

COMMENTS BY

THE SOUTH AFRICAN MEDICAL ASSOCIATION
(SAMA)

ON

THE HEALTH PROFESSIONS AMENDMENT BILL

(As introduced in the National Assembly as a section 75 Bill;
explanatory summary of Bill published in Government Gazette
No. 28754 of 28 April 2006)

SUBMISSION TO THE PORTFOLIO COMMITTEE ON HEALTH
BY THE SOUTH AFRICAN MEDICAL ASSOCIATION ("SAMA")

HEALTH PROFESSIONS AMENDMENT BILL

INTRODUCTION

The South African Medical Association ("SAMA") is the professional association for doctors in South Africa and welcomes the opportunity to comment on the Health Professions Amendment Bill ("the Bill").

This submission has not been ratified by the Board of Directors of SAMA due to the restricted time-lines for submitting comment. It is recorded in this regard that the Explanatory Notes to the Bill were published in Government Gazette No. 28754 of 28 April 2006. The Bill was not published in the Government Gazette for public comment but advertisements inviting comment on the Bill by the deadline of 21 July 2006 were published in the Sunday Times on 2 July 2006.

SAMA supports all legislative measures aimed at accentuating the protection and promotion of public interest and public health. However, it is SAMA's belief that certain Sections of the Bill are unlikely to positively contribute to the aforesaid objectives. Furthermore, it is our view that the promulgation of the Bill, without taking cognizance of the comments contained herein may well lead to compromising public interests and may render the Bill, once promulgated, subject to legal challenge.

EXECUTIVE SUMMARY

SAMA notes with support the amendments in terms of the Bill insofar as it relates to the following objectives : -

- (a) Fostering closer liaison between the council and the boards when considering certain matters;
- (b) Making provision for the removal of members of the council under certain circumstances;
- (c) Empowering the Minister to dissolve the council or terminate membership under certain circumstances;
- (d) Ensuring accountability and transparency by the council and the registrar, particularly relating to financial administration by the council;
- (e) Making provision for the evaluation, quality assurance and accreditation process of teaching institutions and training facilities;
- (f) Enabling professionals to further register in sub-specialties, professional categories and additional professional categories, and to replace the council with the professional board as the authority to register professionals;
- (g) Guiding the professions;
- (h) Empowering the council to make rules on operational issues affecting the council and the boards
- (i) Gender sensitising the language of the current Act and making technical amendments and deletions.

Apropos of the following objectives as stipulated in the Explanatory Notes to the Bill, SAMA wishes to submit comment and raise areas of concern to a greater or lesser degree on various issues.

1. Make clear and more comprehensive the objects and functions of council in order to ensure that the objectives are achieved in line with the national health policy determined by the Minister;
2. Reduce the number of council members from 25 to 16, and to further regulate the appointment of the president and members of the council and the registrar;
3. Empower the Minister to appoint members of the professional boards on the basis of nominations as opposed to the costly exercise of elections by members of the profession concerned;

4. Make provisions dealing with the keeping of a register, application for registration and removal of names from such register more comprehensive;
5. Empower the Minister to make regulations excluding certain persons from performing compulsory community service;
6. Empower the Minister, after consultation with the council and the board, to make regulations relating to unprofessional conduct as opposed to this function being performed by the council only;
7. Empower the Minister to make regulations "after", and not "in" consultation with the council.

Finally, we note that notwithstanding one of the objectives outlined in the Explanatory Notes being to "accentuate the provisions of the Medicines and Related Substances Act, 1965 (Act 101 of 1965) in so far as this Act regulates the compounding and dispensing of medicines and a prohibition of keeping an open shop or pharmacy", there appears to be no amendments in the Bill to this effect.

EXPANDED CONTENT

Introduction

The SAMA comment which follows will focus firstly, on General Comment on the Objectives as outlined in the Explanatory Notes to the Bill and, secondly on specific comment on Sections in the current Health Professions Act of 1974 (HPA) to which amendments are proposed.

