Chapter 10

The rights and duties of health care workers
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10.1 The indispensable role of health care workers

Health care workers (HCWs) play an indispensable role in the implementation of health policy and the provision of health care services. However, their rights are frequently overlooked, and many HCWs complain of poor conditions of service, long hours and low wages. As a result many nurses in particular have chosen to leave the public health service. Some have gone to the private sector where conditions are better but job security is worse. Many have gone abroad. In 2001, for example, it was estimated that over 23,000 South African health workers were working in developed countries.

Health care workers play many different roles in providing health care. Reflecting this, the National Health Act 61 of 2003 recognises several categories of HCWs:

- **Health care personnel**: defined as “health care providers and health workers”, meaning all people who work in the health service.

- **Health care providers**: defined as people “providing health services in terms of any law”, including the Allied Health Professions Act 63 of 1982, the Health Professions Act 56 of 1974, the Nursing Act 50 of 1978, the Pharmacy Act 53 of 1974, and the Dental Technicians Act 19 of 1979. This means doctors, nurses, dentists, pharmacists and medical specialists.

- **Health workers**: defined as all people “involved in the provision of health services to a user” and who are not health care providers, such as persons responsible for cleaning, security, medical waste disposal and clerical work. It also includes counsellors, community health workers, environmental health officers, emergency medical service workers and volunteers.

Together, these workers have the responsibility of ensuring that the government’s health policies are translated into service delivery.

This chapter provides an overview of the rights and duties of HCWs in both the public and private health care sectors. It starts by considering the rights of HCWs as ordinary workers, focusing on the right to fair labour practices and the right to organise in the workplace, the right to equality, occupational health and safety rights, and the rights to freedom of conscience, religion, thought, belief and opinion. In this respect we examine how the rights of all HCWs are protected by the Constitution and the National Health Act, as well as a range of general employment-related statutes, including:
The rights and duties of health care workers

The Labour Relations Act 65 of 1995
The Basic Conditions of Employment Act 75 of 1997
The Employment Equity Act 55 of 1998
The Occupational Health and Safety Act 85 of 1993
The Compensation for Occupational Injuries and Diseases Act 130 of 1993
The Protected Disclosures Act 26 of 2000
The Promotion of Administrative Justice Act 3 of 2000
The Public Service Act, Proclamation 103 of 1994 and regulations
The Public Service Labour Relations Act 105 of 1994

We then consider the specific duties of health care providers, such as their duties to their respective professions, to users of the health system and to the general public. Here we look at some of the laws and policies that regulate the professional conduct of health care providers, including:

The Health Professions Act 56 of 1974
The Nursing Act 50 of 1978
The Batho Pele Principles of 1997

NOTE: This chapter does not deal with the duties of traditional health practitioners. These are described fully in Chapter 7 on traditional and alternative health care.

10.2 The rights of health care workers

Under apartheid, black workers were denied basic human rights to organize in trade unions of their own choice, to strike and to protest against low wages and poor working conditions. However, in the 1970s and 1980s the South African labour movement organized mainly under the Congress of South African Trade Unions (COSATU) won many rights in the course of strikes and struggles.

Today, the Constitution entrenches workers’ rights like other human rights and various labour laws have been enacted to improve working conditions and enable workers to enforce their rights.

The right to fair labour practices

The constitutional right to fair labour practices

Section 23(1) of the Constitution says that “everyone has the right to fair labour practices”. The Labour Relations Act 66 of 1995 and the Employment Equity Act, 55 of 1998 elaborate on the right to fair labour practices and are dealt with in more detail in the next section.
Section 23(2) of the Constitution says that every worker has the right:
- to form and join a trade union;
- to participate in the activities and programmes of a trade union; and
- to strike.
This includes health care workers, who are not designated as providing an essential service.

There are other rights in the Constitution that are also significant for health care workers, including:
- The right to equality (section 9): this is the basis for protecting workers against unfair discrimination, and for affirmative action to promote the advancement of previously disadvantaged groups.
- The right to human dignity (section 10): this was already an important element in any common law contract of employment, promoting mutual respect between employer and employee, and putting this into the Constitution entrenches it further.
- The rights to freedom and security of the person, freedom of opinion, freedom of expression, assembly, demonstration, picket and petition, freedom of association, freedom of movement, freedom of trade, occupation and profession, access to courts, and arrested and detained persons: these all entrench the organising space needed for a vibrant and democratic trade union movement which is transparent, accountable and participatory and vital for the protection of health care worker’s rights and the improvement of working conditions.

But in addition it is important for health care workers to know and take advantage of their constitutional rights to:
- Access to information (section 32) [see also section 16 of LRA]: it could be important to get hold of additional information which might be required for trade unions to negotiate in collective bargaining and retrenchments.

CASE STUDY: USING THE CONSTITUTION TO IMPROVE LABOUR RIGHTS

Workers who do not benefit from specific labour legislation have used section 23 of the Constitution to entrench their rights. For example, in the case of South African National Defence Force Union v Minister of Defence 1999 (4) SA 469 CC, soldiers used section 23 to gain the right to form and join their own trade union. In this case the Constitutional Court held that the term “worker” in section 23(2) should be interpreted to include members of the armed forces.
The rights and duties of health care workers

For more information see the Promotion of Access to Information Act.

Just administrative action (section 33): this might be important to reinforce the rights of workers in dismissal and disciplinary disputes. For more information see the Promotion of Administrative Justice Act.

The Labour Relations Act and Basic Conditions of Employment Act

After the advent of democracy in 1994 a process began to codify the constitutional right to fair labour practices into labour legislation and to reform existing labour laws. The resulting labour laws spell out workers’ constitutional rights and the forums for their enforcement.

The most important of these laws are the Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA). These laws deal with a range of issues from hours of work, annual leave, sick leave, notice pay (under the BCEA) to rights to challenge unfair labour practices and unfair dismissals and negotiate and strike over better working conditions (under the LRA).

The LRA’s main purpose is to advance economic development, social justice, labour peace and the democratisation of the workplace.

