



SUBMISSIONS ON THE NATIONAL HEALTH INSURANCE BILL

29 November 2019

Attention: Mr Sibongiseni Maxwell Dhlomo

Chairperson Portfolio Committee on Health

National Parliament of South Africa

C/O Ms Vuyokazi Majalamba (Committee Secretary)

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Introduction

1. Amnesty International is a global movement of people who campaign for a world where human rights are enjoyed by all. Today, Amnesty International is the largest human rights movement with over nine million members, supporters and activists who take injustice personally. Amnesty International has evolved to become a global community of human rights defenders based on the principles of international solidarity, effective action for the individual victim, global coverage, the universality and indivisibility of human rights, impartiality and independence, and democracy and mutual respect.
2. We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.
3. Our vision is for everyone to enjoy all the rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights standards.
4. Our mission is to undertake research and campaigns action focused on preventing and ending grave abuses of these rights.
5. Amnesty International South Africa, within our operational plan, currently works on key thematic areas such as Economic and Social Cultural Rights (ESCR), Justice and Accountability/Climate Change and Women and Marginalized Groups.
6. Amnesty International has done a significant body of work, including research and campaigning, in several countries around the world on the obligation of states to respect, protect and fulfil the right to the highest attainable standard of physical and mental health

for all persons, free from discrimination.¹ We welcome the opportunity to make this submission, and the observations and recommendations we make below are based on South Africa's international human rights obligations and our prior experience working on these issues.

7. Section 27 of the Constitution² requires that government takes "reasonable measures progressively to realise the right of access to health care services". "Reasonableness" has been interpreted in this context to require that these measures must be comprehensive, coherent and coordinated³ and must be reasonably conceived and implemented.⁴
8. 84 percent of the population in South Africa rely on the public health system, and 16 percent, that is, who are able to afford to, access private health care'.⁵ There are several problems facing the public health system in South Africa today, as a result of which, the people who rely entirely on public health care face several challenges, including shortage of facilities in many rural areas, lack of human resources, shortage of specialist including general practitioners and nurses, long waiting times and lack of essential medicines. As a result of which people are often not able to access timely and adequate health care.
9. While Amnesty International recognises the clear need to reform the public health system, we are concerned that some of the proposals in the NHI Bill would worsen rather than improve the situation. As a result, in this submission, we seek to raise some of our concerns that will make the NHI Bill constitutionally compliant, consistent with South Africa's international human rights obligations, and constitute a step towards ensuring universal health coverage.⁶
10. We cover the following concerns in this submission, in the light of our recent report titled – *Living in Limbo: Right of Asylum Seekers Denied*⁷:
 - 10.1 The law/ International human rights standard
 - 10.2 Public Health Concerns associated with the Exclusion of Asylum Seekers and Undocumented Persons
 - 10.3 Presumption against Retrogressive Measures
 - 10.4 Public Participation and Stakeholder Involvement
 - 10.5 Conclusion and Recommendation

The Law/ International Human Rights Standard

11. The South African Constitution is based on the values of human dignity and equality. It further rejects unfair discrimination on several listed grounds. Although nationality and immigration status are not listed grounds in terms of section 9(3) of the Constitution, they

¹ <https://www.amnesty.ca/news/canada-people-irregular-status-have-right-access-essential-health-care>

² The Constitution of South Africa, 1996

³ *Government of RSA and Others v Grootboom and Others* 2001 (1) SA 46, para 39 and 40.

⁴ *Grootboom* para 40-43.

⁵ <file:///C:/Users/SamsonO/Downloads/some%20key%20messages%20on%20nhi.pdf>, p3

⁶ <https://www.timeslive.co.za/politics/2019-09-27-ramaphosa-gets-award-from-new-york-health-ngo-for-controversial-nhi-bill/>

⁷ *Living in Limbo: Right of Asylum Seekers Denied*; AFR 53/0983/2019

have nevertheless been acknowledged as analogous grounds by our Courts.⁸ As such the courts have held that “Human dignity has no nationality.”⁹

