

Legislating for children's right to health care services

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After a gestation period of 6 years, the draft National Health bill has been published for comment in the Government Gazette. It is due to be tabled in Parliament this year. The long awaited bill will replace the National Health Act of 1973 and will provide a new framework for the provision of health care services in South Africa.

The bill provides a golden opportunity to entrench the gains made in child health services since 1994 and to legislate for the further protection and promotion of children's right to health care. However, while the White Paper on the Transformation of the Health System and Health Department practice since 1994 has recognized the need to create specialised structures and services for children, the draft bill does not recognize children as a vulnerable group in need of specialised structures and services and in some instances actually takes retrogressive steps away from a child appropriate approach:

- ◆ While referring to the constitutional right of everyone to health care services (section 27), the preamble neglects to mention children's right to basic health care services (section 28)
- ◆ The bill does not create or entrench existing structures that were established in 1994 and tasked with the express aim of ensuring that children's health needs are given special attention. For example the Maternal, Child and Women's Health (MCWH) Directorate and its provincial branches.
- ◆ The list of user rights in chapter 2 does not take into account children's special rights, except in relation to confidentiality and disclosure of health records.
- ◆ The legislative provision entrenching free medical care for pregnant women and children under 6 and free primary health care for everyone has been removed from the bill (it appeared in an earlier draft - May 1998) and replaced by a clause giving the Minister an unlimited discretion to decide whether to grant or take away free health care to any particular category of persons.

Arguments in favour of the bill being redrafted to ensure it promotes and protects children's health rights

(1) The lack of a child focus in the draft bill is not in keeping with international or domestic precedent. The international trend and the trend in new South African legislation and practice demonstrates a recognition of the value of providing specialised services for children.

South African examples include the draft Child Justice Bill; the draft Child Care Act; the creation of the Office on the Rights of the Child within the President's Office and the National Programme of Action; the establishment of the parliamentary Joint Monitoring Committee on Children, Youth and Persons with Disability; the continued existence of the Child Protection Units within the South African Police Service.



History has taught us, both on an international level and in South Africa, that children's needs are best met through creating dedicated structures, ring fencing dedicated resources and appointing and training staff in specialised child services. When children's needs have to compete with other priorities for attention and resources, the result more often than not, is that children find themselves at the bottom of the list of priorities. This is because children are not represented in government, are often not able to speak up for themselves, do not vote, and invariably find themselves in a position of powerlessness in the hierarchy of society.

In order to ensure that children's needs are provided for and prioritised, dedicated child health services, structures, resourcing and staffing is needed.

(2) The inclusion of children's rights to basic health care services [section 28(1) (c)] in the Constitution has been interpreted to mean that children's basic health care needs should enjoy priority when the state drafts legislation, allocates budgets or makes executive policy decisions.

While the health rights of everyone (section 27) are "rights of access to", the health rights of children (section 28) are "rights to". The "access rights" have been interpreted to place an obligation on the State to create an enabling environment for people to be able to gain access to the right. On the other hand, a "right to" requires the state to deliver the right directly to the person with no cost attached if the person cannot afford to pay. Furthermore, children's right to health care is not expressly limited by "resource availability" and "progressive realisation" as is the general right to health care in section 27(1).

While children's right to basic health care services (s.28) does not exist in a vacuum separate from the general right to health care services (s.27) and the limits placed on that right by section 27(3), a Court will still require a higher standard of justification from a state body that has failed to deliver health rights to children versus failure to deliver health rights to everyone.

(3) Besides the above arguments, the dismal state of child health in South Africa also presents a good argument for the National Health Bill to take a special focus on children.

In the light of the above, the following is recommended, as a bare minimum, in order to strengthen the bill for children:

- ◆ The inclusion of children's right to basic health care services (s.28) in the preamble
- ◆ Legislating for the provision of free primary health care for all pregnant women, and all children under 18
- ◆ The entrenchment of the MCWH Directorate as a structure that must be established, adequately staffed and resourced at all levels of government (National, Provincial and District)
- ◆ A provision providing clarity that the MCWH Directorate is responsible for co-ordinating all health services for children. This

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- ◆ may have to be done in consultation with other relevant Directorates in relation to certain issues, but the MCWH directorate should have co-ordinating powers. (eg. HIV Directorate with respect to services for children with HIV, Chronic Diseases Directorate with respect to services for children with chronic illnesses)
- ◆ The ring fencing of the budgets for priority child health programmes to ensure they are not undermined if budget shortages occur at a national, provincial or district level
- ◆ Legislated obligations to draft detailed plans to address urgent child health priorities with stipulated timeframes for implementation (eg. Prevention of Mother to Child Transmission of HIV, malnutrition, child abuse, trauma)
- ◆ Compulsory MCWH representation on the National Health Authority (NHA), Provincial Health Authorities (PHA), District Health Authorities (DHA).
- ◆ Chapter 2 of the bill must include a user's right to be treated with dignity and respect and the right not to be discriminated against and the Department must take a special focus on children when training staff on implementing this right
- ◆ A provision that minimum norms and standards on child health services be set by the National Department and that such minimum norms and standards be considered mandatory for provinces and districts. Provision of services above the minimum must be in the discretion of the province or district concerned, provided minimum norms and standards have been met
- ◆ An obligation on the National Department to support provinces logistically and financially in the implementation of the minimum norms and standards



While the due date for comment on the Departmental draft has passed, the door is still open for communications to the Department and the Ministry. An opportunity to make written and oral submissions before Parliament's Portfolio Committee on Health will also be provided when the bill is tabled.

The debate surrounding the drafting of the bill thus far has focussed on the functions of the national, provincial and district levels of government. Children's needs have not been an area that has received much attention. Considerable effort from government bodies tasked with promoting children's rights, such as the NPA; Children's Desk in the Office of the President; the Joint Monitoring Committee on Children, Youth and Persons with Disabilities; and from civil society organisations in the children's sector, is needed to ensure that children's needs are adequately addressed.