Similarly the BCEA aims to give effect to the fair labour practice provision in the Constitution by setting minimum terms of employment. It sets maximum hours of work and minimum days of leave for unorganised workers and provides for ways to regulate and alter these, sector by sector, through sectoral determinations. For example the BCEA states that:

- Every employee has a right to six weeks’ paid sick leave in a three-year cycle. In the first six months of work, an employee may take one day of sick leave for every 26 days worked. If a worker is absent repeatedly or for more than two days at a time, a medical certificate is required.
- For deaths, births and illness of children in the family an employee may take up to three days’ paid family responsibility leave a year, provided that they have been employed for more than four months.

Below we explain some of the most important aspects of these laws:

Protection against unfair dismissals and unfair labour practices

The LRA protects all employees, including health care workers, against dismissal unless the employer can show that the reasons for the dismissal and the process were fair. The following reasons are internationally accepted as fair:
misconduct, eg being absent from work without permission;
- incapacity, eg being unable to carry out the work required; and
- retrenchment eg the employer no longer needs that type of work (called “dismissal for operational requirements” in the LRA).

The LRA makes it automatically unfair to dismiss workers for arbitrary reasons unrelated to conduct or performance at work. This includes being active in trade unions, being part of a strike or supporting a strike which follows the prescribed dispute procedures, pregnancy or making a disclosure, for example of corruption, in terms of the Protected Disclosures Act 26 of 2000.

Workers may not be dismissed for discriminatory reasons like race, gender or HIV status.

In terms of the LRA, “unfair labour practices” include:
- Unfair conduct of the employer in relation to promotion, demotion, probation, providing training or supplying benefits.
- Unfair suspension or other unfair disciplinary action less serious than dismissal.
- An employer making a worker suffer some occupational detriment or disadvantage at work after the worker has made a disclosure of information eg where the employee has exposed corruption, such as theft in the hospital pharmacy or laundry.

CASE STUDY: AN UNFAIR DISMISSAL?

_Naude v MEC: DoH, Mpumalanga (Labour Court) JS 331/04_

In June 2000, Dr N was appointed as a Community Service Medical Officer at Rob Ferreira Hospital in Nelspruit, Mpumalanga. In March 2001, he applied to the Mpumalanga Department of Health (DoH) to upgrade his position to a Junior Medical Officer. His application was submitted to the medical superintendent, who in turn submitted it to the human resources (HR) division of the Mpumalanga DoH. The medical superintendent received oral confirmation from a senior official in HR that the MEC, Sibongile Manana, had approved the upgrading of Dr N’s post.

Some time later, the MEC was served with court papers in a case brought against her by an NGO called the Greater Nelspruit Rape Intervention Project (GRIP) regarding their right to provide access to post-exposure prophylaxis (PEP) services for reducing the risk of HIV transmission following sexual assault at Rob Ferreira Hospital. The court papers contained an affidavit made by Dr N in support of GRIP’s case. Dr N’s contract was not extended to that of a Junior Medical Officer as expected. A conciliation meeting at the Public Health Bargaining Council did not resolve the dispute over his unfair discrimination dismissal. In 2006 his case was still pending before the Labour Court.
Health care workers can exercise their right to strike provided they are not one of the groups specified in a Bargaining Council agreement to provide minimum services eg the intensive care section in hospitals or a designated essential service by the Essential Services Committee. The Essential Services Committee has been established by the Labour Relations Act to determine essential services. Some services which have been designated as essential services include emergency health services, blood transfusion services, nursing and medical and paramedical services (including support services such as catering, medical records, security, porter and reception, pharmaceutical and dispensary, medicine quality control laboratory, forensics, laundry work, clinical engineering, hospital engineering, waste removal, mortuary services and pest control).

**Conditions at work: Collective agreements at bargaining councils for public sector workers**

All health care workers have rights to organise in trade unions. But health care workers who are employed by the government are also members of the public service, and as such are also governed by the laws and regulations that apply to the public service as a whole. The public service consists of employees of the national departments and the provincial administrations who deliver a variety of public services, including health services.

Section 197(2) of the Constitution states that “the terms and conditions of employment in the public service must be regulated by national legislation”. The structure of management in the public sector is determined by legislation, particularly the Public Service Act, Proclamation 103 of 1994. In 1996 the Public Service Amendment Laws reconfigured managerial power in the public service in an attempt to ensure that it could meet its constitutional obligations. Under the amended laws the terms and conditions of employment of public servants were incorporated into a collective agreement of the Public Service Co-ordinating Bargaining Council (PSCBC). The power of authority to determine pay and other conditions of service is now vested in the Minister of Public Service and Administration. Collective bargaining is conducted at national level, and all pay scales are determined in a central collective bargaining forum at the PSCBC.

Collective agreements reached at the PSCBC cover most areas of employment including recruitment, salary scales and allowances, job descriptions, grading and remuneration, service benefits, leave, working hours, emergency work, probations, policy on dismissals and education and training.
In recognition of the fact that different types of work raise different types of issues the PSCBC has designated three sectors for the establishment of sectoral bargaining councils. These are:

- the Public Health and Welfare Sectoral Bargaining Council
- the General Public Service Sectoral Bargaining Council

The Public Health and Welfare Sectoral Bargaining Council (PHWSBC) covers all employees of the Department of Health and the Department of Welfare, at national and provincial level. It is made up of representatives from the relevant national and provincial government departments and representatives from the health care sector.

These councils also deal with disputes and can make collective agreements on organisation of work, employment and dismissals.

**EXAMPLE: AN AGREEMENT ON HIV/AIDS**

In 2001 the PHWSBC reached an agreement on HIV/AIDS. This is reflected in the 2001 Public Service Regulations where Chapter 1 Part VI paragraph E covers HIV/AIDS and related diseases. It sets out the rights of employees and duties of heads of departments in relation to occupational exposure, non-discrimination, HIV testing, confidentiality and disclosure and a health promotion programme, eg departmental workplace policies. Similarly, Resolution 8 of 2001 of the PSCBC sets out a more detailed policy on HIV/AIDS coupled with a framework for training on these issues. It recognises the *Code of Good Practice on Key Aspects of HIV/AIDS and Employment* attached to the Employment Equity Act and the Southern African Development Community (SADC) *Code on HIV/AIDS and Employment*.

