

REPUBLIC OF SOUTH AFRICA

NATIONAL HEALTH AMENDMENT BILL

(As introduced in the National Assembly (proposed section 76); Explanatory summary of the Bill and prior notice of its introduction published in Government Gazette No. 41789 of 24 July 2018)

(The English text is the official text of the Bill)

(MS DEIDRE CARTER, MP)

Comment [DK1]: Still considering the classification of the Bill.

[B 2018]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the National Health Act, 2003, so as to amend a definition and to insert a new definition; to provide for the legal recognition and requirements of a durable power of attorney for healthcare and a living will; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 61 of 2003, as amended by section 1 of Act 12 of 2013

1. Section 1 of the National Health Act, 2003 (Act No. 61 of 2003) (hereinafter referred to as the “principal Act”) is hereby amended—

(a) by the insertion after the definition of “communicable disease” of the following definition:

“**‘competent witness’** means a person of the age of 14 years or over who at the time he or she witnesses the durable power of attorney or living will, referred to in sections 7A and 7B respectively, is not incompetent to give evidence in a court of law and for whom the death of the maker of the durable power of attorney or living will hold no benefit”; and

Comment [DK2]: Used the definition from the SALRC draft Bill but changed the age to 14 (as opposed to 18) to align with other Acts (Wills Act, Human Tissue Act, etc)

(b) by the substitution for the definition of “Constitution” of the following definition:

“ ‘**Constitution**’ means the Constitution of the Republic of South Africa, 1996 [(Act 108 of 1996)];”.

Insertion of sections 7A and 7B into Act 61 of 2003

2. The following sections are hereby inserted after section 7 of the principal Act:

“Durable power of attorney for healthcare

7A. (1) For purposes of section 7(1)(a)(i), any person who is—

(a) 18 years or older; and

(b) of sound mind,

may appoint and entrust any decision making power regarding his or her future medical treatment to an agent and mandate such agent to take medical decisions on behalf of such person, when he or she is no longer competent to make or communicate such medical decisions, by way of a durable power of attorney for healthcare substantially in the form contained in Schedule 2.

(2) The maker of the durable power of attorney referred to in subsection (1) may mandate the agent therein to take medical decisions on behalf of the maker including—

(a) to refuse any specific types of treatment on behalf of the maker due to religious or other reasons; or

(b) about donating any or all of the organs of the maker.

(3) The durable power of attorney referred to in subsection (1), and any amendment thereof, must be in writing and must be signed by the maker thereof and two competent witnesses, in each other’s presence.

(4) The durable power of attorney referred to in subsection (1) will take effect and remain in force if the maker thereof becomes ill and as a result is incompetent to make, or communicate, decisions concerning his or her medical treatment or the cessation thereof.

Comment [DK3]:

DK: I included most of the suggestions made by Prof Landman under this section. I did not include the suggestion that states “the appointment of a legal guardian by a court of law to act on behalf of a principal would render a durable power of attorney for healthcare ineffective”. My concern is whether this does not take away the principal’s right to self-determination if he or she has already appointed an agent UNLESS I am missing the point here. Please advise.

(5) Any decision taken by the agent referred to in subsection (1), in terms of the durable power of attorney—

(a) must be informed by any medical advice from the medical doctor treating the maker of the durable power of attorney referred to in subsection (1); and

(b) is final and may not be overridden by any other person.

(6) The durable power of attorney referred to in subsection (1) may be revoked at any time by the maker thereof.

Comment [DK4]: We suggest that the agent be required to seek advice before making a decision. He or she would not be bound by it but at least it won't be an emotional decision alone. Not sure what your views are.

Living will

7B. (1) For purposes of section 7(1)(e), any person who is—

(a) 18 years or older; and

(b) of sound mind,

may express his or her refusal for any future potentially life-sustaining medical treatment or procedure, when such person may no longer be competent to express such refusal, in a living will substantially in the form contained in Schedule 3.

(2) The potentially life-sustaining medical treatment or procedure contemplated in subsection (1) includes—

(a) artificial nutrition;

(b) hydration;

(c) dialysis;

(d) any IV tube; or

(e) machine support.

(3) A treating medical doctor, before giving effect to the living will referred to in subsection (1), must—

(a) satisfy himself or herself that —

(i) the medical condition of the user is terminal and incurable;

(ii) the user is in a permanent vegetative state; or

(iii) the user is completely and irreversibly unconscious;

(b) satisfy himself or herself, in so far as is reasonably possible, of the authenticity of the living will; and

Comment [DK5]: Included this list as suggested by Prof Landman – it is not a closed list.

Comment [DK6]: Replaced the term “medical practitioner” with “treating medical doctor” as it was not clear from the Health Professions Act whether the term “medical practitioner” was limited to medical doctors or whether it incorporated dentists, psychologists, etc. Also, Prof Landman indicated that only a “medical doctor” should act upon advance directives.

Comment [DK7]: In discussion with my team leader, we discussed whether this is the correct term to use and whether it should not be replaced with the term “Unresponsive Wakefulness Syndrome”. Please see article at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2987895/> and kindly advise.

