

SOUTHERN AFRICA LITIGATION CENTRE

SUBMISSIONS BY THE SOUTHERN AFRICA LITIGATION CENTRE ON THE NATIONAL HEALTH INSURANCE BILL, 2019¹

22 November 2019

EXECUTIVE SUMMARY

These submissions detail the Southern Africa Litigation Centre's (SALC's) concerns that the National Health Insurance Bill, 2019, removes existing forms of access to healthcare services to certain categories of foreign nationals, particularly, asylum-seekers, certain categories of children and dependents, immigration detainees, citizens of the Southern Africa Development Community and other undocumented migrants.

SALC believes that this restrictive population coverage in the Bill is unlawful, unconstitutional, inhumane, bad for public health, and in conflict with the objectives of NHI.

Parliament has a duty to uphold the Constitution and not to enact laws that it knows to violate the Constitution. With extensive court precedent indicating that these provisions would be unconstitutional, passing the Bill in its current form would be an infringement of the rule of law, exposing the public purse to inevitable, expensive, and wasteful litigation.

INTRODUCTION

1. The Southern Africa Litigation Centre ("SALC") is a regional non-governmental organisation that works to advance human rights and the rule of law in 11 southern African countries, including South Africa.
2. These submissions focus solely on the exclusion of certain categories of non-citizens and migrants for services covered by the National Health Insurance Fund ("the Fund") in the National Health Insurance Bill, 2019 ("the Bill").
3. SALC is concerned that these exclusions are unlawful and unconstitutional, violate human rights and compromise the public health benefits, equity and social solidarity of the Bill's vision for Universal Health Care ("UHC"). At the core of our

¹ Bill published in Government Gazette No 42598 of 26 July 2019.

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concern is that the Bill fails to recognise the equal humanity of some of the most vulnerable members of our society.

4. These submissions address the following points to substantiate our position:

- a. We examine the objects of the Bill to ground our understanding that **persons excluded from cover under National Health Insurance (“NHI”) will effectively be denied State-funded access to healthcare services.**
- b. We refer to constitutional law that requires the Legislature to be explicit in providing for the rights of persons protected under the Constitution in this context: it is insufficient to merely create discretionary powers for the possibility that the person exercising those powers might later expand access.
- c. We note that realising the Constitution’s protection of “**everyone’s**” right to health is core to the Bill’s aims. We detail established principles of constitutional law that require that, in progressively realising this right, the State has (at a minimum) a **duty of non-retrogression**. It is therefore unconstitutional for the Bill to remove or diminish existing forms of access to health care services.
- d. We further detail established principles of constitutional law that require the State to respect the prohibition against **discrimination** and to ensure **protection for the most vulnerable** in society in fulfilling the right to health.
- e. We detail our position that the Bill, unlawfully and unconstitutionally, removes existing forms of access to healthcare services for certain categories of non-citizens. In turn, we describe the existing services that are provided by law that are removed by the Bill. We detail the vulnerability of each of these groups to justify why we consider the Bill’s discrimination against these groups to be unreasonable. In particular, we consider the positions of:
 - i. **asylum seekers;**
 - ii. **certain categories of children and dependents;**
 - iii. **immigration detainees;**
 - iv. **citizens of the Southern Africa Development Community (“SADC”); and**
 - v. **other undocumented migrants.**

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- f. We note additional concerns that **registration criteria** to access services may function to exclude even those migrants already minimally covered under the current version of the Bill.
- g. Finally, before making recommendations to amend these legal defects in the Bill, we address why (separate to the Legislature’s duty to uphold the Constitution and the rule of law) it is important for South Africa to consider an inclusive approach to migrant health from the perspective of UHC, population health and other values core to the Bill’s vision.

THE OBJECTS OF THE BILL

5. The Preamble to the Bill affirms its objectives as being embedded in human rights duties as well as the goal to make progress towards achieving UHC.
6. Clause 2(a) of the Bill affirms the purpose of NHI Fund is to achieve sustainable and affordable universal access to health care services by “serving as the **single purchaser and single payer** of health care services”.²
7. The 2017 White Paper on NHI further states:
 - “e) Single Fund: NHI will integrate all sources of funding into a unified health financing pool that caters for the needs of the population.”
 - ...
 - g) Single-payer: NHI will be structured as an entity that pays for all health care costs on behalf of the population. A single-payer contracts for healthcare services from providers. Single-payer refers to the funding mechanism and not the type of provider.”³
8. We are not aware of any other legislative proposals external to NHI that seek to establish secondary or corollary funding mechanisms to guarantee coverage for categories of persons who are excluded under the Bill, nor are any such proposals evident in the White or Green Papers.
9. In this context, it follows that persons who are excluded from cover under NHI are intended to be and will effectively be deprived of access to State-funded

² Emphasis added.

³ Para 30, p 8.

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healthcare services once the Bill is fully implemented.

