



## LEGISLATION TO 'CON' DOCTORS ?

'Draconian and irrational' legislation regulating where doctors may practise in future threatens the very existence of private medicine in South Africa and will undermine rather than bolster the nation's health care delivery.

This is the view of the South African Medical Association (SAMA) which dispatched an urgent, powerfully argued letter to President Thabo Mbeki early in October in a last-ditch attempt to dissuade him from signing the far-reaching changes into law.

Mbeki was briefed on the letter by his legal advisor, Mojanki Gumbi, whom he instructed to elicit a full and considered response from the national Department of Health.

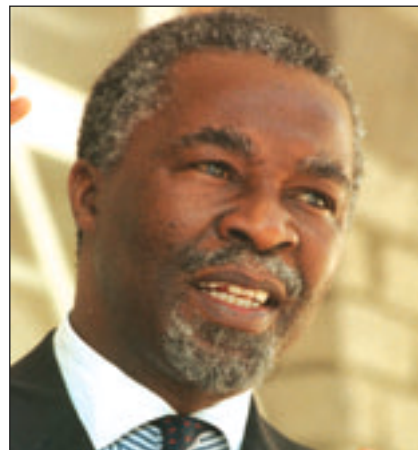
The law means that if a doctor wants to establish a practice or join an existing one, he or she will have to apply for a 'Certificate of Need' (CON).

SAMA Chairperson, Kgosi Letlape, vowed to fight the legislation 'tooth and nail, with everything we've got', and has briefed lawyers to prepare for a Constitutional Court challenge. This would enable an immediate and efficient SAMA response should Mbeki reject the appeal.

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Letlape, who is hoping for a meeting with Mbeki once the Department of Health has responded to his letter, likened the relevant section of the National Health Bill to some of the worst former apartheid legislation. It gives unfettered powers of final arbitration to the Minister of Health and allows the nine provincial directors general (DGs) to decide where and under what conditions private doctors may practise.

Writing off further attempts to engage the Department of Health as a 'useless exercise where not even sign language helps', Letlape said any implementation of the CON legislation would cause a mass exodus of doctors. Pure frustration at being rendered unable to deliver health care to their patients and being forced to leave their families to earn a living would ensure this.



*President Thabo Mbeki.*

'You won't have a single doctor left in this country unless you chain them down, take away their passports away and detain them — we have rights as human beings and we're not going back into an apartheid system. We're now being persecuted because of our medical qualification — before it was because we were black,' he fumed.

He described the CON as 'another form of the Group Areas Act where influx control was practised — we're back to the good ole' days'.

SAMA's head of health policy, Professor John Terblanche, said the new bill was being enacted without final regulations being made available for comment, in marked contrast to KwaZulu-Natal which spearheaded much of it in consultation with SAMA before omitting the CON.

'The government doesn't have the infrastructure to deal with certificate

applications from every private doctor, pathology group, clinic — and when a local director general says no, the appeal goes to the minister who will obviously support their DG,' he said.

Letlape told the *SAMJ* that 'the large bulk' of health care delivery that should be public sector responsibility was already being handled by the private sector. He says in his letter to Mbeki that SAMA clearly understands that the law's intention is for an equitable distribution of doctors, but that the effect will be to 'exponentially intensify' the insecurity and demoralisation felt by most junior doctors.

In spite of SAMA exhortations to a Parliamentary Portfolio Committee hearing on the National Health Bill to scrap the CON or 'at the very least' to include a 'sunset clause' for existing practices, neither concern was addressed in the subsequent draft.

The Junior Doctors Association of South Africa (Judasa) said the government already expected junior doctors to go where they were sent for internship training and community service.

The prospect of another regulatory system restricting their right of free association made 'any real future in the medical profession in this country' a daunting prospect.

Judasa Chairperson, Dr Marietjie Slabbert, said juniors already felt they were not appreciated 'in their own country by their own government'.

'We are confronted by appalling public sector working conditions and many members feel unable to safely invest in a secure future in this profession in South Africa'. Market forces, technologies and infrastructure were the (correct) way to attract doctors to under-served areas.

Letlape echoed this sentiment in his letter, saying infrastructure rather than



people should be redistributed because health professionals 'tend to follow infrastructure'.

He said the mode of regulation was not rationally related to the objectives of the legislation. It would be far less restrictive to implement accreditation systems to incentivise doctors to set up practices in under-serviced communities.

Although SAMA viewed the law as an undue restriction of a doctor's constitutional right to freely choose his/her trade, occupation or profession, it did recognise that the constitution suggested that legislatures could regulate this right.

However, most crucially, SAMA argued that the legislation could not regulate the practice of medicine without regulating the choice of an occupation, as these two concepts were not mutually exclusive.

The CON directly infringed on the patient's constitutional right of 'access to health care', and his or her right to choose a particular health care provider for services, both of which were in the Department of Health's own 'National Patient Rights Charter'.

Letlape writes that doctors, denied the right to practise a profession for which they had committed several years studying, would face economic uncertainty, have their qualifications rendered meaningless and be 'professionally destroyed'. The DoH view that doctors would set up practice 'elsewhere' was inconsiderate, inhumane and iniquitous and would 'have dire consequences'.

The law was irrational, arbitrary and defeated its proposed aims and objectives.

This was short-sighted, indicated poor research nationally and internationally, and was 'not for the common good or doctors or the public'.

Letlape told the *SAMJ* that a contributory problem was that the collective public service bargaining

forum made no provision for the retention of scarce skills.

Health Minister, Dr Tshabalala Msimang, told a delegation of SAMA doctors in February this year that they were 'just one of many' groupings in the public health sector.



*Health Minister, Dr Manto Tshabalala-Msimang.*

Added Letlape, 'We're saying create a separate bargaining chamber for doctors as part of the scarce skills retention strategy — take us out and negotiate directly, then we can help you deliver health care because we'll be incentivised'.

He said the vast majority of patients (without medical aid) went to private doctors and that the new law would achieve the opposite of its ostensible purpose, namely to entrench people's constitutional right of progressive access to health care.

Terblanche said repeated offers of help in drawing up the legislation had been rejected.

SAMA has had two official meetings with the government in as many years, one with the Deputy Director of Health, Dr Camy Chetty last year and the other with Tshabalala-Msimang.

Added Terblanche, 'The implication of this is a lack of trust in their ability to do the rational, reasonable thing in publishing the regulations. Because they don't talk to us, they don't know how we can help!'

The South African Registrar's Association (SARA) said the 'unfortunate reality' was that despite several attempts, career pathing in the public sector remained 'woefully inadequate and virtually non-existent'. Frustration levels among health care providers were almost beyond measure and a CON would 'markedly disadvantage and disenfranchise a young doctor or specialist wishing to enter practice'.

The SARA do not support a sunset or grandfather clause because they see it as giving existing practices an advantage and discriminating against juniors. SARA called for the CON to be scrapped and a system of accreditation of practices to be introduced while regulating technologies and therapies instead of individual doctors.

As currently proposed the law would be 'devastating to newly qualified doctors and specialists'.

Letlape said Mbeki's most politically astute tactic would be to send the lawmakers back to the drafting board in order to win short-term support from doctors before the April election. Asked to speculate on why the government seemed so determined to go ahead in spite of repeated warnings, he said, 'this is an ideological thing'.

'There are people who have decided they are going to destroy the private sector. It's got nothing to do with the public good. They think Cuba is the health model to go for.'

If the government wanted SAMA to show them successful international health systems it had only to ask. 'France is a socialist country, yet 30% of their health care is delivered by the private sector,' he added.

**Chris Bateman**