NOTICE 162 OF 2007

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

TERMS OF REFERENCE

PUBLIC INQUIRY INTO THE RIGHT TO HAVE ACCESS TO HEALTH CARE SERVICES

1. Introduction and Rationale

> ***Health** is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest standard of health conducive to living a life in dignity.*[1]

The right to health care is an important and critical right, without which other fundamental rights cannot be exercised. As part of the work of its ongoing mandate, the South African Human Rights Commission (SAHRC) has a duty, *inter alia*, to monitor the exercise and enjoyinent of this right. Although large budgets are allocated by government towards health care and the provision of health services, and although there has been anecdotal information about the development of new clinics, a cursory diagnosis of the health care system by the SAHRC indicates that access to health care services in the public health care system and the quality of care provided are of great concern, in spite of existing policy and legislation governing this sector.

Apart from high profile court judgements, investigations and annual surveys that pronounce on the ills of the sector, the SAHRC has received many complaints with

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1 *General Comment No.14 (2000) The Right to the Highest Attainable Standard of Health,* (Article 12 of the International Covenant of Economic, Social and Cultural Rights). UN Committee on Economic, Social and Cultural Rights, 2000. para 1

regard to poor service delivery in the health care system in all the provinces. These information sources point to the lamentable state of many hospitals in the country, the shortage of trained health. care workers, lack of drugs in clinics, long waiting periods for treatment, poor infrastructure, disregard for patients' rights, the shortage of ambulance services and poor hospital management. These trends have been confirmed by the SAI-IRC in its visits to various health care facilities in several provinces such as Mpumalanga, the Eastern Cape, the Western Cape, the Northern Cape, North West Province and the Northern Province where it found that conditions in many clinics and hospitals visited were unacceptable. All. these factors pointing to poor service .delivery have compelled the SAHRC to hold public inquiries on the right to access health care services.[2]

2. Legislative Framework

2.1 Constitutional Provisions

The right to health care services is provided for in three sections of the South African Constitution. These provide for access to health care services including reproductive health, basic health care for children, Emergency services and medical services for detained persons and prisoners[3]. Universal. access is provided for in section 27 (1) (a) which states that "Everyone has the right to have access to health care services, including reproductive health care..." Section 27 (1) (b) provides for the State to "take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right." According to the Limburg Principles, progressive realisation does not imply that the state can defer indefinitely, efforts for the full realisation of the right. On the contrary, state parties are to "move as expeditiously as possible towards the full realisation of the right" and are required to take immediate steps to provide minimum core entitlements.[4]

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[2] See the SAHRC's mandate, sections 181 and 184 of the Constitution of the Republic of South Africa, Act 108 of 1996.

[3] Sections 27 (1) (a), (b) &(c); Section 28 (1) (c) and Section 35 (2) (c) of the Constitution of the Republic of South Africa, Act 108 of 1996.

[4] Limburg Principles on the Implementation of tlic International Covenant of Economic, Social and Cultural Rights Para 21 pp 63-78 in *Economic, Social and Cultural Rights: A Compilation of Essential Documents* International Commission of Jurists, 1977.

Section 27 (3) states that no one can bc denied emergency medical treatment. Section 28 (1) (c) provides for "basic health care serviccs" for children, while section 35 (2) (c) provides for "adequate medical treatment" for detainees and prisoners at the State's expense.

2.2 International and Regional Human Rights Provisions

A number of international and regional instruments protect the right to health. To mention a few, the Universal Declaration of Human Rights (UDHR) (article 25)[5], the International Covenant on Economic, Social and Cultural rights (ICESCR) (article 12)[6], the African Charter on Human and People's Rights (ACHPR) (article 16)[7], and the Convention on the Rights of the Child (article 24).[8]

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[5] **Article** 12 of the Universal Declaration of **Human** Rights (1948), states **that:**

(1) Everyone **has** the right to a standard of living adequate for the hcnlth and well-bcing of himself and of his family, ..."

[6] The International Covenant on Economic, Social and Cultural Rights (1976)
Article 12 provides that:

"(1) The States Parties to the Covcnant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the State Partics to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of cnvironmcntnl and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would. assure to all medical service and medical attention in the event of sickness."

[7] Article 16 of the African Charter states that;

"(1) Every individual shall have the right to enjoy tlie best attainable state of physical and mental health.

(2) State parties to the present Charter shall take tlie necessary measures to protect the health of their people and to ensure that they receive mcdical attention when thcy are sick."

