

Women's health: legal and ethical obligations of the health professional in SA



Ms Claudine Marshall

Greeting

Thank you Program Director for that special welcome.

Good evening ladies and gentlemen. It is my singular honour today to be delivering the keynote address at this conference.

My address

The theme of the conference is advocating equitable access to women's health and I have been asked to speak on women's health generally and more specifically, the legal and ethical obligations of the health professional in South Africa, with particular emphasis on Termination of Pregnancy and the Law, Reproductive Rights, Minors and Sex and Surrogacy.

It is not difficult to see how the gendered discrimination during apartheid – layered into and on top of racial discrimination – led to the subordination of women, disrupted family life and poverty that are all key contributors to the poorer health outcomes women face today. The impact of this discrimination on health outcomes is particularly profound for black women and women of lower socio-economic status.

Consequently, much of the health of women is not solved by healthcare alone but instead an interdisciplinary approach that seeks to advocate for the empowerment and upliftment of women in every facet of society. Advocating for women's health by necessity requires that one advocate for their rights and status in society more generally.

Termination of Pregnancy and the Law

Many of the rights contained in our Constitution were a direct response to the oppression of the Apartheid government and sought to protect rights that previously, had been violated such as the right to vote, freedom of movement and assembly.

Reproductive rights are recognised and protected under two different rights in our Constitution. Everyone has the right to bodily and psychological integrity, which includes the right- to make decisions concerning reproduction. The Constitution also provides that everyone has the right to have access to- (a) health care services, including reproductive health care;

These rights were given meaningful effect when the Choice of Termination of Pregnancy Act, 1996 (I will simply refer to it as the Termination Act) which legalised abortion, replacing the restrictive Abortion and Sterilization Act of 1975. The preamble of the Act recognised that the autonomy on reproductive health was integrally linked to human dignity. The new legislation allowed women request terminations of pregnancy at public and private healthcare facilities up to 12 weeks and allows terminations up to 20 weeks in certain circumstances such as where (i) the continued pregnancy would pose a risk of injury to the woman's health; or (ii) there is a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or

(iii) the pregnancy resulted from rape or incest; **or**

(iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman;

The impact of the Termination Act on women's health was profound. In the years following the law's passage, abortion-related deaths dropped 91%.

However, there do remain barriers to women accessing termination of pregnancy services, societal stigma has persisted and, in some instances, there is opposition from the healthcare practitioners who are unwilling to perform terminations.

Reproductive Rights, Minors and Sex

The Termination Act allows minors to consent to terminations of pregnancy at any age. Under the Children's Act of 2005, minors are able to obtain contraceptives and this must be kept confidential. However, under the Sexual Offences Act, 2007 minors are only able to consent to sexual intercourse at the age of sixteen.

This framework also carries mandatory reporting obligations, some specifically on healthcare professionals, both to report sexual offences to the police and the reasonable belief of sexual abuse to appropriate agencies. Tensions arise where a healthcare provider is required to provide and keep confidential the provision of contraceptives to a 13 or 14 year old who intends to engage in sexual conduct that is unlawful and an offence under the Sexual Offences Act. The question here then is how do healthcare practitioners navigate this terrain?

Under the Constitution, the child's best interests are of paramount importance. It is important to recognise that the measures contained in the Children's Act and CTOP Act are aimed at promoting the health and wellbeing of children, particularly in light of the vulnerability of young women in the context of the HIV epidemic. Similarly, the reporting obligations are aimed at ensuring that children are not sexually abused or

engage in sexual intercourse where they are unable to consent. The responsibility of a practitioner is then to preserve and promote the health of their patient and, where there has been a sexual offence committed, to report such offence to the relevant bodies.

Surrogacy in South Africa

The question of surrogacy and in-vitro fertilization is a developing area of law. Surrogacy was not regulated until the Children's Act was passed in 2005. Chapter 19 of the Children's Act outlines the legal limits around surrogacy agreements under our law. At a minimum, agreements need to be in writing and confirmed by a High Court in order to be valid. There are a number of requirements that agreements need to meet in order to be confirmed. The parents seeking to use a surrogate must be unable to give birth to a child and their condition must be permanent and irreversible. In addition, the parents must be 'suitable persons' to accept parenthood of the child to be conceived. The surrogate must not be using surrogacy as a source of income and must have previously, delivered a viable child and a living child of her own. The Children's Act also requires that at least one of the commissioning parents contribute a gamete. This means that parents may not enter into surrogacy agreements unless they share a 'genetic link' with the child. ("gamete" means either of the two generative cells essential for human reproduction.)

