

# CPA to Change Patient-Provider Relationship

The Consumer Protection Act, which will be implemented early next year, will significantly affect the relationship between patients and health care providers, including practitioners and hospitals.

The Act's broad definition of consumer services means that a patient will be considered by the Act to be a consumer for the purposes of legislation. The purpose of the Act is to promote and advance the social and economic welfare of consumers in SA.

## Basic human rights as expressed in the Constitution

Most pertinent in the health care context are:

- **Section 10 - Human Dignity** - Everyone has inherent dignity and the right to have their dignity respected and protected.
- **Section 11 - Life** - Everyone has the right to life.
- **Section 12 - Freedom and Security of the Person** - Everyone has the right to bodily and psychological integrity, which includes the right:
  - To make decisions concerning reproduction.
  - To security in and control over their body.
  - Not to be subjected to medical or scientific experiments without their informed consent.
- **Section 27 - Health Care, Food, Water and Social Security** - Everyone has the right to have access to health care services, including reproductive health care and emergency medical treatment.

These and other rights have been taken forward and given concrete expression in the **Consumer Protection Act No. 68 of 2008**. Limited Sections of the Act came into force in April 2010 with the balance scheduled to take effect on **31 March 2011**.

## Why a Consumer Protection Act is necessary

### General overview of consumers of medical services

In the South African context, the vast majority of recipients/consumers of medical services are:

- Uninformed concerning medical matters.
- Mostly illiterate or semi-literate.
- In a weak bargaining position.
- Contracted for/or receive medical services during times of emotional or physical distress, such as to negate contractual ability.
- Overawed and overwhelmed by the demigod image of the medical profession.

Doctors and hospitals need to review their medical malpractice insurance and ensure that it includes appropriate cover for the product liability exposure, which will be created under the Act.

### Formulation of standard contracts

All health care professionals are advised to consult their attorneys with regard to the formulation of standard form contracts, which should spell out in simple language adequate information understandable to persons of the socio-economic/demographic class being serviced, including:

- Sufficient information as to the reasonably anticipated risks and benefits of specific treatment procedures.
- Anticipated recovery time and usual constraints and time periods involved when a patient resumes normal work and leisure activities.
- Full details of all costs of the procedure by the full team of service providers; time and manner of payment; and the extent to which these costs will exceed applicable medical scheme cover.
- Anticipated aftercare required and precautions that the patient should take for that period.

"Yes, establishing a public bank is going to be expensive. But if you look at the problems the SABMR is experiencing in finding donors representative of local demographics and consider the cost that will be incurred if an international donor is used, cord blood is still going to be significantly cheaper than sourcing donors from overseas registries," Prof Pepper commented. He suggested that the solution probably lies in a concerted effort on both fronts.

### How doctors can assist

While SA waits to see if this plan is going to materialise, the SF and the registry have urged doctors to become more involved in the process of recruiting and educating people to become donors.

"Haematologists should encourage the families of existing patients to educate their friends, families and communities to become donors. "Families who have already been tissue typed to donate to a relative should also be persuaded to complete a transfer form, which will allow their results to be placed on the registry to help others," Botha said.

While the SABMR and the SF acknowledge that there are still too few donors on the registry, it is certainly not for lack of trying. "We are constantly meeting and planning and currently have a new strategy in place and are working very hard to improve both the demographics and the level of tissue typing, with the funds and infrastructure available to us," Botha said.

"The SABMR is the only registry in the whole of Africa as this is not a field that most developing countries are able to tackle, due to the huge costs involved and a lack of funding. We are doing it in SA, despite lack of government funding, and have made significant progress, particularly over the past three years."

- An invitation to the patient to seek a second opinion and an offer to identify an appropriate specialist.
- If the service provider is not a natural professional person, a detailed notice must be provided of any disclaimer for delictual liability (damage claims) arising out of negligence on the part of the service provider or any of its employees.
- Not include any conditions that impose terms that are unfair or unreasonable, i.e. conditions that are excessively one-sided in favour of any person other than the consumer.

### Conclusion

The international trend of patient-centred care and consumer protection has finally reached SA. For too long, service providers have pressurised patients who are admitted, invariably in pain or in life and death situations with regard to themselves or their families, into signing waivers in respect of delictual liability arising from the very services that hospitals



and their staff are being paid to deliver professionally and in a safe manner.