10. We observe that in terms of clause 4(1)(e) of the Bill, the Minister of Home Affairs is empowered to extend coverage under the Fund to “certain categories of individual foreigners”.
11. To the extent that the NHI Bill deprives persons of healthcare service to whom the State owes a duty to provide these services, this discretionary power of the Minister is insufficient to rescue the Bill from unconstitutionality. The Constitutional Court has held that it is insufficient for the Legislature to rely on the assumption that discretionary powers will be exercised in a manner consistent with the Constitution.⁴
12. The Legislature is therefore obliged to ensure that the Bill explicitly provides for access to healthcare services for all categories of persons whose rights to health are protected by the Constitution.

THE STATE’S DUTIES UNDER SECTION 27 OF THE CONSTITUTION

1. Section 27(1)(a) of the Constitution protects the right of “**everyone**” “to have “access to health care services, including reproductive health care”. The right is not limited to citizens of South Africa.⁵
2. The State has a duty under section 27(2) to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of this right.
3. The South African Constitutional Court has recognised that in realising this right, while “it may be reasonable” in certain circumstances, and therefore constitutionally permissible, to distinguish between South African citizens and citizens of other countries,⁶ at a minimum, the State has a **duty not of non-retrogression**.⁷

⁴ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 54-5.

⁵ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC), para 53.

⁶ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC), para 59.

⁷ *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC)

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4. This means, that the State has a basic duty to refrain from interfering with⁸ people's enjoyment of their rights and not to diminish⁹ or remove existing forms of access¹⁰ to health care.
5. Similar principles are founded in international human rights law. For example, the United Nations ("UN") Committee on Economic Social and Cultural Rights has stated that:

"The adoption of any retrogressive measures incompatible with the core obligations under the right to health ... constitutes a violation of the right to health. Violations through acts of commission include the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the

"At the very minimum, socio-economic rights can be **negatively protected from improper invasion.**" (Emphasis added.)

⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46, para 34:

"there is, at the very least, a negative obligation placed upon the state and all other entities and persons to **desist from preventing or impairing** the right of access to adequate housing." (Emphasis added.)

The Constitutional Court later applied this dicta to the right to health in *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 at para 46:

"That '**negative obligation**' applies equally to the section 27(1) right of access to 'health care services, including reproductive health care'." (Emphasis added.)

⁹ *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; Case No CCT 39/09, 8 October 2009, as yet unreported, at para 47:

"The state bears a duty to **refrain from interfering** with social and economic rights just as it does with civil and political rights." (Emphasis added.)

In *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC):

"It must follow that when a learner **already enjoys** the benefit of being taught in an official language of choice the state bears the **negative duty not to take away or diminish the right** without appropriate justification." (Emphasis added.)

¹⁰ *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at paras 31-4:

"any measure which permits a person to be **deprived of existing access** to adequate housing, limits the rights protected in section 26(1)." (Emphasis added.)

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right to health.”¹¹

6. **Therefore, to the extent that the Bill removes or diminishes existing avenues or forms of access to healthcare services, including those provided to non-citizens, it is our position that the Bill violates section 27 of the Constitution.**
7. To the extent that the exclusion of any particular group from healthcare services implicates the prohibition against discrimination, particularly where against a vulnerable group, the constitutionality of the Bill is further undermined:
 - a. The Constitutional Court has held that when the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, these have to be taken into account along with the availability of human and financial resources in determining the State’s compliance with the constitutional standard; a distinguishing factor is whether the State’s measures infringe the prohibition against unfair discrimination.¹²
 - b. The Constitutional Court has held that while the State’s cost and capacity limitations are relevant to assessing compliance with socio-economic rights such as the right to health, a “programme that excludes a significant segment of society cannot be said to be reasonable.”¹³
 - c. The Court has further affirmed that the vulnerability of particular groups are important to assessing compliance with the State’s duties as “those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril” must be provided for.¹⁴
 - d. The Supreme Court of Appeal has stated that in relation to socio-economic rights –

¹¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para 48. See also: UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para 9.

¹² *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC), para 44.

¹³ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46, para 43.

¹⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46, para 44.

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“Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by Section 10 of the Bill of Rights”.¹⁵

- 8. Therefore, the NHI Bill’s exclusion from cover groups of people who are particularly vulnerable and whose ability to enjoy their rights are most at peril, and in a way that discriminates on the basis of a person’s citizenship status, is in our view an unjustifiable violation of constitutional rights to health, dignity and equality, amongst others.**

ASYLUM SEEKERS

The Bill’s position

9. Asylum seekers are persons who are in the process of seeking recognition as a refugee in South Africa.¹⁶
10. Under the NHI Bill, asylum seekers are treated differently to refugees. While the Fund purchases healthcare services on behalf of refugees, asylum seekers enjoy access only to emergency medical services and services for notifiable conditions of public health concern.¹⁷
11. The term “emergency medical services” is narrowly defined in clause 1 of the Bill as “services ... to offer pre-hospital acute medical treatment and transport of the ill or injured.” This definition limits “emergency services” essentially to ambulance or paramedic services outside of hospitals.

¹⁵ *Minister of Home Affairs and Others v Watchenuka and Others* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA).

¹⁶ Refugees Act No 130 of 1998, section 1(1)(v).

