



## PERSONAL VIEW

### Certificate of Need: Dead and buried, or hibernating?

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On 2 May 2005, ten of the twelve chapters of the National Health Act (Act No. 61 of 2003)<sup>1</sup> came into effect, generally with favourable reviews. I restrict myself to the motivation and ideology fundamental to Chapter 6 of the Draft Bill which (together with Chapter 8) was omitted in the Act, or rather, as the official government communiqué ominously asserted, 'not yet proclaimed'.<sup>2</sup> Chapter 6 deals among other things with the classification of health establishments as a precursor to the notorious Certificate of Need.

#### Motivation and underlying ideology

The objectives of Chapter 6, as stated in the communiqué, are to register each health establishment as defined in the Act, to ensure equitable distribution and access for everyone, and to ensure greater public participation in their governance. Draft regulations related to Chapter 6 are to be published. On its website, under the heading 'Health care planning',<sup>3</sup> the ANC defended the much maligned Certificate of Need as an integral part of the new National Health Bill and suggested that doctors are displeased at 'not getting their privileges protected'. The aim is to have all 'health establishments, which include doctors' surgeries' licensed. It is an administrative 'planning tool to ensure equitable distribution of resources (health establishments, human resources, health technology) and ensure provision of better quality of services'. It is 'supported by the Health Professions Council of South Africa'. The issue, according to the ANC, is not that doctors and private practice are the targets of the Bill, but, to the contrary, that doctors are up in arms because their privileges are at risk. Nevertheless, what the ANC and Government have in store for us, and their tactics and strategies for the implication thereof, is clear.

But what are the essential tenets of the legislation, and what, if any, are the moral objections to it? The NHB must 'provide a framework for a structured uniform health system within the Republic, taking into account the obligations imposed by the Constitution'. The great hindrance is 'socio-economic injustices and imbalances in health services' and this prevents a just

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system from developing spontaneously, although there have been advances since 1994.

#### The 'free market' as a hindrance to Government objectives

An essential problem as the ANC sees it is what economists call the 'free market': in this instance 'unregulated markets that trade in issues of life and death'.<sup>3</sup> Our relative freedom – within the constraints of good economic maxims of supply and demand – has led to a maldistribution; medicine is now practised in 'a commercialised environment'. Only interfering with these market forces can attain equitable resource distribution – *transformation* – and this is the aim of the NHB.

And this is its moral argument: that 'access to health services is one of the basic requirements for government to fulfil'. It 'cannot be achieved without ensuring that resources are distributed equitably'. It is a matter of 'equity and social justice'. The 'constitutional right of doctors to practise wherever they wish' if indeed it exists, should be 'counter-balanced with the constitutional right of access to health care' and the 'constitutional obligation for the state to ensure that access. Since health resources are not unlimited the next obvious means of ensuring better access is to ensure more rational distribution so that the resources that are available are accessible to the greatest number of people', through the mechanisms of legislated 'incentivisation and control' of both quantum and type of service provided in balance with the 'the needs of the population in that area'.

What does Government expect from us? Honest engagement not directed at 'protecting privilege'.

So much for the ANC's motivation (with a lot of political rhetoric and general mud-slinging, a lot of it directed at our gallant chairperson, Dr Kgosi Letlape). In essence Government are saying that they have a constitutional obligation to 'transform' health care delivery in order to match supply and demand because the public has a constitutional 'right' of access to health care. Free market forces, private enterprise and what we see as a constitutional right to practise where we see fit hinder this redistribution, and the only mechanism to set this right is the Certificate of Need which, it seems clear, will be applicable to all health care facilities and professionals – presumably also those in state employ. In effect Government argues that it has a right to limit our rights in order for it to honour its obligations – an argument that seems, to say the least, counter-intuitive and fallacious.



## Does Government have a case?

What are the merits of Government's case? There certainly is a maldistribution of essential services, but also of infrastructure. My own interest in bioethics started about eight years ago when I was fortunate enough to attend a congress in Venice. The aged Professor of Ethics at Rome University, an eminent Roman Catholic cardinal, discussed the question of distributive justice in access to health care: *is it right that essential medical services be withheld from citizens simply because they cannot afford it?* Well, in principle the answer is clear – no. As to the issue of who should supply those services, he was equally clear – the government of the day. So at least on that point we would be in agreement with Government.

