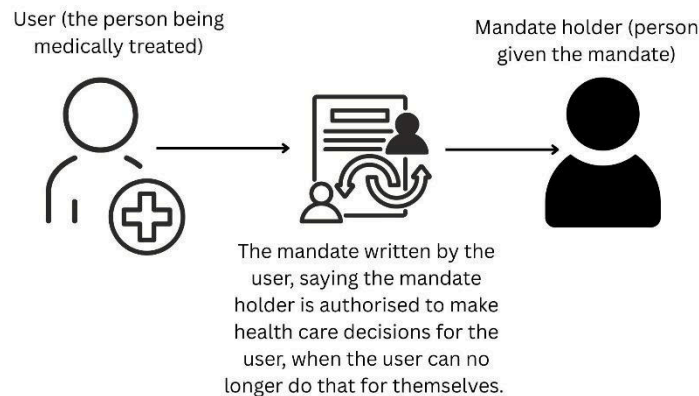


## Summary

People want legal clarity about who will make medical decisions for them **when they are no longer able to make or communicate these decisions themselves**. They also want to know that health care providers will respect and act on wishes they have communicated. But they *can*, in terms of current law, **authorise a particular person to make those decisions for them** when they no longer can.

The National Health Act of 2003 allows a health care **user**<sup>1</sup> to mandate (give authority to) someone in writing, who can give informed consent to any health service (medical treatment), or refuse it,<sup>2</sup> on their behalf when they cannot. That person is then the user's **mandate holder**.<sup>3</sup>

Many people, including health care providers, often do not know that **this right exists in our law**.



<sup>1</sup> A “user” means the person receiving treatment in a health establishment, including receiving blood or blood products, or using a health service, and if the person receiving treatment or using a health service is—

- (a) below the age contemplated in section 39(4) of the Child Care Act, 1983 (Act 74 of 1983), and includes the person’s parent or guardian or another person authorised by law to act on the first mentioned person’s behalf; or
- (b) **incapable of taking decisions**, “user” includes the person’s spouse or partner or, in the absence of such spouse or partner, the person’s parent, grandparent, adult child or brother or sister, or another person **authorised by law to act on the first mentioned person’s behalf**.

### <sup>2</sup> Section 6 of the National Health Act: User to have full knowledge

(1) Every health care provider must inform a user of—

- (a) the user’s health status except in circumstances where there is substantial evidence that the disclosure of the user’s health status would be contrary to the best interests of the user;
- (b) the range of diagnostic procedures and treatment options generally available to the user;
- (c) the benefits, risks, costs and consequences generally associated with each option; and
- (d) the user’s right to refuse health services and explain the implications, risks, obligations of such refusal.

(2) The health care provider concerned must, where possible, inform the user as contemplated in subsection (1) in a language that the user understands and in a manner which takes into account the user’s level of literacy.

### <sup>3</sup> Section 7 of the National Health Act: Consent of user

(1) Subject to section 8, a health service may not be provided to a user without the user’s informed consent, unless—

(a) the user is unable to give informed consent and such consent is given by—

- (i) a person mandated by the user in writing to grant consent on his or her behalf;
- (ii) a person authorised by any law or court order to give consent on behalf of the user;
- (iii) in the absence of such a person, a spouse or partner, a parent, a grandparent, an adult child or a brother or sister of the user, in the specific order listed; or

(b) the provision of a health service without informed consent is authorised in terms of any law or a court order; or

(c) the failure to treat the user, or group of people which includes the user, will result in a serious risk to public health.

(d) failure to treat the user, or group of people which includes the user will result in a serious risk to public health; or

(e) any delay in the provision of the health service to the user might result in his or her death or irreversible damage to his or her health and the user has not expressly, impliedly or by conduct refused such service.

(2) (a) A health care provider must take all reasonable steps to obtain the user’s informed consent.

(b) If the user is unable to give informed consent and no person is available to give such consent on his or her behalf, but treatment is immediately necessary to save the life of or prevent serious damage to the health of the user, the health care provider concerned may provide such health service without such consent.

(3) A user who has consented to the provision of a health service may withdraw such consent at any time, with the result that the health service concerned must be discontinued, unless such discontinuation would—

(a) be contrary to law; or

(b) result in a serious risk to public health.

## Section 7 of the National Health Act

Before section 7 was enacted (became law), either family members or health care providers made decisions about health services when a user was no longer able to make or communicate these decisions themselves. Since being enacted in 2005, section 7 empowers a user to give a **written mandate** that authorises a specific person (mandate holder) to consent to or refuse health services on their behalf **when they are unable to do so themselves**.

Everyone has the right to consent to or refuse any health services (routine or life-sustaining) in terms of the law, and there is case law (court judgments) to explain this legal fact. A mandate holder has the same power as the user who gave them their mandate, to consent to or refuse health services, on the user's behalf.

If a user does not give anyone this written mandate, then section 7 states that consent must by default be given by people on a list in section 7, in the order they are listed. That order is: a spouse or partner, a parent, a grandparent, an adult child, or a sibling of the user. Many people may not want a default person to make their medical decisions for them, so it is important that everyone knows they have the **legal right to choose their mandate holder for this**.

### Writing a section 7 mandate

It is important to understand that the written mandate is a simple piece of writing done by the user, with the purpose of authorising a person as their mandate holder. No lawyer or other official is needed, and the document does not have to be formal. As long as it is in writing and signed by the user, and says clearly who the mandate holder will be when the user can no longer make their own medical decisions, it is a "section 7 mandate". The written section 7 mandate **does not need witnesses of their signatures**, and does not have to be dated, to be legally valid.

A "section 7 mandate" has clear legal authority. If a person has only communicated their wishes for future medical decisions verbally, or written their views and wishes down but without authorising someone to be their mandate holder, it will not have the same legal authority as a section 7 mandate. This does not mean that their verbal or written views and wishes will just be ignored, because both verbal and written views and wishes are still good evidence of what someone would want. But for legal certainty, it is better to write down your views and wishes **and, in the same document**, also authorise someone you trust to follow those wishes as your mandated person.

### The way forward

#### 1. Education and advocacy

People in South Africa must be educated and informed about the legal right to give a section 7 mandate to whoever they want. People should be encouraged to use section 7, and to write their section 7 mandates before they become unable to make medical decisions for themselves.

Health care providers must be educated and informed that the right in section 7 exists. They must understand that, if a user has a mandate holder, they are legally bound to include that person in any decision-making. When a user is unable to give informed consent to health services, health care providers must be aware that the user may have a mandate holder, and must get informed consent from the mandate holder.<sup>4</sup>

---

<sup>4</sup> Section 8 - Participation in decisions

(1)(a) A user has the right to participate in any decision affecting his or her personal health and treatment.

(b) If the informed consent required by section 7 is given by a person other than the user, such person must, if possible, consult the user before giving the required consent. A user who is capable of understanding must be informed as contemplated in section 6 even if he or she lacks the legal capacity to give the informed consent required by section 7.

Our focus will be education and empowerment through advocacy. We will develop a strategy to reach and engage with users (patients), families, regulatory bodies like the HSPCA and SAMA, and state health departments using a range of targeted advocacy tactics. All stakeholders in the Advance Directives Campaign are encouraged to share this information prominently on their websites and social media platforms.

---

(3) If a user is unable to participate in a decision affecting his or her personal health and treatment, he or she must be informed as contemplated in section 6 after the provision of the health service in question unless the disclosure of such information would be contrary to the user's best interest.