[8] Article 24 of the Convention on the Rights of the Child states:

(1) States parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State parties shall strive to ensure that no child is deprived of his or her right of access to health care services ...
(2) States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
(a) To diminish infant and child mortality;
(b) To ensure the provision of necessary medical assistance and health care to all cliildren with emphasis on the development of primary health care;

2.3 National Jurisprudence

Since 1994 there have been several court cases that have served to add to the normative content of the right to health care. These have thrown light on the concepts *of* "available resources" and "reasonable measures" in terms of section 27 (1) (b) of the Constitution. In the *Soobramoney* case' the Constitutional **Court** opined that the scarcity of resources available to the State were constraints to the enjoyment of the right by the appellants, given the socio-historical context of South Africa. In the *Grootboom* case,'' the Constitutional Court defined the parameters of what constitutes "reasonable measures" but did not venture to define the minimum core content. It concluded, however, that measures that **do** not include meeting the needs *of* the most vulnerable groups in society, were unreasonable. Furthermore, **it** was stated that implementation plans that failed to be "reasonable" would not meet the State's obligations in terms of section 7 (2)[11] of the Constitution. Another important case dealt with the prevention of mother to child transmission of HIV in **which** the Treatment Action Campaign (TAC) requested that the anti-retroviral drug, nevirapine be made available to all. HIV positive pregnant women in the public health sector, which at the time was only available at the 18 pilot sites. In this case the Constitutional Court upheld the High Court order to make nevirapine available to all HIV positive pregnant women.

(c) To combat disease and malnutrition, including within the framework of primary **health care,** through, ***inter alia,*** **the application of** readily available technology and **through** the provision **of** adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks **of** environmental pollution;
(d) To ensure appropriate pre-natal and post-natal health care for mothers;
(e) To **ensure that all segments of society, in particular parents** and **children, are informed, have** access to education and **are** supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents;
(f) To develop preventive **health** care, guidance for parents and family **planning** education and services.

3. States Parties shall take **all** effective **and** appropriate measures with a view to abolishing traditional practices prejudicial to the health OF children.
4. **States** Parties undertake to promote **and** encourage international co-operation **with** a view to achieving progressively the full **realization of the right** recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

[2] **See** *Soobramoney v Minister of Health, Kwa-Zulu Natal,* **1997** (12) BCLR 1696 (CC).
[10] *Government of the Republic* of *South Africa: and Others v Grootboom and Others* **2000** (11) **BCLR 1169 (CC)**
[11] Section 7 (2) **of the** Constitution requires *the* **State** to respect, protect, promote **and fulfil all the rights in the Bill of Rights.**

3. Mandate of the SAHRC

In terms of section 184 (1) of the Constitution, the Commission is mandated to:

" (a) promote respect for human rights and a culture of human rights;

(b) promote the protection, development and attainment of human rights; and

(c) monitor and assess the observance of human rights in the Republic."

The Commission has powers in terms of section 184(2) of the Constitution read with section 9 of the South African Human Rights Commission Act 54 of 1994, to:

" (a) investigate and to report on the observance of human rights; and

(b) take steps to secure appropriatc redress where human rights have been violated;"

The *Human Rights Commission Act No 54 of* 1994 also provides for investigations by the Commission and section 9.6 thereof states that the procedure to be followed in conducting an investigation shall be determined by the Commission with due regard to the circumstances of each case. Section 9.7 provides that the Commission "shall from time to time by notice in the Gazette malce known the particulars of the procedure which it has determined in terms of subsection (6)."

4. Terms of Reference

The inquiries will take into account the normative content of the right to health as defined in the General Comment No. 14 by the Committee of the ICESCR which recognises tlie right to health.to include equal access for all, on the principle of non-discrimination, to health care facilities, goods and services. These have: to be available in sufficient quantity; must be physically and economically accessible to everyone; must be ethically and culturally acceptable; and must be of a medically appropriate quality. These four principles are outlined in more detail below:

1. *Availability*: Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity. They will include the .underlying determinants of health, such as safe and potable drinking water and sanitation facilities, hospitals, clinics and other

health-related buildings,,trained medical and professional personnel. receiving domestically competitive salaries, and. essential drugs, as defined by WHO's Action Programme on Essential Drugs.

2. ***Accessibility:*** Health facilities, goods and serviccs have to be accessible to everyone without discrimination, within the jurisdiction of the State **party.** Accessibility has four overlapping dimensions:

   i. Non-discrimination - Health facilities, goods and services **must** be accessible to all, especially the most vulnerable or marginalised, in **law** and in fact, without discrimination on any of the prohibited grounds.

   ii. Physical accessibility - Health, facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups.[12] Accessibility further includes adequate access to buildings for persons with disabilities.

   iii. Economic accessibility (affordability) - Health. facilities, goods and services must bc affordable for all.[13] Payment for health care scrviccs must be based on the principle of equity. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

   iv. Information accessibility - Accessibility includes the **right** to seek, receive and impart information and ideas concerning health issues. However, accessibility *of* information should. not impair the right to have personal,health data treated **with** confidentiality.

3. ***Acceptability***- All health facilities, goods and services must be respectful of medical ethics **and** culturally appropriatc, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve **the** hcalth status of those concenied.

