

REPUBLIC OF SOUTH AFRICA

NATIONAL HEALTH AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
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 D CARTER, MP)

[B 8—2019]

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

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

To amend the National Health Act, 2003, so as to amend a definition and to insert new definitions; to provide for the legal recognition and requirements of a durable power of attorney for health care 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:—

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 older who, at the time he or she witnesses a durable power of attorney for health care or a living will, is competent to give evidence in a court of law;”;
- (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 No. 108 of 1996)];”;
- (c) by the insertion after the definition of “district health council” of the following definition:
- “**‘durable power of attorney for health care’** means the instrument or document contemplated in section 7A;” and
- (d) by the insertion after the definition of “Inspectorate for Health Establishments” of the following definition:
- “**‘living will’** means the instrument or document contemplated in section 7B;”.

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 health care

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 any adult person to act as his or her agent and mandate such agent to take any and all medical decisions, including decisions about withholding or withdrawal of any treatment, 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 health care substantially in the form contained in Schedule 2.

(2) The maker of the durable power of attorney for health care 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 transplantable organs or tissues of the maker.

(3) The durable power of attorney for health care 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 one another’s presence: Provided that one of the witnesses is not the spouse or partner of the maker, or related to the maker by blood or adoption.

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

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

- (a) must be informed by any medical advice from the medical doctor treating the maker of the durable power of attorney for health care referred to in subsection (1);
- (b) must be informed by the values, principles and beliefs of the maker in so far as these are known to the agent, and where not known, such decisions must be taken in the best interests of the maker;
- (c) must be taken while the agent is competent to make such decisions; and
- (d) is final and may not be overridden by any other person.

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

- (a) a signed and dated letter of revocation;
- (b) physically destroying it and any copies thereof;
- (c) an oral expression of his or her intent to revoke it; or
- (d) means of a later executed durable power of attorney for health care which is materially different from the former document.

(7) A maker of a durable power of attorney for health care may also choose to make a living will contemplated in section 7B.

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) may include—

- (a) artificial nutrition;
 - (b) artificial hydration;
 - (c) dialysis;
 - (d) any medication or drug, including antibiotics, administered through any method, including an IV tube; or
 - (e) life support of any kind.
- (3) A treating medical doctor, before giving effect to the living will referred to in subsection (1), must—
- (a) satisfy himself or herself that, on the face of the facts before him or her—
 - (i) the medical condition of the maker of the living will is terminal and incurable and the maker is no longer competent to make or communicate decisions concerning his or her medical treatment or refusal thereof;
 - (ii) the maker of the living will is in a permanent vegetative state; or
 - (iii) the maker of the living will 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
 - (c) inform, where practicably possible, the maker of the living will's spouse or partner, or in the absence of such spouse or partner, the maker's parent, grandparent, an adult child or a brother or sister, in the specific order as listed, of the existence and content of the living will.
- (4) A living will 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 one another's presence: Provided that one of the witnesses is not the spouse or partner of the maker or related to the maker by blood or adoption.
- (5) A living will containing the refusal, withdrawal or withholding of medical treatment, or the withholding or withdrawal of such medical treatment in accordance with such living will, will not be invalid or unlawful even though such refusal, withdrawal or withholding of medical treatment will hasten the natural death of the maker of the living will.
- (6) The treating medical doctor who withholds or withdraws any medical treatment in accordance with a valid living will, will not be criminally or civilly liable even though such withholding or withdrawal might hasten or had hastened the natural death of the maker of the living will.
- (7) A living will referred to in subsection (1) may not be overridden by any other person.
- (8) A living will referred to in subsection (1) may be revoked at any time by the maker thereof by—
- (a) a signed and dated letter of revocation;
 - (b) physically destroying it and any copies thereof;
 - (c) an oral expression of his or her intent to revoke it; or
 - (d) means of a later executed living will which is materially different from the former document.
- (9) A living will does not preclude emergency care until a person's condition can be established and the applicability of a living will can be determined.
- (10) A maker of a living will may also choose to make a durable power of attorney for health care contemplated in section 7A.”.

