BASIC PACKAGE OF HEALTH CARE SERVICES
Civil society submission
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We welcome the consensus of the Health Charter Steering Committee (HCSC) that the Health Charter should stipulate that a basic package of health care services will be made accessible to all who need it within a reasonable distance, regardless of whether this is through the public or private sectors, and of the ability of the user to pay.

What remains is for us to define the content of the basic package. We agreed at the HCSC meeting on 10 March 2006 that we will continue working on the definition of the basic package as a separate process, outside of the Health Charter. That way we could propose principles and some content for agreement and inclusion in the Health Charter, but continue to work on the further detail of the package, which will require proper research and consideration by all the stakeholders.

For the discussion at the Service Delivery Task Team meeting on 20/22 March 2006, civil society representatives therefore make the following submissions with regard to the process of developing the basic package of health care services and the definition of its content.

Based on the constitutional imperatives outlined below, we propose the following wording in the Health Charter:
"The parties to the Charter commit to the delivery of a reasonable basic package of health care services to all through the public and private sectors, regardless of ability to pay.
At minimum the basic package will include the following services [here we insert the agreements by the HCSC]
The fuller definition of the basic package of services will take place through an open and consultative process, within a reasonable time frame [determine time frame].
The basic package will define the minimum health care services to which everyone shall have free access.
This package will be reviewed by all stakeholders on an annual basis so as to ensure the progressive realization of the right of access to health care services. In this regard it will be necessary to expand the content of the basic package of health care services over time in order to meet constitutional obligations.
To this end the basic package will include a mechanism for data collection and monitoring its delivery and impact on the health status of the nation, and for monitoring the quality of health service provision.
A range of financing options will be considered through which to fund the basic package: including a review of tax-based incentives, regulation of the cost of health care in the private sector to ensure the affordability of health services, and increasing public health expenditure.
The parties to the Charter commit to ensuring the efficient delivery of the basic package of services through optimal utilization and sharing of personnel, facilities, equipment and any other necessary resources."

The content of the basic package

The proposed text and the following discussion regarding the content of the basic package are based on the constitutional imperatives that are outlined below. Given these constitutional imperatives, it is clear that defining the content of the basic package must be a carefully considered process. More research will therefore be required to ensure that the basic package is a reasonable one. In this regard we believe that it is essential to bring on board health academics, who would be able to provide expert advice on the topic.

However, we are of the view that at this stage there are some broad elements of a basic package that can be identified with little controversy. These elements were discussed amongst most members of the Service Delivery Task Team in the afternoon of 9 March 2006, and agreement was reached regarding these elements. These are:

- The essential drug list, as continually revised
- Preventative and primary health care (to be defined further)
- A referral mechanism upwards for secondary and tertiary care (the limits of which have to be defined)
- Auxiliary services(dentistry, ophthalmology etc)
- Emergency medical services and treatment

We would like to caution against the duplication of the PMBs to define the package. The PMB model is constructed for the medically insured sector (based on risk-pooling) of only about 7 million people. It is therefore not a barometer of the minimum essential needs of people in South Africa, nor is it a barometer of affordability. It is based on a fund-management model rather than outcomes-based, or epidemiology based model. There are also issues regarding the treatment protocols and whether they are fair and efficient in the long term.

However a similar process for developing PMBs, which are annually reviewable, by all stakeholders, may be useful for basic package.

In addition to these broad elements, the following concrete deliverables were proposed, and agreed upon, at the Health Charter Steering Committee meeting:

- Free primary, emergency and ante-natal treatment for unfunded individuals within a radius of X kms [to be decided]
- Free testing and counseling for HIV/AIDS and free PEP
- Private sector to work with public sector to extend vaccinations in poor areas
- Private sector to make underutilized staff, facilities or equipment available to public sector at cost.
- Consumer education on health care and private health insurance

The implementation of the basic package should include a mechanism for data collection and monitoring the accessibility of the package and its impact of the health status of the nation.

Financing the basic package

While we have stated that the basic package should be freely available to the user, there remains the question of how the services are to be financed and delivered.

There are a range of financing mechanism that may be considered, including reviewing tax incentives that are currently provided to the private sector, increasing public health expenditure (ie increasing the percentage of the budget which is allocated to health care) and harnessing savings in the private sector through savings made as a result of regulation.

A costing of health care is necessary and both sectors should commit to a process for this costing, which is transparent and time-bound.

The constitutional basis for a basic package of health care services

Section 27 of the Constitution states that everyone has a right to have access to health care services, including reproductive health care. While we are dealing here with health care services alone, It is important remain cognizant of the fact this right is located in the collective context of a right to have access to sufficient food, water and social security. One's health status is dependent on a number of determinants, not access to health care services alone.

The state bears a constitutional duty to ensure that the above rights are protected and promoted. In this regard section 27(2) of the Constitution requires the state to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights'.

Section 27(3) categorically states that no one may be refused emergency medical treatment.

It is generally accepted that the right cannot be fulfilled immediately. What is required therefore is a gradual or 'progressive' realization of the right by fulfilling a minimum essential level of the right, within available resources, such level to increase over time. The National Health Act reflects this approach in sections 2 and 3 in particular. However, for progressive realization to have any meaning, a target must be set which, if realized would satisfy the right. Without such a target the term "progressive realization" is meaningless.

Constitutional imperatives to bear in mind when developing the package

There are 3 elements embedded in the wording of the right that ought to be observed when developing measures to give effect to the right. These are reasonableness, available resources and progressive realization. In essence the

basic package must be reasonable, must be deliverable within available resources, and must realize the right to health progressively. We briefly unpack these concepts below.