**The rights of private sector health workers**

As we explained in chapters 4 and 6, South Africa’s health system is divided between private and publicly-funded sectors. Workers in privately owned health care institutions are not covered by the PSCBC or PHWSBC. A large proportion of the work in private hospitals and clinics is done by the staff of nursing, cleaning, private security and other agencies who provide low wages, little or no job security and no benefits. These workers have to negotiate, with the assistance of their trade unions, workplace or company-level collective agreements to regulate their terms of employment. However, private workers can still use labour legislation to enforce their rights.

In addition, many public sector nurses also work in private hospitals and clinics to improve their income. Because these employees are “moonlighting” they often do not invoke their rights against unfair labour practices for fear of losing the opportunity to supplement their income in the private sector.
The right to equality

The Employment Equity Act

The right to equality is entrenched in section 9 of the Constitution. In the labour context, it is recognised in the Employment Equity Act (EEA). This Act aims to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment by:

- eliminating unfair discrimination; and
- implementing affirmative action measures to redress the disadvantages in employment that are still experienced by certain groups as a result of apartheid.

The EEA aims to prevent discrimination of employees (including people applying for jobs) by the employer, a co-worker, another employer or a client of the employer.

The EEA refers to discrimination in relation to any “employment policy or practice”, very broadly defined to include recruitment procedures, advertising and selection criteria, the appointments process, job classification and grading, remuneration, benefits, terms of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfers, demotion, disciplinary issues, and dismissals policy.

The EEA covers all the grounds for discrimination listed in the Constitution, for example race, gender, and ethnic origin. But it also adds some new grounds:

- pregnancy, following the development of case law in recent disputes; and
- HIV/AIDS status, as a result of the high level of discrimination against people with HIV.

Proving unfair discrimination

If a person feels that they have been unfairly discriminated against, there are two stages to a complaint:

- The first question to ask is whether or not there is evidence of the employer having applied one of the listed or unlisted grounds of discrimination. If the answer to this question is “yes”, there is discrimination. For example, being treated differently on the basis of HIV status would apply.

- The second question to decide is whether this discrimination is fair or unfair. In the past the Labour Court has looked at the commercial rationale for the employer’s action. Today it must also consider
constitutional values, looking at the impact of the differentiation on the individual, and then looking at the objective reasons. The court will then consider whether the employer had looked at other, less harmful, methods of achieving their objectives.

Discrimination can be direct or indirect. Direct discrimination would exist if an employer transfers an employee who has HIV from a large internal office into a small solitary outside cubicle with no access to the same toilet or kitchen. Indirect discrimination is harder to show. It might exist if an employer, without giving reasons, failed to send female employees on training courses, thereby making their promotion impossible.

**CASE STUDY: DISCRIMINATION ON AN UNLISTED GROUND**

In the case of *NUMSA v Gabriels (Pty) Ltd* 2002 23 ILJ 2088 (LC) the court said that, where differentiation is based on an unlisted ground in the EEA, it is not enough for the complainant to show that the employment policy or practice is arbitrary, she must show that it is based on an analogous ground. The complainant must identify the ground of discrimination relied upon and must show that it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparable manner. The complainant must establish that the discrimination is unfair with regard to the impact of the discrimination.

**CASE STUDY: DISCRIMINATION ON THE BASIS OF HIV STATUS**

In *Hoffman v SAA* 2000 11 BCLR 1211 (CC) an applicant for a job as a cabin attendant sued South African Airways (SAA) for refusing to employ him solely because he had HIV. One of SAA’s defences was that a mandatory yellow fever vaccination for cabin attendants (needed for travel to West Africa) might exacerbate his illness. Expert medical evidence however showed that people with HIV can receive this vaccination if they are not in the later stages of the HIV infection and being HIV negative was accordingly not an inherent requirement of the job of cabin attendant. The Constitutional Court said that employers should not lump all HIV positive employees together but should look at the stages of the infection and the impact on the individual. The Court said that the policy to exclude HIV positive applicants from employment as cabin attendants amounted to unfair discrimination. The key factor in determining the unfairness of discrimination is its impact on the person discriminated against.
The most common defence for discrimination is for the employer to show that the discrimination was “fair”. In South Africa affirmative action is fair discrimination because it tries to overcome some of the disadvantages black people faced in the past. Discrimination that relates to the ability of a person to perform an inherent requirement of the job is also fair. An inherent requirement of a job is a skill or capability without which a job may not be properly performed. For example, an airline pilot must be able to see – this fairly discriminates against blind people.

Codes of good practice
The EEA allows for the establishment of codes of good practice to give direction to employers and workers on how to tackle particular issues. These codes are not equivalent to laws. However, because they are jointly negotiated at the National Economic Development and Labour Advisory Council (Nedlac) by the labour movement, employers’ organizations and the government, they are considered binding and any departure must be justified.

The Code of Good Practice on Disability in the Workplace seeks to limit the impact of the section in the EEA which allows for discrimination on the basis of an inherent requirement of the job. The Code strictly interprets inherent requirements as essential features or indispensable attributes of the job.

The Code of Good Practice on Key Aspects of HIV/AIDS and Employment (2000) is based on the principle that no person may be unfairly discriminated against on the basis of HIV status. The Code sets out guidelines for employers and employees to prevent unfair discrimination against workers living with HIV and to manage HIV/AIDS within the workplace.

The Code covers:
- HIV testing, confidentiality and disclosure;
- provision of equitable employee benefits;
- creating a non-discriminatory work environment;
- dealing with dismissals; and
- managing grievance procedures.

The Department of Labour has released HIV/AIDS Technical Assistance Guidelines on the Code which explain in detail how the Code should be interpreted and implemented.
Other codes include:

- the revised *Code of Good Practice on Sexual Harassment*; and
- the *Code of Good Practice on Pregnancy and the Period after the Birth of a Child*.

**Medical testing under the EEA**

One of the ways that the EEA protects against unfair discrimination is by limiting the ability of employers to determine a worker’s health status (including HIV status) without the worker’s consent.