¹⁷ Clause 4(1) of the Bill states that the NHI Fund purchases healthcare services on behalf of:

- (a) South African citizens;
- (b) permanent residents;
- (c) refugees;
- (d) inmates as provided for in section 12 of the Correctional Services Act No 11 of 1998;
- (e) certain categories of individual foreigners determined by the Minister of Home Affairs.

Clause 4(2) states that an asylum seeker “or illegal foreigner” is only entitled to “emergency medical services” and services for “notifiable conditions of public health concern”.

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12. Notifiable conditions are currently listed in Annexure A of the Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions, 2017. The conditions listed do not include HIV. Asylum seekers will therefore not access HIV-related services through the Fund, nor any other non-emergency services (including maternal healthcare services) unless the Minister of Home Affairs determines otherwise.
13. We note with concern that this is a regression from the previous positions on NHI and the 2018 Bill:
- a. The 2011 Green Paper¹⁸ stated that NHI was intended to cover “all South African citizens and legal residents”¹⁹ and that refugees **and** asylum seekers would be covered in line with the Refugees Act 130 of 1998 and international human rights law.²⁰
 - b. The 2017 White Paper²¹ stated that “refugees, asylum seekers and irregular migrants will receive basic health care services in line with the Refugees Act and international human rights law.”²²
 - c. The 2018 NHI Bill²³ in clause 7(2) provided for limited coverage in access to emergency health care services, services for notifiable conditions and paediatric and maternal services at primary health care level for both refugees and asylum seekers.

Existing access to services by law

14. Asylum seekers are currently provided with a broader range of free health care services than provided for in the NHI Bill. The Bill is therefore removing and restricting existing forms of access to care.
- a. Section 4(3) of the National Health Act states that the State, clinics and community health centres funded by the State must provide all persons

¹⁸ National Health Insurance in South Africa: Policy Paper.

¹⁹ Para 5, p5.

²⁰ Para 64, p 23.

²¹ National Health Insurance for South Africa: Towards Universal Health Coverage.

²² Para 101, p 21.

²³ National Health Insurance Bill, 2018 published in Government Gazette 41725 of 21 June 2018.

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with free primary health care services,²⁴ health care services for pregnant and lactating mothers and children below six years,²⁵ and termination of pregnancy services for women. No distinction is made on the basis of nationality or immigration status, therefore including asylum seekers.

- b. Section 5 of the National Health Act further states that health care providers, health workers and health establishments may not refuse a person emergency medical treatment. The definition of “emergency care” in the Act²⁶ is significantly broader than the definition of “emergency services” in the NHI Bill.
- c. The National Uniform Patient Fee Schedule (Annexure H) treats non-citizens with temporary residence permits (thus, including asylum seekers) and undocumented migrants from the Southern Africa Development Community (SADC) in the same way as South African citizens to the extent that they access health services subject to a means test based on their income to determine the subsidisation of fees.
- d. A 2007 Department of Health Revenue Directive²⁷ provides that in order to “avoid contravening patients’ rights as precepts to the Constitution ... and Refugees Act” refugees and asylum seekers – whether or not they are in possession of a permit – that access public health care shall be assessed according to the means test and shall be exempted from paying for antiretroviral services regardless of where these services are accessed. We understand further that TB treatment is similarly accessible.

15. By removing access to these forms of healthcare described in (a)-(d), and providing coverage to asylum seekers only for an inhumanely limited form of “emergency services” and notifiable conditions, the Bill infringes the constitutional right to health.

²⁴ Except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases.

²⁵ Excluding members or beneficiaries of medical aid schemes.

²⁶ National Health Act defines “emergency care” as “the evaluation, treatment and care of an ill or injured person in a situation in which such emergency evaluation, treatment and care is required, and the continuation of treatment and care during the transportation of such person to or between health establishments”.

²⁷ Department of Health “Revenue Directive – Refugees / Asylum Seekers with or without A Permit”, 19 September 2019.

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The vulnerability of asylum seekers

16. A refugee is someone who has been forced to flee his or her country because of persecution, war or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Most likely, they cannot return home or are afraid to do so. War and ethnic, tribal and religious violence are leading causes of refugees fleeing their countries.
17. The asylum process in South Africa is lengthy and, in many ways, dysfunctional. As a result, people who are extraordinarily vulnerable (fleeing conflict and persecution and who are entitled to protection under law) can remain for many years as “asylum seekers” without being formally recognised as refugees and as a result are unable to enjoy the rights that follow from this recognition.
18. In South Africa, an asylum seeker is required to lodge an application for asylum in person at a Refugee Reception Office (“RRO”) in order for their asylum status to be legally acknowledged. During the period in which asylum claims are determined, asylum seekers receive documentation in the form of a temporary asylum seeker permit that legalises their stay in South Africa. This temporary permit must be renewed every one to six months in person at an RRO.
19. Since 2011, two RROs have closed – in Johannesburg and Cape Town – making access to asylum and in particular for new asylum seekers extremely difficult. Currently, there are only four functional RROs: in Durban, Musina, Pretoria, and Port-Elizabeth (which has only recently re-opened subsequent to litigation). The Cape Town RRO has been ordered by a court to re-open by March 2018 and has failed to do so.
20. Making repeated trips to RROs on a regular basis is burdensome for asylum seekers who can at times be turned away from RROs without obtaining the renewal of their asylum permits, merely given appointment slips indicating a return date or at worst prevented from even accessing the RRO. This leaves asylum seekers undocumented for periods of time despite diligent efforts to comply with the law.
21. Added to these difficulties, there is on average a 96% rejection rate of asylum

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claims at the first instance.²⁸ The majority of these rejected asylum seekers can then lodge an appeal, however, these appeals take many years to finalise, despite that the law requires a final outcome in 180 days.

