

Amendments to the Ethical Rules – a step in which direction?

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On 17 November 2023, the Registrar of the Health Professions Council of South Africa (“HPCSA”) published certain amendments to the Ethical Rules for the Conduct of Practitioners Registered under the Health Professions Act, 1974 (GNR 717, dated 4 August 2006) (“the Ethical Rules”).

The amendments are entitled “Proposed Amendments to the Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974” and were published in Board Notice 510 in GG 49720 (“the Amendment Notice”). Although the title of the Amendment Notice refers to “Proposed Amendments”, the Registrar of the HPCSA has since confirmed that the amendments are indeed final.

The Amendment Notice has the effect of fundamentally changing the landscape in which healthcare “practitioners”,^[1] as that term is defined in the Ethical Rules, may collaborate with others. We deal below with certain of the key changes.

Prior to the publication of the Amendment Notice, practitioners were only entitled to receive fees for services personally rendered, or for the services rendered by someone in their employment, which prevented certain alternative models of reimbursement, including global fee agreements. The Amendment Notice has now introduced Rule 7(6) of the Ethical Rules, which provides that –

“Notwithstanding anything contained in sub-rules (4) and (5) above, a practitioner may share, charge or receive fees from another practitioner: Provided that in such an instance, there is an express agreement, arrangement or model of rendering multi-disciplinary based health-care services to patients which is structured, which provides high quality health-care services or products, contain costs of rendering health-care services, and enhance access to appropriate healthcare”.

A definition for the term “multidisciplinary healthcare” has also been included in the Ethical Rules and means healthcare delivery that involves multiple health practitioners from different professions of healthcare; while “appropriate healthcare” is now defined as healthcare delivery where the expected clinical benefits of care to patients outweighs the expected negative effects to such an extent that the treatment is justified.

Based on the amendments to Rule 7, therefore, further opportunities appear to now be available to practitioners to extend the manner in which they collaborate and consequently bill for healthcare services.

Rule 8 of the Ethical Rules then deals with partnerships and juristic persons in the context of practitioners. In particular, Rule 8 restricts practitioners to practising only in partnerships with each other or in associations where the practitioners concerned are not prohibited, in terms of the Ethical Rules, from entering into such partnerships or associations.

The Amendment Notice now introduces new Rule 8(5) which provides that –

“Notwithstanding anything contained in [Rule 8], a practitioner may provide health-care services with other registered practitioners, persons registered in terms of the [Health Professions Act No. No. 56 of 1974 (‘HPA’)], or in terms of any other legislation regulating health professions: Provided that the primary aim will be to enhance the quality of health-care services to patients, and further that there is an express agreement, arrangement or model of rendering multi-disciplinary based health-care services to patients which provides high quality health-care services or products to patients, structured to contain costs, and enhance access to appropriate healthcare”.

Rule 8, therefore, now authorises collaboration between practitioners in different registration categories provided that an express agreement, arrangement or model is in place which ensures high quality health-care services or products to patients, structures to contain costs, and enhanced access to appropriate healthcare.

A further change in the Ethical Rules relates to Rule 8A. Prior to the enactment of the Amendment Notice, Rule 8A provided that “[a] practitioner shall not share his or her rooms with a person or entity not registered in terms of the Act” – which was interpreted as precluding registered persons from having medical rooms in the same establishment as that of a non-registered entity or person. Rule 8A has now been substituted and reads as follows –

“A practitioner may share his or her rooms with a person registered in terms of the Act, or in terms of any other legislation regulating health professions”.

Once again, therefore, the newly inserted Rule 8A appears to support the establishment of multidisciplinary practices, that may now operate together in the same establishment.

One of the most significant changes to the Ethical Rules is the amendment to Rule 18. Rule 18 deals with professional appointments (including the employment) of healthcare practitioners. The pre-amended wording of Rule 18 read as follows –

*“18(1) A practitioner shall accept a professional appointment or employment from employers *approved by the council* only in accordance with a written contract of appointment or employment which is drawn up on a basis which is in the interest of the public and the profession.*

(2) A written contract of appointment or employment referred to in subrule (1) shall be made available to the council at its request”. (our emphasis)[2]

Accordingly, prior to its amendment, Rule 18, read with the Policy, prescribed that a non-registered person or entity may only employ registered practitioners *if the non-registered entity obtained permission from the HPCSA* to do so – and pursuant to a contract that aligns with the interest of the public and the profession.

Rule 18(1) has now been revised to read as follows (deletions to the previous rule have been reflected in brackets and additions have been underlined) –

“A practitioner shall accept a professional appointment or employment from employers [approved by the council only] in accordance with a written contract of appointment or employment which is drawn up on a basis which is in the interest of the public and the profession: Provided that, the health practitioner ensures that the employment contract has as its primary aim the enhancement of the quality of health-care services to patients, is structured to contain costs, enhance access to appropriate, high quality health-care services or products to patients, and is not designed to extract profit for the benefit of the practitioner or their employer to the detriment of patients”.