12. Notably, the NHI is based on the right of access to healthcare services in section 27 (1)(a) of the Constitution, which as the constitution dictates, is a right that is available to “everyone”.
13. Courts in South Africa have often stressed the linkages between economic and social rights, and the right to equality¹⁰. The constitutional provisions guaranteeing economic and social rights must therefore be read consistently with the right to equality, which is a founding value of the Constitution.¹¹ The fact that socio-economic rights are available to “everyone” means that these rights must apply equally to all persons, and any restrictions must be justifiable in an open and democratic society based on human dignity, equality and freedom.
14. The ambit of economic, social and cultural rights was addressed by the Constitutional Court in the much-quoted case of *Khosa v Minister of Social Development and Others*.¹² In that case, the Court held that the exclusion of permanent residents from the Social Assistance Act was unreasonable, discriminatory and unconstitutional. The Court noted that foreign nationals are a vulnerable group in society and no less deserving of social benefits than their South African counterparts. In *Khosa*, the Court also stressed the link between the right to equality and the realisation of socio-economic rights.
15. What *Khosa* demonstrates is that economic, social and cultural rights must be understood within the Constitution’s commitment to human dignity, equality and non-discrimination. This is further strengthened by the Court’s judgment in *Grootboom*, where the Court held that a policy which excludes those who are most vulnerable or in desperate need would not meet the “reasonableness standard”, which determines whether laws are constitutional and valid.¹³
16. As our report has shown, asylum seekers, much like refugees, are a marginalized group in society. They are often traumatized, and many are survivors of horrific human rights violations in South Africa as well as through their migratory experience. This, among other vulnerabilities, affords them international protection under the Convention Relating to

⁸ See for example *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC); *Minister of Home Affairs and Others v Watchenuka and Others* [2004] 1 All SA 21 (SCA).

⁹ *Watchenuka*, supra, note 1.

¹⁰ *Khosa v Minister of Social Development and Others* 2004 (6) SA 505 (CC)

¹¹ For a more detailed argument on the relationship between the right to equality and socio-economic rights see S Liebenberg & B Goldbatt ‘The interrelationship between equality rights and socio-economic rights under a transformative constitution’ (2007) 23 *South African Journal on Human Rights* 335 – 361.

¹² *Khosa v Minister of Social Development and Others* 2004 (6) SA 505 (CC)

¹³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169.

the Status of Refugees¹⁴.

17. From our own research, the inefficiency of South Africa's asylum system means that many asylum-seekers in South Africa do not have official legal status in the country¹⁵. This is largely due to inadequate number of refugee receptions offices. The consequence is that vulnerable persons lacking the financial resources have to travel long distances to renew their documents every 30 days and/or 90 days; incompetence and maladministration in processing asylum claims; as well as corruption in the system. The combination of these factors has resulted in many asylum-seekers being forced to 'live in Limbo'.
18. Under the proposed NHI Bill, asylum seekers and 'irregular migrants' will not be permitted free access to the public health system, except in limited circumstances. Section 4 (2) states that 'an asylum seeker or illegal foreigner is only entitled to – (a) emergency medical services; and (b) services for notifiable conditions of public health concern'¹⁶
19. The Committee on economic, social and cultural rights has stated that all people under the jurisdiction of a State should enjoy the rights guaranteed by the ICESCR. That includes asylum seekers and refugees, as well as other migrants, even when their situation in the country concerned is irregular. These rights must be guaranteed free from discrimination, and this includes discrimination on the grounds of nationality or legal status. Therefore, restricting asylum seekers' and 'irregular migrants' access to the public health system is inconsistent with these human rights obligations.¹⁷
20. Furthermore, restricting asylum seekers and irregular migrants to emergency care and care related to notifiable conditions of public health concern, infringes their right of access to healthcare services. We are of the view that this restriction is premised on unsubstantiated claims and anecdotes often made by political actors¹⁸ which have been consistently refuted in many quarters by Civil Society Organizations (CSOs) and the SAHRC¹⁹: namely that undocumented migrants and asylum seekers seek to take advantage of and burden South Africa's public health system.
21. This restrictive provision goes against the country's constitutional commitment to human dignity and equality as well as to eradicating policies and structures which perpetuate inequality in society.
22. As one of the respondents in our report states: "*without a document you are nothing*"²⁰. This statement corroborates what is purported in section 4(2) of the NHI Bill. Notably, irregular migrants are similarly a vulnerable group in society because without adequate

¹⁴ <https://www.unhcr.org/1951-refugee-convention.html>

¹⁵ *Living in Limbo: Right of Asylum Seekers Denied*; Amnesty International South Africa Report, 2019