22. Currently there is a huge appeal backlog in the asylum processing system with the UN High Commissioner for Refugees (UNHCR) reporting that in mid-2018, South Africa had 184,200 asylum claims pending.²⁹ In 2019 Home Affairs requested assistance from the UNHCR to clear this backlog³⁰ and we are unaware of the specific plans around this process.

23. The extraordinarily long time that it takes to finalise an asylum claim negatively impacts on asylum seekers' abilities to regularise their status and obtain documents that accurately reflect their status. This affects their abilities to seek lawful employment, access education and healthcare services, incurs expenses, and exacts an immeasurable psychological toll on people who are already vulnerable, having fled desperate circumstances.

24. The position of the Bill is at odds with South Africa's international and regional commitments.

- a. The 1951 Convention Relating to the Status of Refugees (Refugee Convention: ratified by SA in 1996), in line with section 27 of the Refugees Act, states that "States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals".
- b. Paragraph 39 of the UN General Assembly Resolution A/RES/71/1, 19 September 2016 (Declaration for Refugees and Migrants) states that the General Assembly will adopt measures to improve refugees' integration and inclusion in the host societies, including access to healthcare. Under international law a person is regarded as a refugee as soon as they have

²⁸ See, for example, Postman Z "96% of Refugee Applications Are Refused, Say Lawyers" *GroundUp* 8 February 2018, available at: <https://www.groundup.org.za/article/96-refugee-applications-are-refused-say-lawyers/>.

²⁹ UN High Commissioner for Refugees (UNHCR) (2018) *Global Trends: Forced Displacement in 2018*, available at: <https://www.unhcr.org/afr/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html>.

³⁰ Postman Z "Home Affairs Asks UN for Help with Refugee Backlog" *News24*, 17 May 2019, available at: <https://www.news24.com/SouthAfrica/News/home-affairs-asks-un-for-help-with-refugee-backlog-20190516>

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crossed an international border³¹. International law does not require the issuance of permits and documents for a person to be defined as a refugee. These are merely domestic procedural requirements. There is as a result no reasonable justification for why asylum seekers should not be afforded full protection as refugees while their asylum claims are being processed.

- c. The 1998 Declaration on Refugee Protection by the Southern Africa Development Community states the firm belief of SADC Member States that in addressing the needs of refugees and the challenges of refugee protection, regard must be had to “the African values and hospitality, human rights and relevant humanitarian principles of refugees protection” enshrined in international human rights treaties.

CERTAIN CATEGORIES OF CHILDREN AND DEPENDENTS

The Bill’s position

25. Clause 4(1) of the Bill does not currently include coverage under NHI for the dependents of South African citizens, permanent residents and refugees in cases where those dependants are not citizens, permanent residents or registered refugees themselves.³²

26. While clause 4(3) of the NHI Bill states that “*All children, including children of asylum seekers or illegal migrants, are entitled to basic health care services as provided for in section 28(1)(c) of the Constitution*”, the list in Clause 4(1) of persons on behalf of whom the NHI Fund purchases healthcare services does not include children of “*asylum seekers or illegal migrants*”.

27. The mere statement of the rights of “*all children, including children of asylum seekers or illegal migrants*” in clause 4(3) does not necessarily function to include their healthcare as being funded under NHI in terms of Clause 4(1).

28. It is noted that in the Memorandum on the Objects of the Bill, it is stated at 6.4 that the Fund “*must*” purchase comprehensive health service benefits on behalf of

³¹ United Nations High Commissioner for Refugees “The Refugee Concept under International Law: Global Compact for Safe, Orderly and Regular Migration” 2018, available at: <https://www.unhcr.org/5aa290937.pdf>.

³² It is noted that the 2018 NHI Bill provided in Clause 7(1)(c) for cover for dependents of South African citizens and permanent residents. In Clause 7(1)(d) the 2018 NHI Bill provided for cover for children between 12 and 18 years who were not registered as a dependent of another user.

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dependents of South African citizens and persons permanently resident in South Africa as well as “*children of asylum seekers or illegal migrants.*” To the extent that paragraph 6.4 reflects the legislative intent, Clause 4(1) does not in its current form clearly give effect to this intent.