Section 7 of the EEA limits an employer’s ability to use medical testing as a way to establish a worker’s medical condition. Section 7(1) prevents an employer from testing a worker for a medical condition unless:

- the law allows or requires it; or
- the testing is justifiable based on:
  - medical facts;
  - employment conditions;
  - social policy;
  - the fair distribution of employee benefits; or
  - the inherent requirements of the job.

When it comes to HIV testing, the law is even stronger:

- section 7(2) of the EEA says that “testing of an employee to determine that employee’s HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court”.
- section 50(4) allows a Labour Court that permits HIV testing to set conditions for the testing, dealing with:
  - providing counselling;
  - maintaining confidentiality;
  - the period during which testing is authorised; and
  - the category of jobs for which testing is authorised.

These restrictions on testing apply during an application for employment, as a condition of employment, during procedures related to termination of employment, as an eligibility requirement for training or staff development programmes, and as an access requirement to obtain employee benefits.

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**When is Labour Court approval not needed for HIV testing?**

**Workplace VCT programmes**

Labour Court approval to test employees for HIV is not required when HIV testing is voluntary and confidential in terms of a workplace voluntary counselling and testing (VCT) programme.

Chapter 8 sets out the rights of people to provide informed consent for medical procedures including HIV testing.
**Sero-prevalence surveys**
Labour Court approval is also not required where HIV tests are conducted for the purpose of determining the prevalence of HIV in that workplace (known as a sero-prevalence survey). However, this type of HIV testing should be conducted through an expert, outside agency to make sure the results of the tests are confidential. Sero-prevalence studies must be in accordance with ethical and legal research principles.

**Occupational exposure**
Health care workers can be tested for HIV after an occupational accident that carried the risk of exposure to blood or other bodily fluids. Such tests should take place only at the initiative of a worker, with informed consent and pre- and post-test counselling and strict procedures regarding the confidentiality of an employee’s HIV status. A health care worker would benefit from such test which would show whether it is necessary to take post-exposure prophylaxis and can be used as evidence in any subsequent claim to the Compensation Commissioner.

In the case of *PFG Building Glass (Pty) Ltd v CEPPAWU* 2003 5 BLLR 475 (LC) the Labour Court emphasised that where employees consent to HIV testing, the Labour Court should not interfere with their exercise of control over their own bodies. In such cases, there would be no need for an application to the Labour Court.

In the Labour Court case of *I&J Ltd v Trawler and Line Fishing Union & others* (2003) 24 ILJ 565 (LC), the court held that section 7(2) was aimed at prohibiting those HIV tests where the employer is enabled to determine the HIV status of a particular employee. Section 7(2) was not intended to affect voluntary testing where no disadvantage attaches to the decision of an employee not to submit to testing.

**Affirmative action**
Section 9(2) of the Bill of Rights states:

“To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

This is commonly known as “affirmative action”.

The EEA is the law through which the State aims to advance people who were previously disadvantaged in employment. It identifies as designated groups black people, women and the disabled and requires employers to take “affirmative action measures” to “redress these disadvantages and to further diversity” in the workplace. Employers must ensure more equal opportunities, and equitable representation of these three groups at all levels in the workplace, through reasonable accommodation of suitably qualified people and trying to retain and develop them.

The main mechanism provided for this is the requirement that all public sector employers, as well as larger or higher-turnover private sector employers consult over an “employment equity plan” that aims at more equitable
representation of women, black and disabled people at higher levels in the workplace. This plan should be discussed with representatives from each department or category of work, set goals for equity transformation over one to five years, and be reported at intervals to the Department of Labour. Such a plan is supposed to follow an audit of all employment policies and practices to identify barriers to such advancement.

In terms of the EEA the Department of Labour has issued a draft *Human Resources Code of Good Practice* which provides guidelines on the elimination of unfair discrimination and the implementation of affirmative action measures in the context of key human resource areas such as recruitment, probation, medical and psychological assessments, conditions of employment, remuneration, job descriptions, skills development, promotion, discipline, and termination of employment.

**Occupational health and safety rights**

Health care workers have a much greater likelihood of exposure to ill-health and injury associated with the practice of medicine than employees in most other forms of employment. This makes knowing the law and enforcing it (if necessary through pre-emptive collective action) essential.

Section 24 of the Constitution states that “everyone has the right to an environment that is not harmful to their health or well-being”. This must include the right to a safe working environment, necessary to prevent accidents and workers from contracting occupational diseases.

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<td>Workers also have a right of access to information about the health effects of the hazards that may be present in their workplaces.</td>
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**The Occupational Health and Safety Act**

The Occupational Health and Safety Act is concerned with the impact of the workplace on the physical, emotional and psychological health and well-being of employees. This includes everything from work activities themselves to the materials and processes involved. The Act is based on the principle that workers and employers should regulate their own workplaces to prevent occupational injury and disease.
The rights and duties of health care workers

The Act says employers must:

- provide a safe working environment that is without risk to the health of employees;
- organise work, equipment and machinery in such a way that they are safe;
- provide information and training so that people are aware of risks to health and safety;
- make sure work is properly supervised;
- enforce the necessary health and safety measures;
- inform workers and supervisors about the roles they must play in controlling health and safety problems; and
- ensure the physical safety of their workers while on duty.

Employers often define health and safety issues in the workplace. Although employers are obliged to assess occupational health and safety hazards and provide mechanisms to address them, workers should play a central role in identifying working conditions which pose a risk to their health and safety. Budget cuts, frozen posts and decreased funding in the health care sector have a direct impact on the health and safety of health care workers, whose occupational health and safety rights are often neglected. Health care workers provide health services under difficult conditions and often neglect their own health and safety. For example, the absence of protective gloves increases a health worker’s risk of contracting infections through needle-pricks or broken skin.

The Act defines an employee as any person who is employed by or works for an employer and is either entitled to remuneration or works under the direction of any employer. This means that volunteers or unpaid community health workers are classified as an employee for the purpose of the Act. Similarly health care workers who are employed by labour brokers or agencies are regarded as employees irrespective of who pays them, and can therefore benefit from the provisions of the Act. For example, where health care workers belong to an agency that deploys them to health establishments, the health establishment has certain duties in terms of the Act towards those health care workers irrespective of whether they receive a salary from the agency or health establishment.