¹⁶ https://www.gov.za/sites/default/files/gcis_document/201908/national-health-insurance-bill-b-11-2019.pdf

¹⁷ <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJbFePxX56jVvNBwivepPdIEe4%2bUb4qsdJhuBDpCRSOWCXPjZ7VN7SXN0oRoXkZhCuB9Z73iyU35LZveUjX0d7u; General comment 20, CESCR>

¹⁸ <http://www.sabcnews.com/sabcnews/foreign-nationals-are-burdening-sa-health-system-motsoaledi/>

¹⁹ <https://mg.co.za/article/2017-06-23-00-refugees-have-an-equal-right-to-healthcare>

²⁰ *Living in Limbo: Right of Asylum Seekers Denied*; Amnesty International South Africa Report, 2019, P26

documentation they are subjected to threats of deportation and exclusion. Without proper documents they cannot work, open a bank account or access education, healthcare or social security. This renders them, especially 'women' - as Amnesty Report²¹ has shown, at significant risk of abuse and exploitation.

23. The wording of the Constitution states that, “**everyone** has a right to have access to ...” which has been interpreted by the courts to mean ‘**without exclusion**’²². While it is not the case that rights are not subject to limitation, it is the case that both international and domestic law prohibit an unjustified distinction, exclusion, restriction or preference in the realization of rights, or in other words, discrimination.
24. In regional and international law, to which South Africa has either signed or ratified or indicated its assent, the position is clear. ‘Health facilities, goods and services have to be accessible to everyone without discrimination’²³ – This is contained in **UDHR** (Art 25), **ACHPR** (Art 16), **CRC** (Art 24), **ICESCR** (Art 2), **ICERD** (Art 1), and the **CEDAW** (Art 12).
25. Furthermore, under Goal 3 of the Sustainable Development Goals (**SDGs**), South Africa has committed to ensuring healthy lives and promoting well-being for all at all ages, including by achieving universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all.²⁴ Also see, Article 8 of the Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live and **The 1951 Refugee convention** which states that refugees ‘should enjoy access to health services equivalent to that of the host population, while everyone has the right under international law to the highest standard of physical and mental health’.
26. This point is relevant because the Constitution states that when interpreting the Bill of Rights, or any legislation, a court must consider international law.²⁵

Public Health Concerns associated with the Exclusion of Asylum Seekers and Undocumented Persons

27. The need to ensure that asylum seekers, refugees and irregular migrants can access the public health system also supports the public health interests of the country.
28. The government has consistently claimed that people come to South Africa to access health care.²⁶ However, this is not supported by evidence, and has been repeatedly refuted by CSOs and the SAHRC²⁷.

²¹ South Africa: Struggle for Maternal Health: Barriers to Antenatal Care in South Africa; AFR 53/006/2014

²² *Khosa v Minister of Social Development and Others* 2004 (6) SA 505 (CC)

²³ General Comment 14 on health states

²⁴ <https://www.globalgoals.org/3-good-health-and-well-being>

²⁵ Section 39 and 233.

²⁶ <http://www.sabcnews.com/sabcnews/foreign-nationals-are-burdening-sa-health-system-motsoaledi/>

²⁷ <https://mg.co.za/article/2017-06-23-00-refugees-have-an-equal-right-to-healthcare>

29. In South African law, exclusion or discrimination in the provision of health care services is prohibited through the equality clause in the Constitution (Section 9) and through section 27.
30. In the case of exclusion of asylum seekers and irregular migrants from the equal enjoyment of the right to access to health care services, while the department may be seeking to extend coverage of the NHI to as many people as possible within available resources, the distinction between South African citizens and non-nationals on the basis of their nationality is likely to amount to discrimination under the Constitution, and is further inconsistent with international human rights law.
31. Finally, the right to access healthcare services is subject to limitation if such limitation can be justified, is reasonable, and complies with section 36 of the constitution. Where the state is unable to provide any convincing justification for such exclusion – this will amount to discrimination.²⁸