Existing access to services by law

29. In terms of the National Health Act, the National Uniform Patient Fee Schedule, and the Department of Health Revenue Directive Section (described above), this category of children and dependents by law currently enjoy access to the following services:

- a. Free primary health care services, health care services for pregnant and lactating mothers and children below six years, and termination of pregnancy services for women.
- b. Emergency care (as defined by the National Health Act).
- c. If a SADC citizen or in possession of a temporary residence permit, or if a refugee or asylum seeker (whether in possession of a permit or not) health services enjoyed by citizens subject to a means test based on their income to determine the subsidisation of fees.
- d. Free antiretroviral services regardless of where these services are accessed. We understand further that TB treatment is similarly accessible.

Vulnerability of these children and dependents

30. Section 28(1)(c) of the Constitution guarantees the right of “*every child*” to “*basic health care services*”. Section 28(2) states that the “*child’s best interests are of paramount importance in every matter concerning the child.*”

31. It is important to note that the State’s duties to realise these rights are not qualified by any measure of “progressive realisation” or “available resources”.

32. It is noted that a large number of children are undocumented in South Africa. Regulations and procedures around birth registration mean that children born to parents who are undocumented, hold expired documents and blocked or lost

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South African identity documents cannot be issued a birth certificate.³³ Being undocumented, these children are unable to access education, social services or healthcare to which they should be entitled by right. They are also at risk of being stateless. This position has been declared unconstitutional by the High Court in 2018,³⁴ and noted with concern in 2016 by the UN Committee on the Rights of the Child,³⁵ which made extensive recommendations for reform.

33. The impediments created by the State for migrants to regularise their status, including through the dysfunction of the asylum process described above, have a heightened effect on children and dependents who may be unable to independently navigate these barriers and are dependent on others to assist them.

IMMIGRATION DETAINEES

The Bill's position

34. Clause 4(1) of the Bill does not include cover for persons in immigration detainees awaiting deportation.

- a. Under the Immigration Act 13 of 2012, persons who are deemed “illegal foreigners” may be detained pending deportation at a place determined by the Director-General.³⁶ Currently, immigration detainees who are held pending deportation are housed at Lindela Repatriation Centre or in police stations identified by the Department of Home Affairs.
- b. Clause 4(1) of the Bill covers “inmates” (as provided for in section 12 of the Correctional Services Act) under the Fund. The Correctional Services Act defines “inmate” as “any person, whether convicted or not, who is detained in custody in any correctional centre or remand detention facility or who is being transferred in custody or is en route from one correctional centre or remand detention facility to another correctional centre or remand detention

³³ The Scalabrini Centre of Cape Town, Lawyers for Human Rights and the Legal Resources Centre “Our Call to Action: Birth Registration in South Africa” 16 July 2019, available at: <https://scalabrini.org.za/news/our-call-to-action-birth-registration-in-south-africa/>.

³⁴ For more information on the decision see the Press Release of the Legal Resources Centre of 9 July 2018, available at: <http://lrc.org.za/news/landmark-victory-single-dads/>.

³⁵ Committee on the Rights of the Child “Concluding Observations on the Second Periodic Report of South Africa” 30 September 2016 CRC/C/ZAF/CO/2.

³⁶ Section 34(1).

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facility”.

- c. Immigration detainees awaiting deportation do not therefore fall under the definition of “inmates” in Clause 4(1) and are not covered under NHI.

Existing access to services by law

35. It is widely documented that immigration detainees (both those held in police custody facilities and at Lindela Repatriation Centre) are often unlawfully denied health services or provided with inadequate healthcare services.³⁷

36. However, by law, this group of persons has a right to at least “adequate” and “basic” health care to the same range and standard enjoyed by citizens:

- a. Section 35(2)(e) of the Constitution states that “[everyone] who is detained” has the right to conditions of detention that are consistent with human dignity, including at least ... the provision, at state expense of adequate ... medical treatment.” The Constitutional Court has confirmed that the rights in this provision apply to “illegal foreigners detained in terms of section 34(1) of the Immigration Act.”³⁸
- b. Similarly to the Constitution, the common law recognises a “duty of care” (which includes the provision of adequate medical treatment) to all persons held in detention by the State. The individual’s citizenship status or the reason for the person’s detention is not relevant to the existence of this duty of care: all persons in detention (including immigration detainees and criminally accused and convicted persons) are entitled to the rights that flow from this duty of care. This is because their detention has nullified their abilities to provide for themselves, making them entirely dependent on the State for survival.
- c. South African Courts have determined that “adequate” medical treatment for persons in detention at the very least requires that the State provides

³⁷ See, for example: South African Human Rights Commission “*Médecins Sans Frontières and Others v the Department of Home Affairs and Others*” *Baseline Investigative Report* (GP2012/0134) 1 September 2014, available at: <http://www.sahrc.org.za/construction-site/home/21/files/Gauteng%20-%20Investigative%20Report%20-%20Lindela%20-%201%20September%202014.pdf>.

³⁸ *Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22; 2017 (5) SA 480 (CC), para 42.

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(at its expense) the same content, standard and quality of care which is provided to citizens in the community.³⁹

- d. Regulation 39(7) under the Immigration Act states that the “minimum prescribed standards envisaged in section 34(1)(e) of the Act shall conform to the Constitution and those prescribed in the Correctional Services Act”. Regulation 33(5)(1)(a) states that “Detainees shall be provided ... access to basic health facilities.”