In terms of the Act every employer who employs more than 20 employees, must appoint health and safety representatives. Such representatives should only be appointed after consultation with the employees and/or their trade union regarding the nomination and election of health and safety representatives. The health and safety representatives’ functions include:
reviewing the effectiveness of health and safety measures;  
identifying potential hazards and potential major incidents at the workplace;  
examining the causes of workplace incidents with the employer;  
making representations to the employer or health and safety committee on potential hazards, incidents or general matters affecting the health or safety of employees at the workplace;  
inspection of the workplace with due notice;  
participation in consultations with and inspections of the inspectors; and  
attending meetings of the health and safety committee.  

The Act gives health and safety representatives wide powers to assess hazards at the workplace and determine how to minimise their potential impact. It is important that these representatives are aware of the mechanisms available to them in the performance of their functions. For example, they are entitled to:  
visit and inspect the site of an incident at any time;  
attend any investigation or formal inquiry held in terms of the Act;  
in so far as is reasonably necessary to perform their functions, inspect any document which the employer is required to keep in terms of the Act;  
accompany an inspector on any inspection;  
be accompanied by a technical advisor on any inspection; and  
participate in any health or safety audit.  

The employer must provide facilities, assistance and training to health and safety representatives. Where there are two or more health and safety representatives in any workplace, an employer must establish a health and safety committee that must be involved in the development of health and safety policy. The Act places an obligation on employers to consult regularly with the health and safety representatives and committee on policy, safety measures and any other health and safety issue. The employer must provide sufficient information to assist the committee to contribute in the consultation.  

Example: Hazards experienced by primary health care workers  
In a training programme on occupational health and safety, municipal health care workers identified the following hazards:  

Safety hazards: violence, assault, rape, aggressive and angry health care users, carrying heavy equipment, faulty electrical plugs, broken chairs, flammable substances, inadequate security, inadequate procedures for disposing of sharps, lack of fire extinguishers, poor medical waste management, slippery floors, unsafe transport, unserviced machinery and broken equipment.
Health hazards: these can be classified into chemical, physical, biological, ergonomic and psycho-social hazards. In the case of health care workers, the presence and risk of exposure to biological hazards are more pronounced – for example, exposure to viruses, bacteria and parasites that can be transmitted through the air or through body fluids (such as TB, Hepatitis B and HIV). Health care workers’ risk of exposure to these hazards are affected by working conditions such as overcrowding, bad ventilation, inadequate supply and use of personal protective equipment (PPE), negligent waste disposal methods and staff shortages. These conditions cause burn-out, stress and depression amongst health care workers, which in turn increases the risk of occupational injuries and exacerbates staff shortages.


The Regulations for Hazardous Biological Agents passed in terms of the Act cover:
- definitions of the four different categories of hazardous biological agents according to risk;
- standard precautions in relation to blood, bodily fluids, skin and tissues;
- the employer’s duty to inform and train any worker exposed to any hazard;
- the need for risk assessments by employers or sub-contractors;
- monitoring exposure at the workplace; and
- medical surveillance.

Knowing and enforcing these regulations is important for health care workers. They can help to avoid problems like casual cleaners being infected with HIV from handling old, damaged or leaky boxes where sharps in contact with blood are kept.

In terms of the Occupational Health and Safety Act a worker should report an incident of occupational exposure to the employer or health and safety representative. Unsafe conditions should be reported to the Health and Safety Representative. If health and safety concerns are not adequately dealt with in the workplace, complaints can be submitted to the Chief Inspector at the Department of Labour.

The Chief Inspectorate’s functions include the following:
- ensure and enforce compliance with the Act and regulations;
- inspect workplaces;
prohibit dangerous workplace activities and conditions; and
conduct investigations or formal inquiries into hazardous or potentially hazardous incidents occurring in workplaces.

The National Health Act

The National Health Act also deals with occupational health and safety. Health establishments must implement measures that minimise injury or damage to the person or property of HCWs. This means that HCWs must be protected from physical harm, with their working environment made safe and free from any hazardous incidents.

HCWs must be provided with protective clothing against airborne viruses such as Severe Acute Respiratory Syndrome (SARS) or Ebola.

if an HCW accidentally pricks him- or herself with a needle containing blood from a person who may be HIV positive, the necessary measures

Managing occupational exposure to HIV

In terms of the Regulations for Hazardous Biological Agents (HBA), HIV is classified as an HBA that may cause severe human disease and presents a serious hazard to exposed persons but for which effective prophylaxis and treatment is available. The Regulations apply to incidents or exposure to HIV during work in health care units, including isolation and post-mortem units; in clinical and diagnostic laboratories and in the general workplace.

An employer must make sure that the exposure of persons to HIV in the working environment is either prevented or, where this is not reasonably practicable, adequately controlled; and that standard precautions are implemented to reduce the risk of transmission of HIV from recognised and unrecognised sources of infection in a workplace. OHSA defines “reasonably practicable” to mean practicable having regard to:

- the severity and scope of the hazard or risk concerned;
- the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
- the availability and suitability of means to remove or mitigate that hazard or risk; and
- the cost of removing or mitigating that hazard or risk in relation to the benefits deriving from it.

An employer must control the exposure of persons to a HIV in the working environment by introducing appropriate work procedures that workers must follow where materials are used, processes are carried out, or incidents might occur that could give rise to the exposure of a worker to HIV, and such procedures shall include written instructions to ensure:

- the safe handling, use and disposal of HBA;
- a system whereby changes in work procedures and processes that indicate the need for early corrective action can be readily identified.

If it is not reasonably practicable to ensure that the exposure of a worker to HIV is adequately
must be taken to ensure that the worker has access to post-exposure prophylaxis (PEP) to reduce the risk of HIV transmission.

To ensure compliance with these policies by health establishments the National Health Act establishes an Inspectorate for Health Establishments.