A

GENERAL: COMMENT ON THE OBJECTIVES AS OUTLINED IN THE EXPLANATORY NOTES TO THE BILL

1. Make clear and more comprehensive the objects and functions of council in order to ensure that the objectives are achieved in line with the national health policy determined by the Minister

Information at our disposal indicates that discussions on the manner in which Statutory Councils should be transformed commenced as far back as November 2001 between the Minister of Health ("the Minister") and the Chairpersons of the Statutory Councils. Members from government and the Statutory Councils were appointed by the Minister to investigate certain ideas aired during the above meetings, which culminated in the production of a "Report of the Task Team on Statutory Councils" ("the Report").

The contents of the Report came to the attention of SAMA during November 2005 and we note that such Report anticipated legislative change in five main areas, namely:-

- The role of Statutory Councils vis-à-vis government;
- The contribution of Statutory Councils to transformation of the health sector;
- The membership and staffing of Statutory Councils;
- Operational procedures;
- Communication with and accountability of Statutory Councils to the Department of Health.

It was also pointed out in the Report that a point of departure is to understand that the primary accountability of Statutory Councils is to the public and their function is to protect and promote public interest as opposed to serving the interests of those governed by Councils e.g. health professions (Health

Professions Council of SA - HPCSA); nurses (SA Nursing Council - SANC), etc. In light of the above, it is noted that the Objects and Functions of Council have been expanded in Section 3 of the Bill to include about 8 new ones, most of which emphasize the protection and promotion of the public.

It is SAMA's view that there should not be a unilateral approach to "protection" in the delivery of health care, whether by government or Statutory Councils, but rather a dualistic and neutral stance. The Health Professions Council of SA (HPCSA) regulates the interests of health professions in both the public and private sector. Therefore, whilst one of the primary roles of Statutory Councils is de facto to protect the public, this cannot be accomplished without ensuring that the interests of health professions are given equal consideration.

Section 3 of the Bill, and numerous other proposed amendments to the Bill – Section 4(c), Section 15A(c), etc., subsumes the Council to the health policy formulated by the Minister. The definition of "health policy as determined by the Minister" needs to be explicitly outlined. Does it refer to the National Health Act 61 of 2003 ("NHA")? This is crucial since the laws of the Republic of SA may govern and inform the formulation of the strategic policy of Council but policies may never be elevated to the level of law or implemented in such a manner. Unless the "policy" is used analogous to "law" in the Bill, which would be most unusual and would cause a great deal of confusion.

2. Reduce the number of council members from 25 to 16, and to further regulate the appointment of the president and members of the council and the registrar

Whilst we do not have any specific objection to the reduction of the size of Council, we would assume that this recommendation has taken into account the immense role and responsibility of Council and Council is satisfied that its responsibilities would be fulfilled by the reduced representation from professional boards. It is, however, important to ensure that there is reasonable proportional representation on Council in relation to membership of professional boards.

SAMA supports generally the proposed amendments in the Bill which displaces the powers of the Council and awards these powers to the professional boards concerned. This will permit professional boards, as opposed to Council, having more control over matters specifically affecting its members.

It remains a concern that, at first glance, there appears to be less regulation of the Council with the professional boards being awarded more powers. However, the constitution of the professional boards is of concern especially in so far as the Minister is now empowered to select / appoint the members of the professional boards, which when coupled with the powers awarded to the professional boards, simply translates to the "Minster-appointed" professional boards gaining more power. This constitutes a proliferation of power and bureaucracy that contradicts the reasons for the amendments to the HPA.

3. Empower the Minister to appoint members of the professional boards on the basis of nominations as opposed to the costly exercise of elections by members of the profession concerned

3.1 Opposition to amendments to Bill

In terms of the current Section 15(5) (a) of the HPA, regulations relating to the constitution, functions and functioning of a professional board had to provide for the "majority of members of a professional board to be elected by the members of the profession involved". In terms of the proposed amendment as per the Bill, this will now be changed to "Appointment of the members of a professional board by the Minister on the basis of nominations made by the members of the health profession or professions involved".