Vulnerability of immigration detainees

37. Like any person in detention, immigration detainees are a vulnerable population and are particularly at risk of threats to their health and physical safety. With poor conditions of detention and overcrowding, immigration detention facilities in South Africa have been extensively documented as a health threat.
38. Added to this vulnerability is the indeterminate nature of immigration detention as people can be held for lengthy periods without certainty on when they will be deported and with difficulty accessing legal representation and assistance.
39. The severe mental health burden of these conditions on detainees and the absence of mental health services in immigration detention has been documented by independent sources.⁴⁰
40. It has further been acknowledged that despite court orders prohibiting the practice, children continue to be unlawfully detained in immigration detention facilities to the detriment of their health and wellbeing.⁴¹

³⁹ See, for example, *B and Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C); 1997 (6) BCLR 789 (C).

⁴⁰ See, for example, Justice Edwin Cameron “Visit to Lindela Repatriation Centre, Krugersdorp” 2012, available at: https://www.concourt.org.za/images/phocadownload/prison_visits/cameron/Prisons-Lindela-Report-Monday-29-October-2012-FINAL.pdf.

⁴¹ Van Dyk, J “Children Illegally Detained under Bosasa’s Watch at Lindela as Healthcare Crumbles” *Bhekisisa Centre for Health Journalism* 13 December 2017, available at: <http://bhekisisa.org/article/2017-12-13-00-children-illegally-detained-under-bosasas-watch-at-lindela-as-health-care-crumbles>.

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SADC CITIZENS

The Bill's position

41. Citizens of the Southern Africa Development Community (SADC)⁴² who are not refugees or permanent residents (therefore including persons who are lawful temporary residents as well as undocumented persons and asylum seekers) are not covered in clause 4(1) of the Bill to be funded under NHI.

Existing access to services by law

42. As described above, in terms of the Uniform Patient Fee Schedule, undocumented migrants from SADC states (in addition to refugees and asylum seekers regardless of their place of origin) are treated the same way as South African citizens when accessing health care services and are subjected to a means test to determine financial payments for care.

43. In terms of the National Health Act, SADC citizens may not be refused emergency medical treatment and are entitled to primary health care services, services for pregnant and lactating mothers and children below six and termination of pregnancy services.

The position of SADC citizens

44. South Africa has made a number of commitments that affirms its stated intent to expand, integrate and coordinate health services and reduce discrimination on the basis of nationality as a SADC Member State. To the extent that the NHI Bill removes existing access to healthcare services for SADC citizens, South Africa is undermining its commitments to other SADC Member States.

- a. The 1999 SADC Protocol on Health in the Southern African Development Community² recognises the promotion of “**health care for all** through better access to health services” as a principle and common objective of amongst member states.³
- b. Article 9(2) of the SADC Protocol on Health states that “State Parties shall endeavour to provide high-risk and transborder populations with

⁴² In addition to South Africa, the current member States of SADC are: Angola, Botswana, Comoros, Democratic Republic of Congo, eSwatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, United Republic of Tanzania, Zambia and Zimbabwe.

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preventative and basic curative services for HIV/AIDS/STDs.” It further commits that State Parties shall formulate policies, strategies, programmes and procedures that empower “men, women and communities at large to have access to safe, effective, affordable and acceptable” reproductive health care services.⁴

- c. The 2009 SADC Policy Framework for Population Mobility and Communicable Diseases in the SADC Region affirms a regional commitment to enabling migrant populations to access healthcare services. Important aspects of the Policy include the following:
 - i. The Policy is stated to be made in the context of the “common vision” of member states of free movement of capital, labour, goods and services across member states as well as the acknowledgement of the links between population mobility and communicable diseases as a public health concern.
 - ii. Policy guidelines include “access to the regionally agreed minimum standards of services for communicable diseases and re-supply of drugs for the treatment and management of chronic communicable diseases such as TB and HIV and AIDS, in the public sector without discrimination.”⁴³ It further states as a guidelines the “[h]armonization of the fee structures in service delivery for both residents and non-residents.”⁴⁴
 - iii. Member States are tasked with providing “minimum standard services to all regardless of nationality” and with agreeing “on a workable financing system to ensure mobile people are not disadvantaged.”⁴⁵
- d. The SADC HIV and AIDS Strategic Framework, 2009 – 2015 defines as a “major focus” of SADC Action to ensure “access [to quality treatment care and support for HIV and TB] for vulnerable groups, particularly migrant and mobile populations and their children.”⁴⁶

⁴³ At 5.2(i).

⁴⁴ At 5.2(vii).

⁴⁵ At 6.3.

⁴⁶ At 7.1.

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OTHER UNDOCUMENTED MIGRANTS

The Bill's position

45. Foreign nationals visiting the country are obliged, in terms of clause 4(5) of the Bill, to have travel insurance in order to receive healthcare in South Africa, in the absence of which they only have a right to access “emergency medical services” (as narrowly defined)⁴⁷ and “services for notifiable conditions of public health concern”. As described above, “notifiable conditions” currently exclude HIV.
46. The category of “foreign nationals” in clause 4(5) therefore includes persons who are lawfully present in the country but who are not permanent residents or refugees, thus including people with temporary residents permits who work and pay taxes in the country.