Such waivers are unprofessional and immoral, and lead to an ever-increasing abandonment of responsibility, as is visible in the declining levels of professional competence and care from nursing and hospital staff in SA. The Act prohibits waivers in respect of gross negligence **only**. It is hoped that government will remove this limitation and/or a court may hold any waiver in those circumstances to be unconstitutional. Commercial enterprises should be aware that it is cheaper to ensure the safety and wellbeing of consumers than to put profit before pain.

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# Health Care Sector Should Get Ready for POPI

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**The Protection of Personal Information (POPI) Bill is expected to be promulgated in December 2010. It is the product of the Law Commission's finding that privacy laws are lacking in SA, even though the right to privacy is enshrined in the Constitution. POPI will give effect to the constitutional right to privacy; it will regulate the way in which personal information is processed and will provide persons with rights and remedies to protect their personal information. The Bill will apply to all organisations that process personal information.**

Medical information is expressly listed as an example of 'personal information'. It may be kept by external medical scheme administrators and managed health care organisations if necessary for assessing risk; if required for the performance of an insurance or medical scheme agreement; or for the enforcement of any contractual rights and obligations.

However, this information must be processed in full compliance with the provisions of the Bill regarding consent, security, right of access and right of correction. Data may not be retained for longer than is necessary to fulfil the purpose of the organisation, unless authorised or required by law. It may be kept for longer for research, historical and statistical purposes. However, this requires safeguards against the records being used for other purposes.

The POPI Bill must be applied in conjunction with the National Health Act as well as the Long-term and Short-term Insurance Acts. While the National Health Act broadly deals with the obligations relating to the requesting, processing and storing of data, POPI serves as an addition to the National Health Act as it is more extensive and thorough in defining data obligations for all organisations, including health care.

The Long-term and Short-term Insurance Acts, as well as the Medical Schemes Act, do not make explicit reference to the handling of data; hence, POPI will impose on insurers a direct obligation in this regard.

This means that organisations in the health care industry will have to consider

the following in the process of collecting and processing data:

- Are the data being used for the correct purposes? Is request for consent required?
- Have the data been de-identified (past and current, hard and soft copy data) so that they cannot be used to identify any specific individual?
- Deletion of data - is a certificate of destruction required?
- Do the current methods of requesting data include appropriate disclosure and requests for consent?
- Are the IT systems sufficiently established to safeguard against the records being used for any other purposes?
- Are third parties POPI compliant?

Organisations will have one year in which to become POPI compliant. This grace period may be extended to three years in special circumstances. Should a company fall foul of POPI, a complaint may be lodged with the regulator and a claim for civil damages or criminal prosecution resulting in a fine or imprisonment may be the consequence.

We recommend that companies take proactive steps toward reaching compliance with the Bill by adopting the following approach:

- Appoint an information protection officer to take responsibility for information protection-related activities in the organisation.
- Document the policies and procedures to ensure compliance with the POPI Bill as well as related regulations and laws in other jurisdictions within which the organisation operates.
- Ensure incident response by implementing an effective incident management process to capture, assess and adequately handle all POPI-related incidents.

It is essential for organisations to have staff awareness and a manager training programme in place to ensure that all staff have a good understanding of their obligations under the POPI and related laws, e.g. the new Companies Act, Consumer Protection Act and the Promotion of Access to Information Act.

## Doing Good Work against Great Odds: The Challenges Faced in Stem Cell Transplants

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The initial cost to set up a cord blood bank is estimated at around R10m, increasing to about R50m when completed.

But Dr Thomson said the focus should not be on finding an alternative solution to a problem that can be fixed. She said that a concerted effort to improve the SABMR by simplifying the registration process, particularly for black donors, and ensuring that donors are typed to the correct level will go a long way in improving access to more local patients.

"Setting up a cord blood bank will not only cost a huge amount of money but will also compromise patients, as the survival rate of recipients transplanted with umbilical stem cells is significantly lower than that of patients receiving bone marrow stem cells," Thomson asserted. "The goal should be to sit together with the registry and the SF to devise a strategy that will ensure that we can help as many patients as possible in the country."

Despite this limitation, Prof Pepper said international experience has shown that cord blood is becoming a very important resource for the treatment of malignant diseases.



**Prof Michael Pepper, extraordinary professor in immunology at the University of Pretoria's Faculty of Health Sciences**