Presumption against Retrogressive Measures

32. The obligation on the state to realise economic, social and cultural rights includes a strong presumption against retrogressive measures. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.²⁹
33. The NHI Bill seeks to exclude asylum seekers and irregular migrants from accessing the public health system, something they are currently able to do. As mentioned previously, this is discriminatory. Furthermore, the government has not demonstrated how these changes have been introduced after the consideration of all alternatives or that they are justified by reference to the totality of the rights provided for in the Covenant on Economic, Social and Cultural Rights in the context of the full use of South Africa's maximum available resources. Therefore, this exclusion is, both, discriminatory, and amounts to an impermissible retrogression.
34. In advancing access to socio-economic rights, the state is under obligation to work towards the full realization of socio-economic rights.³⁰ This principle essentially means that "a reasonable government policy should not exclude a significant segment of the population, especially not those whose needs are the most urgent and whose ability to enjoy all rights is most in peril".³¹
35. The Refugee Act³² provides that refugees have the right to the same basic health care services as South Africans. As noted, the term "basic health care service" has never been

²⁸ *Khosa v Minister of Social Development and Others* 2004 (6) SA 505 (CC), Ibid

²⁹ General comment 14, para 32 - <https://www.refworld.org/pdfid/4538838d0.pdf>

³⁰ *Government of the Republic of South Africa V Grootboom* 2001 (1) SA 46 (CC)

³¹ Iain Currie & J De Wall (eds), *The Bill of Rights Handbook*, sixth edition, (Juta, 2013)

³² Refugees Act 130 of 1998, section 27(g)

defined.

36. As such, the coverage proposed by the NHI for asylum seekers and undocumented migrants is not commensurate with the coverage that these categories of persons are currently entitled to receive. This regression will not stand constitutional muster.

Public Participation and Stakeholder Involvement

37. Chapter 7 of the NHI bill establishes three essential committees: the Benefits Advisory Committee, the Healthcare Benefits Pricing Committee and the Stakeholders Committee.

38. Unfortunately, only the Stakeholders Committee requires representation from civil society and patients.

39. Should be noted that the courts have established that socio-economic rights impose the obligation of meaningful engagement.³³ This is rooted in the idea that we have a participatory democracy that requires the participation of citizens in the work of the state.³⁴ This enhances their civic dignity and is consistent with a society founded on respect for human dignity and *ubuntu* and should be seen to be in concord with the *Batho Pele*³⁵ Principle (People-First).

40. Similarly, international law requires participation by affected groups when the decisions regarding their rights are being made. For example, the Special Rapporteur on the Human Rights of Migrants has emphasized that ‘in realizing the right to healthcare, states must ensure that migrants participate in the formulation, implementation, monitoring and enforcement of laws’.³⁶ This requires states to take positive steps to ensure that migrant groups can participate without fear of sanctions. He also notes that enabling participation will enhance the quality of laws targeted at migrants’ healthcare by ensuring that such interventions are culturally and linguistically appropriate.

41. The formulation and implementation of national health strategies and plans of action should respect, inter alia, the principles of non-discrimination and people’s participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health rights must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people’s participation is secured by States.³⁷

³³ See for example *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Grootboom*, supra note 4.

³⁴ See *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC)

³⁵ <http://www.dpsa.gov.za/documents/Abridged%20BP%20programme%20July2014.pdf>

³⁶ A/HRC/23/41.

³⁷ General Comment 14, CESCR

42. During the ongoing public consultation and in the development of the bill, Amnesty International has noted along with our partners like Section 27, Treatment Action Campaign (TAC) and others, the anomalies in the public participation process.³⁸
43. We propose that patient groups and civil society organizations have adequate opportunities for participation in all the Committees established by Chapter 7 of the NHI Bill. Notably, the Bill must ensure that steps are taken to ensure that undocumented migrants; stateless individuals and asylum seekers in particular have sufficient opportunities for participation and have no fear of reprisals based on their migration or documentation status. Such an approach is consistent with the duty to provide meaningful engagement, and ensure genuine participation, both in terms of domestic and international human rights law.

Conclusion and Recommendation

44. In light of the above, Amnesty International recommends that provision 4 (2) in the NHI Bill be modified to include equal access to the same services provided to citizens, permanent residents, refugees and inmates for asylum seekers, undocumented persons and all children and dependents irrespective of immigration status and immigration detainees.
45. We trust that these submissions will be helpful to the Committee in its deliberations on the Bill and request an opportunity to make oral submissions at the oral hearings in Parliament.

Should you require any further information, please contact:

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³⁸ <https://www.spotlightnsp.co.za/2019/11/08/spotlight-on-nhi-questions-raised-over-public-hearings-2/>