Curiously, whilst the Amendment Notice itself provides that deletions to the Ethical Rules are to be reflected in brackets, the term “approved by the council only” has not been reflected in brackets – but has simply been deleted. The draft amendments to the Ethical Rules, which preceded the Amendment Notice[3] also do not propose this deletion.

Be that as it may, we understand that the position of the HPCSA is that non-registered persons are no longer required to apply for approval from the HPCSA to employ registered practitioners to perform clinical services.

This question that then arises is: but, what now of the previous approvals already granted by the HPCSA (many of which were subject to conditions) as well as pending employment applications, which were submitted to the HPCSA before the Amendment Notice was published? The position, as we understand it, is that previous approvals and conditions remain effective; whereas pending applications are now considered redundant and will not be advanced.

The amendment to Rule 18, therefore, goes a long way towards increasing the potential for collaboration between registered and non-registered persons – where the aim is to enhance access to and the quality of healthcare services to patients, and is structured to contain costs as opposed to extracting profit for the benefit of the practitioner or their employer to the detriment of patients.

Whilst the amendment to Rule 18 may be a welcome change, certain practical difficulties exist in the context of Rule 18. In particular, and in relation to the Regulations to the Medical Schemes Act No. 131 of 1998,[4] no provision is made for the issuing of practice code numbers to non-registered persons who lawfully employ registered practitioners to render services to medical schemes members.

How then are registered persons to invoice medical schemes for the clinical services they render in terms of such employment? The answer is unclear and will perhaps precipitate much-needed change in the manner in which practice code numbers are issued.

The employment of registered practitioners by non-registered persons also gives rise to questions regarding the interaction between Rule 18 of the Ethical Rules and section 54A of the HPA. Section 54A of the HPA exempts certain juristic persons from the operation of specific provisions of the HPA and allows juristic persons “to practice a profession ... in respect of which registration in terms of [the HPA] is a pre-requisite for practising”.

A juristic person applying for an exemption in terms of section 54A must, in turn, comply with certain prescribed requirements in order to qualify for the exemption, including the requirement that the juristic person must be personal liability company.[5]

In so far as juristic persons (including limited liability companies) may employ registered practitioners to provide clinical services to patients, it is difficult to understand why such juristic entities may not also receive an exemption in terms of section 54A of the HPA – which is perhaps a further issue that may need to be revisited and updated in order to keep pace with the times.

Finally, the Amendment Notice also provides for a change to Rule 23A of the Ethical Rules. Rule 23A prescribes various requirements that must be met in order for a practitioner to have a direct or indirect financial interest or shares in a hospital or any other health care institution. One of the requirements is that the practitioner must submit an annual report to the HPCSA containing certain information. The Amendment Notice expands on the reporting requirements in Rule 23A(h) and provides that the report to be submitted to the HPCSA must contain the following information and documents –

1. the number of patients referred by him or her or his or her associates or partners to such hospital or health care institution and the number of patients referred to other hospitals in which he or she or his or her associates or partners hold no shares;
2. the agreements concluded in relation to the acquisition and/or ownership of the interests of shares in the hospital or health care institution;
3. how the acquisition of the financial interest is funded and whether there are other ancillary contractual relationships between all the parties to the transaction or with related parties and entities and if so, the nature of such contractual relationships;
4. policies or peer review protocols for admission of patients into such hospital or health care institution and quality monitoring mechanisms which serve to ensure that practitioners will comply with the Ethical Rules; and
5. any other information or document which the HPCSA may deem relevant.

The relevant practitioner must, in turn, ensure compliance with Rule 23A at all times.

The amendments to the Ethical Rules are therefore far-reaching and are arguably a step in a direction that aligns with an evolving healthcare service arena. The amendments, however, also highlight certain additional changes that need to be addressed in order to ensure consistency in legislation and policy as well as practical efficiency and proper application.

Footnotes

[1] The term “practitioner” is defined in the Ethical Rules as a person registered as such under the HPA and, in the application of certain rules in the Ethical Rules, also a juristic person exempted from registration in terms of section 54A of the HPA.

[2] Rule 18 of the Ethical Rules was, in turn, expanded on in paragraph 2.4 of the Business Practices Policy of the HPCSA dated 26 October 2016 (which has yet to be updated), and which provides that –

“EMPLOYMENT OF PRACTITIONERS

Generally the employment of practitioners by persons not registered in terms of the Act is not permissible; however the following employment agencies are recognised for the purposes of employing practitioners that are registered under the Health Professions Act:

- The Public Service;
- Universities / Training Institutions (only limited for purposes of training and research);
- Mining companies & NPO's/NGO's (subject to approval of the relevant professional board);
- All registered persons within the HPCSA may also employ fellow registered practitioners in accordance with the Ethical rules.

Any other agent; institution; person may lodge an application with the HPCSA for the purposes of employment of a practitioner registered with the [HPCSA] save that any other employment which falls beyond the professional practice is not required to lodge an application with the HPCSA...”.

[3] Proposed Amendments to the Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act, 1974 published in BN 278 in GG 46422 dated 27 May 2022.

[4] Published under GN R1262 in GG 20556, dated 20 October 1999.

[5] The exemption relating to juristic persons formulated in section 54A of the HPA, is published in the relevant regulations.



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