Reasonableness

The Constitutional Court has held that the following must be met in order for a legislative or other measure to be reasonable. These factors were not meant to be exhaustive:

- Whether is it is a comprehensive and co-ordinated plan, with a clear allocation of tasks and responsibilities
- Whether it is capable of facilitating the realization of the right of access to health care services
- Whether it is balanced and flexible and makes provision for short, medium and long terms needs
- Whether it includes a component that responds to the urgent needs of those in desperate situations
- Whether it is reasonably implemented, and how this may be measured
- Transparency : There must be 'proper communication, especially by government'
- In order for the optimal implementation of a plan or programme its contents must be made known to all stakeholders.
- A plan cannot unjustifiably limit rights

Available resources

Firstly, while financial resources is an obvious element of 'available resources', the latter is not limited to financial capacity. Other forms of resources include:

- natural resources ??
- human resources: HR at all level of the health system are integral to the delivery of health care services;
- technology – affordable access to advances in science and technology is central to ensuring the availability of health services. Local capacity-building should be fostered so as to improver availability of services; and
- information resources - this is perhaps the least expensive resource at the disposal of the state. Yet, it is pivotal to the ability of individuals to make decisions and alter behaviours in a manner that reduces harm. The relatively low cost of dissemination makes the lack of information or misinformation all the more objectionable.

Second, 'available resources' is not limited to those resources that are within the public sector. Again the National Health Act recognizes this, particularly where it enjoins the National Health Council to advise the Minister on policies concerning the 'responsibilities for health by individuals and the public and private sector'[1] and the 'targets, priorities, norms and standards relating to the equitable provision and financing of health services'.[2]

[1] Section 23(1)(a)(i).
[2] Section 23 (1)(a)(ii).

It is the duty of the state to identify the different types of resources that are necessary for the fulfilment of a right, determine their availability and ascertain an effective method of employing them, both in terms of costs and results. The state bears the burden of showing that it cannot do more within its available resources.

In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*, the Constitutional Court stated: 'A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided.'[3]

Progressive realisation

Measures that do not progressively realise the rights will not be reasonable. Progressive realization requires measures that form part of a deliberate, targeted action plan – a plan cannot be "implicit" in nature.

There are at least three factors relevant to progressive realisation: a) the speed with which the state moves in realising a right; b) the 'fit' between the measures taken and society's needs in terms of the right; and c) whether the measure provides a mechanism for monitoring its implementation.

Speed

The measures adopted to give effect to a right must respond to the urgency of a situation. Excessive delays in implementation may fail in achieving the objectives of the measures, and certainly in giving effect to the right.

The concept of progressive realization allows for an incremental approach to the right, but also as requiring promptness in the manner of execution of measures. The Committee on ESCR reads it as imposing a duty to 'move as expeditiously and effectively as possible' toward the goal of full realisation.[4] The approach of the Constitutional Court is consonant with the above articulation of the Committee. The Court has required that '[t]he measures must be calculated to attain the goal expeditiously and effectively' within the available resources. It has stated that the formulation of a programme or plan is not sufficient. It 'must be implemented with due regard to the urgency of the situations it is intended to address.'[5] It has also stated that there is 'a pressing need to ensure that where possible loss of life is prevented in the meantime. [6]

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[3] 2005 (2) SA 359 (CC) at para 88.
[4] *General Comment 3: The Nature of States Parties Obligations* (1990): (art. 2, para. 1, of the Covenant) (fifth session; E/1991/23-E/C.12/1990/8 and Corr.1, annex III para 9.
[5] *Government of RSA v Grootboom* 2001 (1) SA 46 (CC) at para 67.
[6] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at para 131.

The 'fit'
The measures that a state employs in the context of the right must respond to society's needs. A plan that includes as much of the population as possible in its programmes, it will be going further in its task of realisation of the right. It is therefore imperative to ensure that short to long term needs, based on the disease burden in SA, are clearly and explicitly identified. Even if the state can show a 'statistical advance' through implementation of its plan, this will not be sufficient. It must still be able to show an advance in terms of the needs of the most desperate.[7]

Further, to ignore the short term needs may in fact hinder the realisation of the longer term objectives. In the context of the housing crisis, Yacoob J noted in *Grootboom* that the state's measure not only ignores the immediate crisis. It also results in land invasions by those who are desperate, which then frustrate the state's ability to deliver on its medium and long term goals.[8]

Monitoring the realisation of the right (through policy implementation)
The Court's interpretation of progressive realisation requires at least that 'legal, administrative, operational and financial hurdles should be examined, and where possible, lowered over time.'[9]An assessment of the degree to which a policy is achieving its objectives cannot occur without appropriate monitoring. The primary responsibility for monitoring a programme should rest with the implementing authority.

The inclusion of timelines and targets in its monitoring methodology will enable a clear assessment of the advances that are taking place through implementation, and the obstacles that may be hindering implementation.

Without adequate implementation, according to the Constitutional Court, the plan 'will not constitute compliance with the State's obligations'.[10]

Realising the right will also require a constant review of the basic package so as to expand its content where possible over a reasonable period of time. The definition of any minimum standards should be seen as the 'floor' below which we cannot drop, rather than a ceiling.

[7] *Government of RSA v Grootboom* 2001 (1) SA 46 (CC) at para 44.
[8] *Government of RSA v Grootboom* 2001 (1) SA 46 (CC) at para 65.
[9] *Government of RSA v Grootboom* 2001 (1) SA 46 (CC) at para 45.
[10] *Government of RSA v Grootboom* 2001 (1) SA 46 (CC) at para 42.