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12 Such **as** ethnic minorities and indigenous populations, women, children. adolescents, older **persons,** persons with disabilities **and persons** with HIV/AIDS, **including people living in rural areas.**

13 **Payment for** health-care services, as wcll as scrviccs related **to** the underlying determinants **of** health, **has** to bc **based on the** principle of **equity,** ensuring that these services, whether privately or **publicly** provided, are affordable for **all.**

4. *Quality* - Health facilities, goods and serviccs must be scientifically and medically appropriatc and of good quality. This requires skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

In addition to these four principles, the inquiries will also be directed by Gensral Comment No.3 of the CESCR, which enjoins States parties to ensure the satisfaction of minimum essential levels of all the rights enunciated in the ICESCR. For example, a State party where any significant number of individuals is deprived of essential primary health care ,...is *prima facie*, failing to discharge its obligation under the Covenant[14] and constitutes a violation of the tight. In CESCR's view, the minimum cores for the right to health includes at least the following, and arc non-derogable.[15] The state is obliged to ensure:

i. essential primary health care;

ii. to ensure the right of access to health care facilities, goods and serviccs on a non-discriminatory basis, especially for vulnerable and marginalised groups;

iii. to ensure equitable distribution of all health facilities, goods and services;[16]

iv. to provide csscntial drugs as defined by WHO's Programme on Essential Drugs[17];

v. to adopt and implement a national public hcalth strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population which shall be devised and periodically reviewed.

The Comniittee also confirms that obligations of comparable priority include taking measures to prevent, treat and control epidemic and endemic diseases.

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[14] General Comment No. 3. E/1991/23 para.10. Committee on Economic, Social and Cultural Rights. General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23,annex III at 86 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N Doc HRI/GEN/1/Rev.6 at 14 (2003).

[15] Gcncral Comment No 4, para 43,

[16] Equitable access includes rural populations to have the same entitlements to medical carc as people living in urban areas. See Recommendations Concerning Medical Care in Rural Areas. 29"' World Medical Assembly in Tokyo, 1975.

[17] See WHO Model List of Essential Drugs, revised December 199, WHO Drug Information, vol.13, No 4,1999.

5. Rules and Procedures

5.1, The investigations and inquiries will be conducted in terms of the rules of procedure promulgated in terns of section 9(6) of the South African Human Rights Commission Act. No 54 of 1994

5.2 The Commission will call for submissions from the public and interested parties including institutions, organisations and individuals on any matters referred to in the Terms of Reference of this investigation and, inquiry.

5.3 The submissions must be lodged with or posted to the offices of the Commission at the addresses mentioned below in paragraph 7.

5.4 The Legal Services Department of the Commission may assist persons in formulating their submissions. The submissions shall be in writing and must disclose the name, address and other contact details of the person making the submission. Anonymous submissions will not be entertained.

5.5 The Commission may publish all submissions. However, if a deponent does not wish to have his or her name published, the Commission will respect such a wish together with disclosures made under the cover of the *Protected Disclosures Act No. 2G of 2000.* Such confidential submissions will bc considered but they will not form the basis of the findings against: individuals or institutions.

5.6 The closing date for submissions is **30 March 2007** however, the Head of the Legal Services Department may at her / his discretion consider late submissions.

5.7 The Commission will furnish any person or institutions that have been implicated or likely to bc implicated in the submissions, with a copy thereof. Such a copy may be accompanied by a written notice requiring such person to:

a) Submit a written response to the allegations / submission to the Legal Services Department of the Commission within 14 days of the delivery of such written notice; and

b) Appear before a panel of the Commission at a public inquiry to be held on a date and place to be announced in the Government Gazette or a national newspaper, in order to respond to the allegations against him / her.

5.8 The Commission may invite specific individuals, organisations, institutions and any other parties to make documentary and / or oral submissions and testimony to the public inquiry. Such testimony may be given under oath or affirmation.

5.9 A panel nominated by the Chairperson of the Commission will preside over the inquiry. The Chairperson of the Commission or a person designated by the Chairperson will chair the panel.

5.10 The panel may subpoena any person in possession of any information relevant to the inquiry to appear before the panel and give testimony.

5.11 Only a person or institutions referred to in paragraph 5.7 and 5.10 may be entitled to legal representation under oath or affirmation.

5.12 At the conclusion of the inquiry, the panel will make findings and recommendations.

5.13 Such findings and recommendations will be made public.

6. Definitions

6.1 "Act" refers to the *South African Human Rights Commission Act, No. 54 of 1994.*

6.2 "Constitution" refers to the *Constitution of the Republic of South Africa, Act*

108 of 1996 as amended.

6.3 "Chairperson" refers to the Chairperson of the South African **Human** Rights Commission or any **person** duly authorised.

6.4 "Commission" refers to the **South African** Human Rights Commission **as** established by section 181 **of the** Constitution.

7. Contact Details

Submissions **should** be addressed to Ms. Jennifer Joni and may **be** posted, emailed or **hand** delivered **to the** Commission **as follows:**

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For further infomation regarding submissions **and** / or the hearings, kindly contact Ms. Jennifer Joni on:

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