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.”.

Insertion of Schedules 2 and 3 in Act 61 of 2003

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4. The following Schedules are hereby inserted in the principal Act, the existing Schedule becoming Schedule 1:

“SCHEDULE 2

GUIDELINE FOR A DURABLE POWER OF ATTORNEY FOR HEALTH CARE

10

(Section 7A)

I, (full name),
in granting this Durable Power of Attorney for Health Care, wish to confirm
that I

- am 18 years or older; 15
- am of sound mind;
- act of my own free will, free from duress induced by others; and
- have carefully considered my own values, beliefs and preferences, as
well as misfortunes of body and/or mind that may befall me.

Hence, should I, as a result of illness, injury or any other trauma, at a future
date, develop any condition as a consequence of which I lack the requisite
competence to have or communicate any rational preferences regarding my
future health care, 20

I wish to appoint (full name)
as my agent (*proxy*) health care decision-maker, mandating him/her to act 25
as my substitute for any and all of my health care and medical decisions,
and instructing any person or institution to act on the directives of this duly
appointed health care agent.

Should my first choice as health care agent be unable to assume this
responsibility, I wish to appoint 30

..... (full name)
as my alternative agent (*proxy*) health care decision-maker, mandating
him/her to act as my substitute for any and all of my health care and medical
decisions, and instructing any person or institution to act on the directives
of this duly appointed health care agent. 35

I understand that this Durable Power of Attorney for Health Care mandates
my health care agent to make health care and medical decisions on my
behalf for the duration of my biological life, thus enduring while I am no
longer competent to revoke it. Should I, however, regain the requisite
competence, I understand that I would have the authority to revoke this 40
health care mandate.

In making health care and medical decisions on my behalf, my health care
agent should give due recognition to my known values, beliefs, principles
and personal preferences. Should it be impossible or difficult to know the
practical implications of these considerations in particular circumstances, 45
my health care agent should act in my objectively determined best interest.

In particular, I authorise my health care agent (*proxy*) decision-maker to
make any and all of my health care and medical decisions on my behalf, that
is, any and all decisions I would have made while still competent.

In this mandate to my health care agent decision-maker, I specifically 50
include decision-making directives that would be routinely included in a

Living Will, that is, directives relating to refraining from life-sustaining medication, treatment or procedures that would otherwise prolong life, thus impeding a natural death. *[This clause may be excluded.]*

In addition, I mandate my health care agent to make decisions on my behalf regarding the donation of my organs or tissue for any legitimate medical or scientific purpose. *[This clause may be excluded.]* 5

[The grantor/maker of a Durable Power of Attorney for Health Care is free to issue specific instructions or directives to his/her health care agent about any medical intervention that the grantor/maker chooses to include in or exclude from the mandate.] 10

GRANTOR/MAKER of health care mandate/proxy

Name (print in full)
 Signed at (name of place)
 Identity or passport number
 Signature Date 15

WITNESS 1 to the signing of this Durable Power of Attorney for Health Care

I declare that I have witnessed the signing of this Durable Power of Attorney for Health Care by (i) its grantor/maker and (ii) witness 2.

Name (print in full) 20
 ID or passport number
 Relationship to the maker
 Contact telephone number
 Email address
 Full residential address 25

 Signature Date

WITNESS 2 to the signing of this Durable Power of Attorney for Health Care

I declare that I have witnessed the signing of this Durable Power of Attorney for Health Care by (i) its grantor/maker and (ii) witness 1. 30

Name (print in full)
 ID or passport number
 Relationship to the maker
 Contact telephone number 35
 Email address
 Full residential address

 Signature Date

SCHEDULE 3**GUIDELINE FOR A LIVING WILL***(Section 7B)*

I, (full name),
in making this Living Will, wish to confirm that I 5

- am 18 years or older;
- am of sound mind;
- act of my own free will, free from duress induced by others; and
- have carefully considered my own values, beliefs and preferences, as
well as misfortunes of body and/or mind that may befall me. 10