Existing access to services in law

47. As detailed in descriptions above, all persons including undocumented persons (from non-SADC member states, who are not asylum seekers or refugees) currently have a right to access free primary health care, antenatal services if pregnant or breastfeeding women, termination of pregnancy services, and antiretroviral treatment. We understand further that TB treatment is similarly accessible. All other forms of treatment must be paid out of pocket.
48. Like all other persons, undocumented migrants may not be refused emergency medical treatment, although it is acknowledged that under the current law a person may be charged a fee for those services after the provision of care.

Vulnerability of undocumented migrants

49. Many people are forced to enter the country without valid documentation precisely because lawful migration systems are dysfunctional, inoperative or unduly restrictive. This may include many groups that ought to be entitled to residence (such as asylum seekers) but are unable at any particular period of time to access valid documentation. Undocumented migrants are extraordinarily vulnerable and, because of the State’s failure to enable accessible processes to regularise their status, are forced to the fringes of society.

⁴⁷ As described above, the Bill’s definition limits “emergency services” essentially to ambulance or paramedic services outside of hospitals.

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50. In these circumstances, undocumented migrants will struggle to access secure housing, employment and other services. These circumstances make undocumented persons, particularly women, highly vulnerable to exploitation. Undocumented persons may be unable to report sexual violence or other forms of abuse for fear of being identified by authorities. UNAIDS has stated that these forms of social exclusion are understood to leave undocumented migrants in particular “highly vulnerable to HIV” in particular.⁴⁸

REGISTRATION OF USERS

51. Clause 5 of the Bill provides that, in order to be eligible to access services detailed in clause 4 (that is to say, including restricted rights of access such as for asylum seekers), a person must register as a user.

52. In order to register, certain information and documentation is required to be provided in clause 5(5) which includes, amongst others, proof of habitual place of residence, a (South African) identity card, an original birth certificate or a refugee card. Moreover, the Minister of Health, in consultation with the Minister of Home Affairs may prescribe further, additional requirements for foreign nationals to register.

53. While it is understood that users will need to be identified and registered to access services, as currently structured, this provision will effectively preclude access to services for the most vulnerable undocumented migrants, even those who may be entitled to services in clause 4. This includes certain asylum seekers who, as described above, are often undocumented as a result of the dysfunction of the asylum system and may not be in possession of an original birth certificate. Moreover, these requirements will entirely preclude from registration all undocumented children.

THE IMPORTANCE OF MIGRANT HEALTH

54. The stated values that underlie NHI could not be more important to achieving a just and equitable society envisioned in the Constitution. These aims include not only advancing the right to health and public health more broadly but also the pursuit of social justice, equality and human dignity. The Bill seeks to achieve this

⁴⁸ Joint United Nations Programme on HIV/AIDS (UNAIDS) (2014) *The Gap Report: Migrants*, available at: https://www.unaids.org/sites/default/files/media_asset/04_Migrants.pdf.

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through creating an equitable, efficient and sustainable funding mechanism for health.

55. The 2017 White Paper on NHI reflected a laudable vision for what the future for South Africa could look like in 2030 if NHI is fully implemented:

“South Africa will have a life expectancy of at least 70 years for men and women; the generation of under-20 should be largely free of HIV; the quadruple burden of disease will have been radically reduced compared to the two previous decades, with an infant mortality rate of less than 20 deaths per 1000 live births, and the under 5 mortality rate of less than 30 per 1000 live births.”⁴⁹

56. In principle, we affirm and endorse these values and vision. But we are deeply concerned that these goals are not obtainable and will be compromised from the very start if the most vulnerable members of our community are excluded and left behind on the basis of their citizenship-status.

57. It ought not to be the role of NHI or any health service provider to be involved in immigration enforcement.

58. Moreover, there are compelling policy reasons why these discriminatory exclusions obstruct NHI’s goals. In addition to the legal reasoning outlined above, there are evidenced economic and public health arguments for integrating migrants more equitably.

59. The UCL-Lancet Commission on Migrant Health, a commission comprising a range of international experts skilled in different scientific disciplines (including public health, economics and law), examined these issues and reported in 2018 as follows:

“Universal and equitable access to health services and to all determinants of the highest attainable standard of health within the scope of **universal health coverage needs to be provided by governments to migrant populations, regardless of age, gender, or legal status.**

...

A strong case for action on migration and health exists, and evidence indicates that **safeguarding the health of migrants will have positive**

⁴⁹ Para 20, p 5.

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effects for global wealth and population health.

...

Creating such systems [in UHC] that integrate migrant populations will **benefit entire communities with better health access for all and positive gains for local populations.**⁵⁰

60. One of the important justifications for the Commission's findings is based on what it described as an "overwhelming consensus ... on the positive economic benefits of migration." In the South African context, this fact has recently been affirmed by a 2018 World Bank Report that states that immigration (including of undocumented migrants) has a positive impact on local employment, labour earnings and wages in South Africa.⁵¹ In practical terms, the Report finds that for every one immigrant worker in South Africa generates approximately two jobs for locals.