The provisions in the National Health Act should be read with the Occupational Health and Safety Act and labour legislation governing working conditions. This approach accords with the International Labour Organisation’s *Nursing Personnel Recommendation* of 1977 (R157) which prescribes that all possible steps should be taken to make sure that nursing personnel are not exposed to special risks. Where exposure to special risks is unavoidable, measures should be taken to minimise it. The measures suggested include the provision and use of protective clothing, shorter hours, more frequent rest breaks, temporary removal from the risk or longer annual holidays should be provided for in respect of nursing personnel regularly assigned to duties controlled, the employer shall give the worker suitable impermeable personal protective equipment at the employer’s expense.

The Department of Health’s policy on the *Management of Occupational Exposure to HIV* (2000) applies to “health care workers: and refers to all personnel (both professional and non professional) working in health care settings whose activities involve contact with health care users or who handle blood products and body fluids.

Health care workers whose work involves blood collection or the use of sharp instruments such as needles and scalpels, the insertion of intravenous catheters, or minor and major surgery, are at increased risk of occupational injury and exposure to HIV infected blood. There is also a potential risk to workers handling soiled linen and those involved in handling corpses and performing post mortem examinations.

The risk of exposure to HIV and HBV is minimised by strict adherence to standard universal precautions and by adoption of procedures to sterilise or disinfect equipment in contact with blood or blood products. Universal precautions require that health care workers treat the blood and body fluids of all persons as potential sources of infection, independent of perceived risk or diagnosis.

The health facility where you work must inform you about infection risks and ensure that you comply with infection control procedures including (1) the use of protective equipment (i.e. gloves, and aprons); (2) covering skin lesions, cuts or abrasions with occlusive dressings; and (3) ensuring that equipment in contact with blood and body fluids is appropriately disinfected and sterilised.

If an accidental exposure occurred, various procedures should be followed, including evaluating the risk of exposure to HIV, documenting the incident, counselling the health care worker and administering post-exposure prophylaxis (PEP) in high risk cases.
involving special risks so as to reduce their exposure to these risks. In addition, it is recommended that nursing personnel who are exposed to special risks should receive financial compensation. Nursing students and nursing personnel should not be assigned to work that goes beyond their qualifications and competence. Where individuals are not qualified for work that they already do, they should be trained to obtain the necessary qualifications.

The right to compensation for occupational injuries and diseases

The Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) provides for compensation for:

- any disability caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment; or
- death resulting from occupational injuries or diseases.

In terms of the Act the Compensation Commissioner is held liable for any occupational injuries or diseases instead of the employer, although the employer is liable for wages and costs during the employee’s first three months off work. The Act requires that anyone applying for compensation for an occupational injury or disease must follow the reporting and claims procedures in the Act within the stipulated timeframes. To be eligible for benefits an employee must show that he has sustained an occupational injury or disease arising out of and in the course of his employment. Benefits include medical expenses, wage replacement and death expenses. Employees are not entitled to benefits for pain and suffering resulting from the workplace incident.

Objections to the decision of the Compensation Commissioner should be done in writing within 90 days of receiving the decision. It is possible to re-open a claim in the event of deterioration where treatment will assist in rehabilitation. It is also possible to get additional compensation where it can be shown that the injury or illness was as a result of the negligence of the employer.

Example: Compensation for post traumatic stress disorder

Post Traumatic Stress Disorder (PTSD) is a mental disorder following an exposure to an extreme traumatic event or unusual stressor. PTSD is regarded as an occupational injury and a claim will not be eligible for benefits unless:

- the individual was exposed to an extreme trauma or unusual stressor;
- which arose out of and in the course of employment;
the employee experienced PTSD symptoms within 6 months of the incident;
the employment-related trauma was a key factor in the development of PTSD; and
the claim was made within a year of the date of diagnosis.

Workers who claim compensation for PTSD are evaluated every 2 years and, if the condition has reversed, the pension will be withdrawn.

Example: Occupational exposure to HIV

If an HCW acquires HIV as a result of an occupational exposure to infected blood, he or she must report the accident and has a right to claim compensation under COIDA. There is a danger that because some workers fear stigma and discrimination, or that their employers will not respect their right to confidentiality, they will not report accidents. This makes it all the more necessary to reduce the fears of health care workers by implementing workplace programmes protecting privacy, outlawing discrimination and providing care and support. The employer must take the necessary steps to assist workers in their applications to the Compensation Commissioner to claim benefits.

The Department of Labour has issued a draft Circular Instruction regarding compensation for occupationally acquired HIV infection and AIDS which defines occupationally acquired HIV and sets out the criteria for the diagnosis of occupationally acquired HIV, the procedures for reporting occupationally acquired HIV, the method of assessment of impairment and the medical benefits payable.

In terms of the draft Instruction, the criteria that an employee will have to meet before a claim will be considered includes:

- an occupational exposure to an HIV infected source;
- a documented work related incident involving a potential HIV infected source;
- blood test results of the affected employee within 72 hours of the incident confirming the absence of HIV antibodies;
- as far as reasonably practicable confirmation that the source was HIV infected; and
- blood test results of the affected employee confirming HIV infection (sero-conversion) at 6 and/or 12 weeks or 6 months after the date of the work-related incident.
The right to freedom of expression

Whistle-blowing and protected disclosures

Corruption within the public sector is a serious problem. It undermines the provision of services and thus the right of access to health care services. In 1999 a resolution adopted at the National Anti-Corruption Summit made specific reference to developing, encouraging and implementing “whistle-blowing” measures, including protecting people from victimization when they expose corruption and unethical practice. This led to Parliament passing the Protected Disclosures Act 26 of 2000.

The Act provides for procedures to protect employees, in both the private and public sector, who disclose information of unlawful or corrupt conduct by their employers. These employees are known as “whistle-blowers”, who are protected from “occupational detriment” – in other words, harm in the workplace as a result of making a “protected disclosure”.

Points to remember: Need for whistle-blowing

- Whistle-blowing is about ensuring that malpractice, fraud and corruption are dealt with in a manner that promotes individual responsibility and organisational accountability.
- Whistle-blowers act in good faith and in the public interest, raising concerns about real problems in the workplace. They risk victimisation and sometimes dismissal. Because of this, they need to be protected.