SAMA completely opposes this proposed amendment and believes that the constitutionality of the "appointment process" is highly questionable and is probably challengeable. We therefore, oppose this in toto for, primarily, the following reasons: -

- a. The new proviso denies the members of health professions of their democratic right to elect representatives to the Professional Boards. It

also diminishes the rights of members of the professions to participate in the regulation of their professions, which arguably flouts the provisions of Section 33 of the Constitution of the Republic of South Africa Act, 1996 and the Promotion of Administrative Justice Act No. 3 of 2000;

- b. It is important for the public interest that a reasonable balance exists in the membership of Council in order to ensure the legitimacy and credibility of the people who are elected. The credibility of the members representing the health professions is critical in order to maintain public confidence in government and the health professions and persons regulating these professions;
- c. The Report mentioned above states that the Ministry of Health has separated the business undertaken by Statutory Councils from its own ambit to "allow for a level of impartiality outside Government". However, the proposed amendment is contra to this statement. In our new democratic era, it is crucial to ensure that Government does not exercise a major influence on the modus operandi of Statutory Councils so as to ensure that decisions are made without undue influence.
- d. Surpassing the election process would result in majority or full control of the Council by government, via the Minister, with no autonomy for the profession. This could result in a vote of no confidence by the public who may become reluctant to report matters to Council for investigation e.g. When government-employed health professionals were accused of being negligent in the Klebsiella outbreak in 2005, the public could elect to approach the HPCSA for recourse without fear of approaching a "government appointed body";
- e. The maintaining of professional standards in health care and amongst health care professionals is currently of an optimum standard in view of the professional input on practice standards from members of professional boards. These board members are elected by peers for, inter alia, the esteem in which they are held and for the qualities and standards which they emulate.

3.2 International trends

In the United Kingdom, the General Medical Council (GMC) is the independent regulatory body for medical practitioners who represent a partnership between the public and the profession. It functions independently of the Government and the Department of Health. Their concept of "professionally-led regulation in partnership with the public" enables the GMC to set a framework of standards and ethics that is owned by the profession, whilst reflecting the views and expectations of the public.

The GMC's governing body, the Council, has 35 members of which 19 are elected by the doctors on the register.

In Canada, the Federation of Medical Regulatory Authorities of Canada is the umbrella organization of the thirteen provincial and territorial medical regulatory authorities in the country. Professional regulation falls within the provincial / territorial jurisdictions and the ten provincial medical regulatory authorities are completely independent of governments. Even in the three territorial medical regulatory authorities, which are government agencies, the complaint and discipline procedures and certain others are completely independent of government.

The members of the medical regulatory authorities in Canada are elected by physician members.

In light of the above, it is clear that international trends in progressive countries favour an election process for members of Councils, as opposed to an appointment process. We would, therefore, urge that South Africa adopts this approach as well.

3.3 Composition and Appointment of Boards / Council in other Professions

After researching some Acts regulating other professions, the following observations were made:

In the instance of electing a council the Attorneys Act No. 53 of 1979 states that the society shall elect a council. A council shall consist of such number of members of the society concerned as may be prescribed. The member of the council shall be elected in the prescribed manner by the members of the society concerned. In this Act, there is no influence by the Ministry and the different societies elect the members of the Council.

In the case of the Veterinary and Para-Veterinary Professions Act No 19 of 1982 an election should take place to elect a certain number of veterinarians or veterinary specialists. The Minister shall furthermore after consultation with the outgoing council, appoint a selection panel. The selection panel will select the new council from amongst the nominated persons. The compilation of the council is prescribed as a certain number of appointees should come from each sector of the profession. The council will then consist of a mixture of professional people representing the private and public sector as well as persons designated by the Minister and one representative designated by the South African Veterinary Association from its members. The majority of representatives will be from the profession.

Recommendation: The model portrayed in the Veterinary and Para-Veterinary Professions Act clearly allows for nominations by the veterinaries or veterinary specialists registered in terms of that Act. Further to this, in the composition of the council of the Veterinary and Para-Veterinary profession, a representative designated by the South African Veterinary Association serves as a member of such council.

In view of the aforementioned it is hereby submitted that as per the practice in the attorney's profession, that professional boards, such as the Medical and Dental professions board should be allowed to elect its own members.