61. The Bill also seeks to make progress towards UHC. Core to UHC is the principle of universality and ensuring **all people** access care, particularly the most vulnerable and underserved populations.

62. The World Health Organisation has advocated for progress towards UHC on the basis that (amongst other benefits) it leads to improvements in population health. A multi-country empirical study published in the Lancet in 2012 shows that indeed "broader health coverage leads to better access to necessary care and improved population health".⁵²

63. In relation to HIV services, UNAIDS has argued that States should expand access to HIV treatment and other health services to migrants and ensure services are delivered through a rights-based approach.⁵³ In addition to the health and HIV prevention benefits of expanding access to HIV services to all people irrespective of their migration status, UNAIDS considers that "it is increasingly difficult to argue

⁵⁰ Abubakar I et al "The UCL-Lancet Commission on Migration and Health: The Health of a World on the Move" (2018) *The Lancet Commissions* 392: 10164. Emphasis added.

⁵¹ World Bank Group (2018) *Mixed Migration, Forced Displacement and Job Outcomes in South Africa*, available at: <http://documents.worldbank.org/curated/en/247261530129173904/pdf/127706-v2-WP-P163910-main-MixedMigration-ForcedDisplacement-and-Job-Outcomes-in-South-Africa-Final-June-2018-PUBLIC-Volume-2-1.pdf>.

⁵² Morena-Serra R and Smith PC "Does Progress Towards Universal Health Coverage Improve Population Health? *The Lancet: Universal Health Coverage* 2012, 380:9845.

⁵³ Joint United Nations Programme on HIV/AIDS (UNAIDS) (2014) *The Gap Report: Migrants*, available at: https://www.unaids.org/sites/default/files/media_asset/04_Migrants.pdf.

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that people living with HIV incur greater costs to the destination country compared to the benefits they could contribute over a long-term stay while they are healthy”.

64. Expanding the Bill’s coverage to include all children and other dependents, asylum seekers, immigration detainees, SADC citizens and other undocumented migrants on the same terms as citizens, is therefore good policy, consistent with the objectives of the Bill, makes good economic sense, and stands to have positive benefits for population health in the country.

CONCLUSION

65. In the case of *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*,⁵⁴ the Constitutional Court described how the exclusion of certain categories of non-citizens from social assistance “sanctioned unequal treatment of part of the South African community.” The Court raised particular concern that this exclusion has a “strong stigmatizing effect” signaling that the State endorsed the notion that non-citizens were in some way inferior as human beings to citizens.
66. In a climate of repeated xenophobic violence, attacks and murders of foreign nationals in South Africa, the Government should be all the more wary of the risks and dangers of further stigmatizing and dehumanizing migrants through the NHI Bill.
67. As has been illustrated above, the Bill removes existing forms of access to healthcare services to certain groups (or threatens to do so upon the Bill’s full implementation). To this extent, the NHI Bill is unconstitutional and unlawful.
68. It has been demonstrated that the Bill in particular diminishes and removes existing forms of access to services to asylum seekers, certain children and dependents, immigration detainees, SADC citizens and other undocumented migrants. It further entrenches registration barriers that effectively preclude access even to the limited services provided to certain groups.
- 69. Enacting the Bill in this form surrenders the public purse to inevitable, expensive litigation on matters that have repeatedly been settled in court decisions. If the Legislature so enacts a law that it knows to be unconstitutional, this poses a direct threat to the rule of law.**

⁵⁴ [2004] ZACC 11; 2004 (6) SA 505 (CC), at para 74.

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70. Moreover, it has been detailed above that in the particular cases of asylum seekers, immigration detainees and children, these are extraordinarily vulnerable groups to whom the State owes a heightened duty of care. For the State to further entrench the vulnerability of these groups by withdrawing existing rights to access health care is **persecutory, cruel and deeply inhumane**.

71. Finally, it is contrary to the very purposes of NHI to exclude these groups of migrants, including in the Bill's desired positive effects on population health.

RECOMMENDATIONS

72. On the basis of these reasons, we make the following recommendations:

- a. Clause 4 should be amended to remove distinctions made between individuals on the basis of nationality.
- b. In the alternative, to the extent that Clause 4 must list categories of persons covered under NHI, the provision should be amended to clarify equal access to the same services provided to citizens, permanent residents, refugees and inmates for:
 - i. asylum seekers;
 - ii. all children and other dependents irrespective of migration status; and
 - iii. immigration detainees;with further amendment to at least enable access to the same range of services as currently enjoyed by right for:
 - i. SADC citizens; and
 - ii. undocumented migrants.
- c. To the extent that any mention of "emergency services" is made in clause 4, the definition for "emergency services" in clause 1 should be amended to expand the current narrow meaning to align with constitutional standards and the National Health Act.
- d. Clause 5 should be amended to ensure that access to healthcare services are not unduly restrictive on individuals on the basis of their inability to access identity and other documents.

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