have many opportunities to facilitate the realisation of the right to health. Whether in terms of documenting

and, if necessary, providing testimony for those whose rights have been violated or improving the quality and accessibility of health care services, health workers can support attaining the full range of health rights. By becoming aware of provisions in the South African Constitution, in international human rights legislation as well as in ethical codes of conduct, health professionals can begin to redress the legacy of human rights violations and ensure positive conditions for people's health.

*References available on request.*

**SUGGESTED FURTHER READING**

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- For ethical codes that refer to human rights standards, see, for example, the World Medical Association Resolution on the Inclusion of Medical Ethics and Human Rights in the Curriculum of Medical Schools World-Wide <<http://www.wma.net/e/policy/e8.htm>>; World Medical Association Resolution on Human Rights <<http://www.wma.net/e/policy/h28.htm>>; Position Statement: Nurses and Human Rights <http://www.icn.ch/pshumrights.htm>.
- Department of Health. Patients Rights Charter. URL: <http://www.doh.gov.za/docs/legislation/patientsright/charter.html>.
- Department of Health, National Health Act. 2004. Accessed at URL: [www.info.gov.za/gazette/acts/2003/a61-03.pdf](http://www.info.gov.za/gazette/acts/2003/a61-03.pdf)

**IN A NUTSHELL**

Human rights are a core element of professional obligations for health care workers.

Violations of human rights can occur across a spectrum from the egregious (e.g. medical complicity in torture) to the everyday (e.g. treatment of patients with disrespect or providing negligent care).

National and international bodies are increasingly recognising the importance of incorporating human rights into ethical and professional standards.

Human rights are universal benchmarks that reflect global consensus to hold governments and private sector parties accountable for the fulfilment of fundamental needs of individuals.

Health is one of a range of socio-economic rights, recognised as such by the World Health Organization.

Governments have obligations to respect, protect, promote and fulfil rights.

Health care providers carry obligations to ensure that they are not agents responsible for the violations of human rights, and can act positively to promote and fulfil human rights.

The South African Constitution contains a range of provisions regarding health, including rights to access health care services, rights related to the underlying conditions needed for health, rights pertaining to vulnerable groups, and foundational rights that inform how health care should be delivered.

The main right to health in South Africa affords people the right of access to health care on the basis that the government will progressively realise this right.

Health care providers cannot act to obstruct patients' rights to access health care, nor refuse to provide treatment for emergencies.

Rationing of health care can be compatible with human rights provided it is conducted in a transparent manner and the criteria used are reasonable and non-discriminatory.

Human rights may be limited, but only if this is done to protect others' rights, or in the public interest, subject to fair procedures and the absence of alternative strategies.

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