It is further recommended that the HPCSA Council should then function on the principles of the Veterinary and Para-Veterinary Professions Act in which a selection panel would be appointed by the Minister which will select the Council

members for the new Council, in consultation with the outgoing Council. The Council must have a prescribed compilation of which such compilation should consist of representatives from the professional boards. Resulting from the fact that the South African Medical Association (SAMA) is the only representative body of doctors in South Africa it is suggested that SAMA be allowed representation on the HPCSA Council as well as on the Medical and Dental Professions Board. The Minister will appoint the members of the HPCSA council after selection by the selection panel. In the case of the Health Professions Council, the profession, as is the case with attorneys, will amongst themselves elect the members of that particular board.

3.4 Costs of Election Process

We do not believe that the alleged exorbitant costs of an election process would justify elimination of the democratic right to elect a professional board.

One of the arguments raised by the SA Nursing Council in its submission to the Nursing Bill was that only 7% of nurses enrolled and participated in the election process of members on the Nursing Council and this did not justify the costs of conducting an election.

In National elections in SA, 50.56% of the population voted in 1994 but this percentage was reduced to 34.54% in 2004. What is the benchmark for deciding whether or not the cost of a democratic election process is justified? We do not believe there is a justification, in law or otherwise, for infringement of the right of health professionals to elect their representatives on the professional boards.

4. Make provisions dealing with the keeping of a register, application for registration and removal of names from such register more comprehensive

Section 21 of the Bill provides for the Registers to be kept at the Council. The Council will determine the intervals for printing and publishing of the Registers by the Registrar. It is our view that duly updated Registers must be published

annually by the Registrar / Council. This is essential in order to protect the unsuspecting public against unregistered person(s).

5. Empower the Minister to make regulations excluding certain persons from performing compulsory community service

The provisions of Section 24A of the Bill are noted, which empowers the Minister to make Regulations regarding the registration categories excluded from such (community) service. We would urge that these registration categories that would be exempted from community service should be published for public comment, prior to coming into effect, to enable the relevant stakeholders to comment thereon.

6. Empower the Minister, after consultation with the council and the board, to make regulations relating to unprofessional conduct as opposed to this function being performed by the council only

The introduction of sub-section 15(5)(fA) permits the Minister to make Regulations for the establishment by professional boards of professional conduct committees. This means that if the Minister is now empowered to select / appoint the members of the professional boards, these "Minster-appointed" professional boards will determine the conduct of members of the professions. Therefore, the "peer review" element that has always characterized professional disciplinary enquiries will be compromised. This will also prejudice entirely the confidence of the public and health industry in the ability of the professional conduct committees to decide competently or autonomously on matters for which they are responsible.

In light of the above, the above objective is rejected in totality by SAMA.

Likewise, and for the reasons stipulated above, SAMA opposes the proposed amendments to Section 49 of the Bill. In this regard it is recorded that previously "the Council shall, in consultation with a professional board, make rules specifying the acts or omissions in respect of which the professional board may

take disciplinary steps...". This has now been changed to "The Minister may make regulations...".

7. Empower the Minister to make regulations "after", and not "in" consultation with the council

It is our view that all Regulations affecting health professions should be made "in consultation" and not "after consultation" with the Council and professional boards. This objective aims at obliterating the power of Council and the professional boards and tends to centralize power in the hands of the Minister.

B

SPECIFIC: COMMENT ON SECTIONS IN THE CURRENT HEALTH PROFESSIONS ACT OF 1974 (HPA) TO WHICH AMENDMENTS ARE PROPOSED

Section 1: Definitions Clause

1. The new definition of "impairment" only includes those health professionals practising a profession. This must be rephrased to conform to Section 51 of the Bill which allows for investigations re impairment of students or persons registered in terms of the HPA (i.e. not only those who are in active practice).