(c) inform the interested family members of the existence and content of the living will.

(4) The living will referred to in subsection (1), and any amendment thereof, must be in writing and be signed by the maker thereof and two competent witnesses, in each other's presence.

(5) A living will containing the refusal or cessation of medical treatment, or the withholding or cessation of medical treatment in accordance with the living will, will not be invalid or unlawful even though such refusal, cessation or withholding of medical treatment will hasten the death of the user.

(6) A living will referred to in subsection (1) may not be overridden by any other person.

(7) A living will referred to in subsection (1) may be revoked at any time by the maker thereof.

Comment [DK8]: I have included all the suggestions made by Prof Landman.

Amendment of section 93 of Act 61 of 2003

3. Section 93 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) Subject to this section, the laws mentioned in the second column of **[the]** Schedule 1 are hereby repealed to the extent set out in the third column of **[the]** Schedule 1.”; and

(b) by the substitution for subsection (3) of the following subsection:

“(3) The Minister may prescribe such further transitional arrangements as may be necessary to effect a smooth transition between the laws referred to in **[the]** Schedule 1 and this Act.”.

Amendment of Schedule of Act 61 of 2003

4. The Schedule of the principal Act is hereby amended by the substitution for the word “**SCHEDULE**” of the words “**SCHEDULE 1**”.

Short title and commencement

5. This Act is called the National Health Amendment Act, 2018, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

DRAFT 2

**MEMORANDUM ON THE OBJECTS OF THE NATIONAL HEALTH
AMENDMENT BILL, 2018**

1. BACKGROUND

- 1.1 “Dying is a natural and inevitable part of life. Unless we die an unnatural death, we will go through a natural dying process. For some, it will be peaceful and dignified; for others it will be filled with pain, distress and suffering. We do not know which it will be.”¹
- 1.2 Any competent person may foresee the possibility of becoming incompetent when they enter the terminal phase of the dying process, and may wish to control their healthcare decision-making as they are able to do when they are competent. Advance health care directives are designed to enable competent persons to express their preferences and give instructions about such possible future situations.
- 1.3 The National Health Act, 2003 (Act No.61 of 2003) (“the principal Act”), does, to an extent, contain provisions regarding advance health care directives in that in one provision of the Act, a “living will” is inferred and in another, provision is made for the appointment of a substitute healthcare decision-maker. However, it is argued that these provisions, while a step in the right direction, are inadequate for a number of reasons. These reasons, inter alia, include that a “living will” is not expressly recognised; the purpose, scope and format of these advance health care directives are not explicitly set out; it is not clear whether they may, in certain circumstances be overridden by family or treating medical doctors; whether persons acting upon the directives are immune from civil and criminal prosecutions; and how to deal with a situation where two substitute decision-makers disagree about the treatment the patient should receive.

[Still awaiting the anecdotal evidence from Lee to perhaps add here].

2. OBJECTS OF THE BILL

- 2.1 The National Health Amendment Bill, 2018 (“the Bill”), will amend the principal Act so that advance health care directives such as the living will and the durable power of attorney for healthcare are legally recognised, and that legal certainty and legal enforceability regarding these directives are provided for.

3. CONTENTS OF THE BILL

- 3.1 Clause 1 of the Bill amends a definition in the principal Act and inserts new definitions.

Comment [DK9]: Will later add more to this section and revise it once the Bill is finalised.

¹ Landman, WA “End-of-life decisions, ethics and the law: A case for statutory legal clarity and reform in South Africa”, Ethics Institute of South Africa, 2012.

3.2 Clause 2 of the Bill inserts new sections into the principal Act to provide for the two types of advance healthcare directives, namely, the durable power of attorney for healthcare and the living will.

3.3 Clause 3 of the Bill.....

3.4 Clause 4 of the Bill.....

3.5 Clause 5 of the Bill provides for the short title and commencement.

4 ORGANISATIONAL AND PERSONNEL IMPLICATIONS

Member to indicate whether there would be any organisation and personnel implications

5 FINANCIAL IMPLICATIONS FOR THE STATE

Member to indicate whether there would be any financial implications – it is noted that the completed template indicates that there would be negligible costs to the State.

6 DEPARTMENTS, BODIES OR PERSONS CONSULTED

The following departments, bodies and persons were consulted:

6.1 Dignity SA;

6.2 Prof R Landman

6.3 [Other names to be provided by the Member – it is also suggested that the Member consult the Dept of Health for their views and input]

7 PARLIAMENTARY PROCEDURE

7.1 It is proposed that this Bill must be dealt with in accordance with the procedure prescribed by section 76 of the Constitution, since the contents of the Bill, in a substantial measure, deals with “health services”, which is a functional area of concurrent national and provincial legislative competence listed in Part A of Schedule 4 to the Constitution. According to section 76(3) of the Constitution a Bill must be dealt with in accordance with the procedure established by either section 76(1) or section 76(2) if it falls within a functional area listed under Schedule 4 to the Constitution.

7.2 It is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

Comment [DK10]: Still considering the classification of the Bill.

DRAFT 2