Protected disclosures

An employee’s disclosure of information will only be protected if it relates to the conduct of an employer, or an employee of that employer. The person making the disclosure must believe that the information shows one or more of the following:
- that a criminal offence has been or is being committed;
- that someone is not complying with their legal obligations;
- that a miscarriage of justice has or is likely to happen;
- that the health or safety of a person(s) is likely to be endangered;
- that the environment has been or is likely to be damaged;
- that someone is thinking of any act of unfair discrimination;
- that any one of the above is being concealed.

Once an employee has shown that the disclosure relates to one of the issues above, s/he will have to prove that this disclosure was made to one of the following:
The rights and duties of health care workers

- a legal adviser
- an employer
- an employer’s representative
- a member of the Cabinet
- a member of the Provincial Executive
- a body like the Public Protector or the Auditor General.

General disclosures

If the employee cannot prove that the disclosure was made to one of the persons listed above, he will have to show that the information was made available generally. In such a case the disclosure must be a disclosure in good faith, or with no hidden motives; and the employee must reasonably believe that the information is substantially true.

The employee will also have to show that:
- he believes that if they told their employer, the employer would take some unfair action against them (see “occupational detriment” below);
- he believes that if they told their employer, some of the evidence relating to the information would be concealed, and there is no other appropriate person to tell the information to;
- he has already told the employer or one of the people listed above and a reasonable time has passed and no action has been taken; or
- the improper act or remark he is disclosing has or will have exceptionally serious consequences.

In *Communications Workers Union v Mobile Telephone Networks (Pty) Ltd* (2003) 24 ILJ 1670 (LC) the court said that disclosures are protected if they relate to misconduct or criminal activity and there is no protection for an employee who sets out to “embarrass or harass” an employer.

Occupational detriment

Once the employee has shown that his disclosure is protected, he must also prove that as a result of this disclosure, the employer or a representative took some kind of unfair action against him, amounting to an “occupational detriment” or a harm of some kind relating to his work.

In *Grieve v Denel (Pty) Ltd* (2003) 24 ILJ 551 (LC) an employee told his supervisor about mismanagement by the general manager. The employee was charged with misconduct and called to a disciplinary hearing. The employee applied to the Labour Court for protection under the Protected Disclosures Act. The court held
that although the employee was not charged for disclosing the information, but for the way in which he obtained the information, this still amounted to an occupational detriment. This was because the employee could show there was a link between his disclosure and the charges made against him.

Example: Complaining about a senior doctor
In the context of health services this law may work as an early warning system that may lessen possible risks to the health establishment or to users. For example, imagine a doctor who repeatedly tests users for HIV without their consent. Because of his senior position in the hospital, nurses may be afraid to lodge complaints against him with the medical superintendent. But under the Protected Disclosures Act, they may complain without fear of victimisation.

Process for challenging victimisation arising from whistle-blowing
If an employee can show:
- that he made a “protected disclosure” as defined in the Act; and
- that this disclosure led to an “occupational detriment” other than dismissal,
he will be able to claim that his employer subjected him to an unfair labour practice.

Employees who suffer unfair labour practices can claim compensation for unfairness and the loss of their rights to fair labour practices, and for the unfair labour practices to be stopped. They can do this by referring a dispute with their employer to the Commission for Conciliation, Mediation and Arbitration (CCMA) if private sector health care workers, or to the Public Health and Welfare Sector Bargaining Council, if public sector health care workers. The commissioners at the CCMA or panellists at the bargaining council will first conciliate, and if the conciliation fails, they will arbitrate on this dispute (section 186(2)(d) of the LRA).

If the employee has been dismissed as a result of having made a protected disclosure, then the route to follow to challenge the dismissal is different. They will still go to conciliation at the CCMA or the bargaining council. If conciliation fails, then they can take their dismissal to the Labour Court for adjudication (section 187(1)(h) of the LRA).
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Key Point: Compensation for whistle-blowing
If you are dismissed as a result of a protected disclosure, you have a right to claim compensation up to a maximum amount of two years’ salary, or to seek reinstatement. If you suffer an “occupational detriment”, you have the right to claim compensation up to a maximum amount of one year’s salary, and to seek for the “detriment” to be removed.

10.3 The duties of health care workers

Because of the importance of health and its impact on so many other aspects of life, health care workers find themselves with a range of duties, including to a user’s family members, the community and non-governmental organisations,
researchers and academics studying the impact of their work. These duties, which may sometimes appear to be in conflict with one another, are set out more fully below.

**Duties to users**

**The National Health Act**

Chapter 8 of this Handbook considers the rights of users of the health care system. In many ways, the duties of health care workers to their users correspond with these rights. The NHA, in particular, sets out the duties of health care providers.

Examples: User’s rights

- A user’s right to have access to information regarding her health status and the “range of diagnostic procedures and treatment options generally available” corresponds with a duty on health care providers to give this information.
- A user’s right to confidentiality places a duty on health care workers to respect and protect her confidentially.

For more information on links with the rights of users, see chapter 8.

But a user’s rights and the corresponding duties of health care workers are not absolute.

Example: Abuse or harassment of health care provider

Section 20(4) of the NHA allows a health care provider to refuse to treat a user who is physically or verbally abusive or who sexually harasses her. In these kinds of cases, users waive (give up) their rights of access through their own conduct.

**The Occupational Health and Safety Act**

Workers have a duty to take reasonable care of their health and safety, as well as that of persons who may be affected by their actions. This includes reporting unsafe and unhealthy conditions to a health and safety representative or reporting “incidents” before the end of the shift to the employer, and not interfering with or misusing anything provided by the employer in the interests of health and safety (eg personal protective equipment).
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Ethical Guidelines

In addition to their legal duties health care providers also have ethical responsibilities which are often set out in the ethical guidelines of their professional bodies. For example, although the law says that users have a right to confidentiality, the ethical guidelines of the Health Professions Council of SA explain that in certain rare situations it is justifiable (and there is a duty) to breach confidentiality.

Example: Notifying partners about HIV infection

A health care worker must respect the right to privacy of health care users, particularly with stigmatised diseases such as HIV infection. As a rule, he or she may tell a health care user’s sexual partner about the user’s HIV status only when:

- the sexual partner is known and identifiable;
- the user has been counselled on the need to inform his or her sexual partner or to have safer sex, and the duty to protect his or her sexual partners;
- the sexual partner is at risk of being infected with HIV because the user has refused to inform him or her of his or her HIV status or has refused to have safer sex;
- the user has been warned that if he or she does not inform his or her sexual partner or have safer sex, the health care worker will have to breach confidentiality.