Section 3 – Objects and Functions of Council

2. Sections 3(j), (k) and (l) "to serve and protect the public ..." – See discussion and comment above i.e. Whilst one of the primary roles of Statutory Councils is de facto to protect the public, this cannot be accomplished without ensuring that the interests of health professions are given equal consideration;
3. Section 3(f) –It should be explicitly stated that, other legislation may be amended to include the practise of acts, whether for gain or not, mentioned in Section 17(b). However, such amendments to other legislation may only be effected and/or come into effect after consultation with and approval by the HPCSA. Likewise, this clause should be included at Section 15A(c) re "Objects of Professional Boards";

4. In light of the new Section 3(o), a definition for "user" should be included which conforms to the definition in the National Health Act 61 of 2003 ("NHA"). Section 3(o) only refers to protection of the rights of the "users". We would suggest that mention should also be made of the rights of health providers as per Section 20 of the NHA.
5. Sub-section p (ii) refers to "six-monthly report on the status of health professions on matters of matters of public importance..." to be submitted to the Minister. Does this refer to a statistics report?

Section 4 – General Powers of Council

6. Section 4(c) – Change "After consultation..." to "In consultation with the relevant professional board...."

Section 5 – Constitution of Council

7. See comment supra re reduction from 25 to 16 professional board representatives on Council.

Section 6 – Vacation of Office

8. Section 6(c) – Would "mentally ill" include a person found to be "impaired". A definition for mentally ill should be included in Section 1.
9. New Section 6(k) – A person must vacate his office if he/she is an office bearer of an organization that has a conflict of interest with the council, unless such member elects to immediately vacate his or her office in that organization. If a member of Council is a member of a professional association such as SAMA and one of SAMA's main objective is to represent and guide the medical profession, would this be perceived to be a "conflict of interest"? This Section should be aligned to the King Report re conflict of interests – i.e. a person cannot be precluded from being a Director of an organization if all "interests" are declared upfront.
10. The heading of this Section must be amended to include reference to the new sub-sections re "Dissolution of Council" and "Termination of Membership of members".

Section 12 – Appointment of Registrar and Staff

11. Previously the Council appointed the registrar and some staff. The Minister is now empowered to appoint the Registrar after (NOT in) consultation with Council. The Registrar may be delegated by Council to appoint staff. We would propose that the status quo remain i.e. The Registrar should be appointed by the Council.

Section 15 – Establishment of Professional Boards

12. The comments will also apply to sub-section 15(5)(g) re procedure to be followed for the “nomination and appointment” (not election of members). Likewise, Section 61(g)(ii) should also be amended accordingly to refer to “election” and not “appointment”.

Section 15A – Objects of Professional Boards

13. See comment re Section 3(f) above.

Section 16 – Control over Education and Training

14. Sect 16(5) refers to a contravention by a person. However, often it is an organization / Council which contravenes the provisions of this Section by amending legislation without obtaining the necessary accreditation by the professional board concerned. Therefore some other form of sanction should be included for organizations / Councils e.g. fines not exceeding RX amount.

Section 17 – Registration a pre-requisite for practising

15. We support the new Sec 17(1)A re “...not permitting performance of acts which is not performed in the ordinary course of the practising of his/her profession...”. The new 17(5) is also supported re penalties for persons who practise a profession in contravention of the HPA. However, once again, see our comments at Section 16(5) above re penalties for organizations/Councils.

New Sect 19A – Suspension of health professionals and revocation of such suspension

16. We note with support that certain powers have been delegated to the professional board or a committee of such board to authorize the registrar to suspend the

registration of a person / member of such board. We are, however, concerned about the following:-

- i. S 19(1)(a) – If a letter / enquiry which is sent by the Registrar to a person is returned “unclaimed”, such person’s name should not be removed from the Register. The reasons for receiving an “unclaimed” letter could be due to postal office problems, which is common. It is our view that attempts should be made to contact the relevant person as per all contact details provided in accordance with Section 18(1), prior to removing a persons name from the Register.
- ii. Furthermore the Notice of removal, as referred to in Section 19(2), should be given by the registrar to the person concerned by way of certified mail to the address appearing in the register as well as to all contact details provided in accordance with Section 18(1)
- iii. The effect of removal of a person’s name from the Register has dire implications vis-à-vis malpractice insurance. As per Section 19 (g) of the Bill, the person shall cease to practise the health profession in respect of which he or she was registered.

Section 26 – Community Service

17. See comment above re a request that the registration categories who would be exempted from community service, should be published for public comment, prior to coming into effect, to enable the relevant stakeholders to comment thereon.