## A national emergency

But the answer to the question of 'how' is not self-evident. One way of looking at it is to regard it as some form of national emergency. In war, for example, a government is entitled to conscript its subjects to perform military service, taking into consideration issues such as pacifism (those now doing their 'Zuma service' are little more than paid conscripts). In war, much, if not all, of a country's resources are dedicated to defending its integrity and its citizens. We are not at war, at least not in the military sense, but there are at least two other issues that may be described as national emergencies in which the terminology of war has been used. They are poverty and HIV/AIDS. One constantly hears of the 'war on poverty', and against AIDS. But how have Government conducted these wars? The anti-intellectual, anti-scientific rhetoric of our President and Minister of Health in conducting the 'war on HIV/AIDS' has made us the laughing stock of the scientific and medical world. They have persevered against all good sense and odds in their bizarre pseudo-science. Never in our country has it made such good sense to instigate treatment for an affliction. *Scientific evidence* of effectiveness of treatment is overwhelming. It makes *economic sense*; treatment prolongs active life and this means workers remain able to support themselves and their families, thereby limiting the looming spectre of AIDS orphans which would otherwise peak in a decade or so at a figure of somewhere between one and two million. Workers who can continue working make a continued *economic contribution* to the country. It surely makes *political sense* since most victims are black. And lastly, it is *morally sound* to supply medication to persons who, after all, are also innocent victims and have nowhere else to obtain aid. Yet it required a constitutional court decision before Government finally conceded even if, to date, hardly more than in principle (neither the President nor his Minister of Health have publicly conceded their mistakes or backed down).

The war on poverty has also been disastrous. Any good socialist state would have done what the USSR did – employ every jobless person (I do not propose such action). But of course, Government dare not do in the economic world what it feels is right in the medical world: effectively to nationalise

private enterprise, which is exactly what the Certificate of Need implies. And Government seems determined to spend its resources elsewhere; I leave it to the imagination of the reader to draw up his or her own list of senseless spending.

## A National Health Service?

Implementing a C of N is not simply a matter of uprooting a practitioner and replanting his or her practice elsewhere. The only employment available in the country areas where services are lacking is likely to be government service. So the state proposes a surreptitiously instigated nationalisation (your old practice minus a C of N is worthless), mass social engineering and probable hardship. One is justified in suspecting that this is Government's first step on the road to a national health service. The first targets are bound to be urban GPs; the shortage of rural facilities, will initially in any case, preclude the mass relocation of specialists – but they are bound to follow (or emigrate *en masse*). How they will practise without a radical upgrade in health care infrastructure is beyond my understanding.

## Abuse of the system

The type of power and control Government will hand to its often corrupt officialdom is ominous and awesome. Judging from the black market cost of a driver's licence or lucrative government contract, I can imagine how some of these officials might line their pockets.

Affirmation might imply that previously advantaged practitioners may in future be disadvantaged; but as our spokesperson pointed out, all of us, black and white, stand to lose.

Government takes a utilitarian approach in its argument. It needs to obtain certain results, and is prepared to trounce rights and ignore good sense in the pursuit thereof. Morality is defined only in terms of results, not how those results are obtained: *viz.* by simply trampling the most basic human rights of freedom of choice.

## Are we the keepers of our brothers?

However, our concerns regarding the C of N do not absolve us from answering the question the Roman Catholic cardinal posed or the question of our personal responsibility as caregivers. The impasse has come about precisely because the market and the collective medical conscience have not been willing or able to address these questions. If we take to the streets in protest as we did on 6 February 2004, let us simultaneously and with equal vigour take up the fight for our underprivileged brothers and sisters; as moral agents we are, after all, also the protectors of their rights and interests.

1. National Health Act (Act No. 61 of 2003). <http://www.info.gov.za/documents/acts/2003.htm> (last accessed 4 May 2006).
2. National Health Act proclaimed by President: Issued by Department of Health. <http://www.info.gov.za/speeches/2005/05042013451004.htm> (last accessed 4 May 2006).
3. ANC Today Vol. 4 No. 7 20 Feb 2004. <http://www.anc.org.za/ancdocs/anctoday/2004/at07.htm#art1> (last accessed 4 May 2006).