Health care is often very private and intimate. It reveals information about people’s private lives. Not surprisingly, sometimes health care workers may experience feelings of conflict between their duties at work and their own personal beliefs, feelings and opinions.

Example: Providing termination of pregnancy services

Some health care workers may feel that their religious belief that life is sacred is in conflict with a user’s right to choose to terminate her pregnancy. This may cause a conflict between a health worker’s duty to provide access to health care services and her own personal beliefs or morality. In these cases, according to legislation and the Constitution, the primary duty of a health care worker is to provide health care and to act in the best interest of the user.
Chapter 10 explains women’s rights under the Choice on Termination of Pregnancy Act 92 of 1996. The Act gives effect to the Constitutional right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction. The Act allows for termination of pregnancy on demand during the first 12 weeks of pregnancy and under certain circumstances thereafter.

The Act has been challenged for violating a foetus’s right to life and for allowing termination of pregnancy services to young people. The Court has, however, refused to accord a foetus the status of a legal person.

The South African Nursing Council’s policy on nurses’ rights acknowledges that nurses have a right to conscientious objection provided that the employer has been timeously informed in writing and it does not interfere with the safety of the user.

Duties to the profession

In addition to the laws, policies and regulations described above there are a number of statutory bodies with a legal responsibility to regulate and oversee the main health professions. These include:

- the Health Professions Council;
- the SA Nursing Council;
- the SA Pharmacy Council;
- the Allied Health Professions Council; and
- the SA Dental Technicians Council.

Under the NHA each of these councils will also form part of the Forum of Statutory Health Professional Councils. This forum is supposed to discuss issues including:

- how to protect the interests of the public and users;
- communication and streamlining of policies;
- responding to complaints from the public like ombudsmen;
- setting performance improvement targets;
- developing policies on education, training and distribution of health care providers; and
- monitoring, reporting and advising on the professional councils above.

At time when this handbook was being finalised the Forum had not yet been established.

Below we refer briefly to some of the statutory bodies and the duties they establish for health professionals.
The Health Professions Council of South Africa (HPCSA)

The HPCSA was established by the Health Professions Act 56 of 1974. Under this law all practising doctors, dentists and psychologists have a duty to register with the HPCSA. Any unregistered person who practises as a medical practitioner is guilty of a criminal offence.

The HPCSA is meant to:
- promote the health of the population;
- determine standards of professional education and training; and
- set and maintain excellent standards of ethical and professional practice.

One of the HPCSA’s main roles is to provide guidelines for regulating the conduct of health care providers in order to protect the interests and rights of users of health care services. It does this through a series of Professional Boards which are “responsible for formulating the rules and regulations of conduct and professional practice, as well as conducting preliminary and professional enquiries.”

The South African Nursing Council (SANC)

The Nursing Act 50 of 1978 provides for the establishment of the SANC. Under this law no person may practise as a nurse unless they are registered with the SANC. To do so is a criminal offence.

Like the HPCSA the SANC must ensure that nurses comply with their duties to respect the “constitutional rights of users to human dignity, bodily and psychological integrity and equality and that disciplinary action is taken against nurses who fail to do so”.

The SANC has developed a number of policies including on HIV/AIDS and on nurses’ rights. The latter policy is particularly important given the pressure under which nurses are often placed by their employers and other health care workers.

The SANC has powers to ensure that nurses comply with their ethical and legal duties. It may institute an inquiry into any complaint, charge or allegation of improper or disgraceful conduct. A guilty finding may be followed by the SANC imposing one or more of a range of penalties, including cautions or reprimands, removal from the rolls and fines. However, the council must first summon the nurse to an inquiry.
Duties to the general public
The primary duty of a health care worker is to the user. But they also have a
duty to society as a whole. This is reflected in the Constitution, the NHA and
the Health Charter which sees health as a shared social responsibility and
encourages partnerships between health providers and the communities they
work in. This is the rationale behind bodies such as Hospital Boards and clinic
committees – which directly involve communities in health planning.

The basic values and principles that govern public administration are set
out in section 195 of the Constitution. These duties fall on all people who
work in the public service, including health care workers.

Section 195 says that public servants must maintain and promote a high
standard of professional ethics and efficient, economic and effective use
of resources. It also requires that services be provided “impartially, fairly,
equitably and without bias” and that people’s needs be responded to and the
public be encouraged to participate in decision making. This applies to health
care workers and health services.

In 1997, the Department of Public Service and Administration tried to give effect
to section 195 of the Constitution by publishing a White Paper that introduced the
Batho Pele (People First) Principles. The Batho Pele Principles aim to:

- enhance the quality and accessibility of government services by
  improving efficiency and accountability, especially in the public service;
  and
- promote openness and transparency within the public service.

Batho Pele and health service delivery
The Batho Pele Principles are important in the public health sector because
they set standards binding health care workers.

These are the eight standards for public health facilities:

- Consultation – communities must be consulted about the level and quality
  of public services they receive and, where possible, be given a choice
  about services being offered.
- Service standards – users must be informed about the level and quality of
  public services they receive and know what to expect.
- Access – all users have equal access to the services they are entitled to.
- Courtesy – all people should be treated with courtesy and consideration.
- Information – users should be given full, accurate information about
  public health services they are entitled to.
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- **Openness and transparency** – people should be told how national and provincial departments are run, how much they cost and who is in charge.
- **Redress** – if the promised standard of service is not delivered and a complaint is lodged, health care workers must offer an apology, an explanation and an effective remedy.
- **Value for money** – public services should be provided economically and efficiently in order to give individuals and communities the best possible value for money.

These principles are also reflected in Chapter 2 of the National Health Act.

**Example: Requests for ARVs**
If a person requests access to ARV treatment at a clinic where the service is not yet available, the health care worker should:
- inform the user that the service is available elsewhere; and
- refer the user to the nearest health establishment that offers the service.