Hence, should I, as a result of illness, injury or any other trauma, at a future date,

- develop a terminal and incurable medical condition; or
- become permanently vegetative; or
- become completely and irreversibly unconscious, 15

and, as a consequence, no longer possess the requisite rationality or competence to have or communicate my health care decisions,

I grant authority to and authorise any medical professional and/or medical facility and/or other carer to execute this Living Will, thereby allowing me to die a natural death by refraining from keeping me alive by artificial 20 means, or by potentially life-sustaining medical intervention, treatment or procedure, such as:

- artificial nutrition;
- artificial hydration;
- dialysis; 25
- any medication or drug, including antibiotics, administered through any method, including an IV tube; or
- life support of any kind.

[The maker of a Living Will is free to insert a clause instructing an attending or treating medical doctor/health care professional, or any other person, not to discontinue a specific form of life-sustaining treatment, for example, artificial hydration.] 30

In addition, I authorise any attending medical professional and/or medical facility and/or other carer to administer to me comfort or palliative care, specifically adequate medication to alleviate my pain and suffering, even 35 though it might hasten my natural death as a secondary consequence.

Moreover, I give permission for any of my organs or tissue to be donated for legitimate medical or scientific purposes. *[This clause may be excluded.]*

MAKER of this Living Will

Name (print in full) 40

Signed at (name of place)

Identity or passport number

Signature Date

WITNESS 1 to the signing of this Living Will

I declare that I have witnessed the signing of this Living Will by (i) the maker of the Living Will and (ii) witness 2.

Name (print in full) 5
 ID or passport number
 Relationship to the maker
 Telephone number
 Email address
 Full residential address
 10
 Signature Date

WITNESS 2 to the signing of this Living Will

I declare that I have witnessed the signing of this Living Will by (i) the maker of the Living Will and (ii) witness 1.

Name (print in full) 15
 ID or passport number
 Relationship to the maker
 Contact telephone number
 Email address
 Full residential address 20

 Signature Date

Short title and commencement

5. This Act is called the National Health Amendment Act, 2019, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 25

MEMORANDUM ON THE OBJECTS OF THE NATIONAL HEALTH AMENDMENT BILL, 2019

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.”
- 1.2 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 health care 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 health care 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.

2. OBJECTS OF THE BILL

- 2.1 The National Health Amendment Bill, 2019 (“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 health care 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 amends a definition in section 1 of the principal Act and inserts new definitions.
- 3.2 Clause 2 inserts new sections 7A and 7B into the principal Act to provide for the two types of advance health care directives, namely the durable power of attorney for health care and the living will. This clause sets out the content of each of these advance health care directives and the various requirements that must be complied with. It also sets out how these directives can be revoked. This clause also refers to the newly inserted Schedules 2 and 3, which provide examples of a durable power of attorney for health care and a living will, respectively.
- 3.3 Clause 3 amends section 93(1) and (3) of the principal Act by numbering the existing Schedule in the principal Act as Schedule 1.

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.

3.4 Clause 4 inserts new Schedules 2 and 3 into the principal Act. These Schedules provide examples of a durable power of attorney for health care and a living will, respectively.

3.5 Clause 5 provides for the short title and commencement.

4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

None.

5. FINANCIAL IMPLICATIONS FOR THE STATE

None.

6. DEPARTMENTS, BODIES OR PERSONS CONSULTED

The following stakeholders were consulted:

6.1 Dignity SA;

6.2 Prof W A Landman

An explanatory summary of the draft Bill was published for public comment in Government Gazette No. 41789 on 24 July 2018.

7. PARLIAMENTARY PROCEDURE

7.1 The Member proposes that this Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution. Even though the Bill seeks to amend the National Health Act, 2003, which regulates a functional area of concurrent national and provincial legislative competence listed in Part A of Schedule 4 of the Constitution, namely “health services”, the nature of the amendments proposed in the Bill are largely administrative and hence it is proposed that the Bill should be dealt with in accordance with section 75 of the Constitution.

7.2 The Member is further of the opinion that 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.

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