Sections 36, 37 and 38 – Repeal

18. Previously these sections specifically provided a sanction for “holding out a cure for cancer”. Would this now be omitted in toto or included in other legislation/regulation? SAMA strongly supports the latter. Furthermore, other clinical conditions where a cure/treatment is still being investigated must also be included in such legislation/regulation.

Section 40

19. We note and support the increased penalty from 12 months to 5 years for professing to be a registered person / holder of certain qualifications.

Section 41: Inquiries by professional boards into charges of misconduct

20. Sub-section 1 - The power of the professional board to institute an inquiry is deleted. It is not clear why subsection 1 is deleted. Furthermore, subsection 2 does not make sense on its own.

Section 41A: Manner in which investigations may be instituted

21. Previously the Registrar had to obtain the "approval of the chairperson of a professional board" before appointing an investigating officer to carry out certain investigations. Likewise the investigating officer had to obtain "approval from the chairperson of the board". This has been removed and the Registrar and/or investigating officer may take decisions independently. We would suggest that the status quo remains and that the approval of the chairperson of the professional board be obtained.

Section 56 – Death of person undergoing procedure of therapeutic, diagnostic or palliative nature

22. Presently there not enough qualified Forensic Pathologists to fill the available posts in the country in the metropolitan areas. The problem is further compounded in the rural areas where most of the medico-legal autopsies are done by general practitioners with no postgraduate qualification or training. The latter is applicable to the majority of the magisterial districts in the country. Presently there definitely are not enough qualified medical personnel (specialist and medical practitioner and it is expected to remain so for sometime), support administrative staff or the infrastructure or capacity to adequately service the needs in the present dispensation. Capacity building is still in the process. The HPCSA has previously asked the various Health Science Faculties to increase or intensify the training for medical undergraduates in Forensic Medicine. This stems from the poor services reported by the general public to the HPCSA. The additionally large volume of work that the Amendment will generate will cripple the present medico-legal system and would render it legally unacceptable and, at worst, bring it to a near standstill. Therefore, by changing the definition of the medico-legal service, this will not benefit the general public but negatively impact on the service that

admittedly is not ideal but still acceptable. Turn-around-times will become unbelievably long and the general public could receive a worse than mediocre service. Should this definition be extended to a first world medico-legal system, there are few such systems that would be able to function adequately due to the enormity on the medico-legal workload that will be expected to be completed in a legally acceptable manner and prescribed time. South Africa has a high rate of unnatural death already and with the expected increase should the Amendment be passed now; the future and quality of the medico-legal service in this country will be grim, bleak and forbidding.

In light of the above, we implore the authoritative persons to apply their minds adequately to this matter and suggest that the change/amendment not be implemented for the various reasons cited above. We would suggest that consultation takes place with the Forensic Units and medico-legal experts in the field and clarify the scope of "Death of a person [under anaesthetic] undergoing a procedure of therapeutic, diagnostic or palliative nature" which in our view is too wide and needs clear and better definition.

Section 61 - Regulations

23. Previously the Minister could make Regulations "in consultation", now it is proposed that this be changed to "after consultation". This is not acceptable and we would propose that the original wording of "in consultation" be retained.

Section 62 – Levying of annual fees

24. Previously the Minister, on recommendation of the Council, could authorize a professional board to prescribe the annual fee. It is proposed that the fee will be prescribed by Council alone in future. We would suggest that such fee should be determined in consultation with the professional board concerned.

CONCLUSION

In this submission the SAMA has concentrated on areas which are of great concern to its members. SAMA believes that the above areas of concern should be addressed prior to

passing the Health Professions Amendment Bill. It would be counter-productive to enact the Bill and react to problem areas which arise in respect of the above issues.

If so indicated, the SAMA is willing to clarify any of the points at the convenience of the Portfolio Committee on Health. We would also request a time-slot to allow us to make a verbal presentation on 1 or 2 August 2006.

Once again we wish to express our gratitude for the opportunity to present our submission in this regard.

Compiled by : -

The South African Medical Association

Date: 19 July 2006

Contact person:

Dr Aquina Thulare : Secretary-General

Tel: (012) 481 2000 / 37

Fax: (012) 481 2100

e-mail: aquinat@samedical.org