This latter requirement has introduced some problems for couples who wish to use surrogates and one woman in particular, challenged the constitutionality of this requirement on the basis that it infringed on her right to dignity and reproductive autonomy. The woman concerned was a

divorcee and infertile. Since she was a single parent and could not contribute a gamete, she did not meet the requirements of the Children's Act and her surrogacy agreement would not be confirmed.

This matter came before the Constitutional Court and the Court had to consider whether the section was unconstitutional. One of the arguments made in the court was that the regulations for in-vitro fertilization under the National Health Act did not contain a genetic link requirement and allowed for two donor gametes to be used. The Court held that, under our law, IVF and surrogacy are different processes and the two cannot be compared. The Minister of Social Development argued for the validity of the section, raising concerns that removing the genetic link requirement would open the door to commercial surrogacy and designer babies.

It was ultimately held that the genetic link for surrogacy was constitutional. In particular, it was recognised that there were other legal routes for an individual who does not qualify for a surrogacy agreement to become a parent nonetheless. One of these routes would be to adopt children or to enter into a relationship with a fertile individual who could contribute a gamete. The position to only allow for altruistic surrogacy is not a legal one but instead a policy one that does not look to be changing any time soon.

Legalisation of Sex Work

In 2017, the South African Law Reform Commission recommended that sex work continued to be criminalised. However, in December last, it was

announced that the ANC had decided to fully decriminalise sex work. Though the legalisation of sex work will likely improve the lives of individuals engaged in the profession, the impact on health will be largely influenced by how decriminalisation is implemented. Given the prevalence of HIV and sexually transmitted diseases more generally, it will be important for the industry to become regulated, particularly in respect of condom use and the health of sex workers, rather than simply being decriminalised. However, the decision at the ANC conference offered no concrete details for the route government will pursue.

Conclusion

I wish you well in your deliberations over the next few days. Please remember that as a health care practitioner you perform a vital function in society and go a long way towards creating a healthier nation. I know I am going outside my brief now, but in conclusion, I am using my speaker's prerogative.

While the right to health care is a fundamental right enshrined in our Constitution the reality is that Adequate health care is unfortunately a question of income. Martin Luther King said that "Of all the forms of inequality, injustice in **health care** is the most shocking and inhumane."

I had a niece pass away two days ago from a burst appendix. She was turned away from a private hospital because she didn't have adequate medical insurance. Her family took her to a public hospital. They left her there overnight. She passed away the following morning. This is one of many tragic examples where death could have been avoided with adequate medical intervention. My plea is – let us work towards reducing tragic incidents like these. I urge each one of you to say — #NotUnderMyWatch

In May 2017, hundreds of men and women marched to the Union Buildings in an effort to create awareness around violence against women and children. This march was part of the #NotInMyName campaign where men spoke out against gender-based violence and shifted focus to the perpetrators of violence against women and children. Healthcare practitioners and workers are uniquely placed to address sexual violence as, frequently, health services are often the first point of contact for many people who experience sexual violence or assault.

In the State of the Province Gauteng Address, David Makura admitted that there has been a failure to uphold the right to adequate healthcare:

"[T]he Life Esidimeni tragedy has exposed deep institutional problems within our public health system and public service in general. It cannot be business as usual. Serious governance failures have compromised the quality of care of millions of people who depend on our public health system, especially the poor and most vulnerable sections of society..."

Healthcare workers and doctors like yourselves are placed in a unique position to take on and stop preventable deaths in South Africa. It is not just deaths from gender-based violence that are preventable. In 2014, 57.3% of maternal deaths within the healthcare system were considered potentially preventable. It is striking that in respect of patient orientated avoidable factors, 27% of deaths were due a delay in accessing medical help whilst 25.6% were due to no or infrequent antenatal care. One of the greatest factors contributing to preventable deaths are a result of a lack of equitable access to healthcare. A lack of appropriately trained doctors and nurses caused a quarter of the administrative related deaths, while a lack of healthcare facilities accounted for 26.3%.

As South Africans, we leave the care of and responsibility of our health in the hands of practitioners like yourselves. It is an immense burden that you all carry, often under unforgiving conditions with limited resources. I acknowledge that there is little a single doctor can do to solve the macro problems of resource shortages and the physical inaccessibility of problems. Over half of maternal deaths are preventable and you, as healthcare practitioners, are the ones who can stand up to say #NotUnderMyWatch and fight to stop these preventable, unnecessary deaths.

I want to leave you with a challenge – a challenge to start a campaign that will spread to all health practitioners – #Not under my Watch – Not under my Watch will there be a preventable or avoidable death. #Not under my Watch will any patient be denied proper, adequate and reasonable healthcare because of insufficient access to financial resources. If you remember one thing from what I said this evening – this is it #NotUnderMyWatch

I thank you.