

COMPETITION COMMISSION MARKET INQUIRY INTO THE PRIVATE HEALTHCARE SECTOR
SECTION27 comment on the Draft Terms of Reference

24 June 2013

Introduction

1. SECTION27 is a public interest law centre that seeks to influence and use the law to protect, promote and advance human rights. One of our priority areas is the right of access to health care services as guaranteed by section 27 of the Constitution. As an organisation that acts in the public interest, we are concerned about pricing in the private healthcare sector in South Africa and the drivers of the high cost of health care in the private sector.
2. We welcome the initiation of a market inquiry into the private health sector. This sector provides crucial health services to a significant number of people in South Africa and from elsewhere. We look forward to engaging in the process over the next 18 months.
3. We make this submission in response to the Commission's call for public comment on the Draft Terms of Reference for the market inquiry into the private health sector. Below we provide some specific comments in respect of the text, as well as a detailed discussion of the public health rationale for the inquiry.

Paragraph 2.1.4 Consumables

4. The use of the term "consumables" on page 7 may be misleading. While medicines are classified as consumables, other consumables are not regulated in the same way as medicines. Reference to the single exit price, for example, refers only to medicines, and not to other consumable products. It is important to note that medical devices can also be classified as consumables but are not regulated at all. We recommend that this be clarified in the final Terms of Reference.

5. We support the Commission's approach to pharmaceuticals in the draft terms of reference. Given that the price of pharmaceutical drugs is already regulated in terms of the Single Exit Price regulations. Whilst the regulatory framework may not be perfect, it has succeeded in stabilising the price of medicines to a large extent. In addition, it is not possible for an inquiry of a limited duration and limited resources to deal with every part of the complex private health system. In our view, the Commission is correct in focusing on cost drivers such as hospitals and specialist, whose prices are unregulated and which have been shown to be relatively high cost drivers in the private health care sector.

Paragraph 3.1 Rationale for a market inquiry

6. We believe that the rationale for a market inquiry into the private health sector is broader than what is reflected in the Draft Terms of Reference. We deal with this in more detail below.

Rationale for a market inquiry into the private health sector

7. Below we discuss the human rights context in relation to the rationale for the inquiry. The preamble to the Competition Act, 1998 confirms:

‘That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.’

8. The preamble to the National Health Act, 2003 recognises the socio-economic injustices, imbalances and inequities of health services of the past and the need to improve the quality of life of everyone, and seeks to do the following:

‘unite the various elements of the national health system in a common goal to actively promote and improve the national health system in South Africa;’

‘promote the spirit of co-operation and shared responsibility among public and private health professionals and providers and other relevant sectors within the context of national, provincial and district health plans’.

9. With the broad competition and health context in mind, we consider the constitutional framework. Section 27 of the Constitution of the Republic of South Africa, 1996 guarantees the right of access to health care services and imposes a positive obligation on the state to progressively realise the right by taking reasonable legislative and other measures, within its available resources. Section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights, and ‘must take reasonable legislative measures and other measures to ensure the progressive realisation of this right.’ The reasonableness of such measures relies on the context.
10. The health and competition legislative framework as a whole suggests that “reasonable measures” include establishing an appropriate regulatory system that improves access to health care services and that protects people from infringements of their right to access health care services in the private sector.
11. The Constitutional Court has considered the state’s obligation to set policy and promulgate regulations. In *Minister of Health and another v New Clicks South Africa (PTY) Ltd*,¹ the late Chaskalson CJ noted that, ‘Government is entitled to adopt, as part of its policy to provide access to healthcare, measures designed to make medicines more affordable than they presently are’.²
12. In *Government of the Republic of South Africa v Grootboom*,³ Yacoob J distinguished the right of ‘access’ to adequate housing from the right to adequate housing.⁴ Yacoob J also noted the difference between the position of those who can afford to pay for housing and those who cannot, and held that state policy needs to address both groups. ‘For those who can afford to pay ... the state’s primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework....’⁵

¹ 2006 (2) SA 311 (CC).

² *Minister of Health and another v New Clicks South Africa and others* 2006 (2) SA 311 (CC) at para 32.

³ 2001 (1) SA 46 (CC).

⁴ Para 35.

⁵ *Grootboom* at para 36.

13. Section 27 of the Constitution already forms the basis of existing regulation to ensure quality and equitable access to health care services in the private health sector. For example:

13.1. The Medical Schemes Act, 1998 regulates the conduct of medical aid schemes and mandates the Council for Medical Schemes to protect the interests of beneficiaries and to monitor health services and health outcomes. The General Regulations require medical aid schemes to pay in full, without co-payment or deductibles, for prescribed minimum benefit conditions;

13.2. The Health Professions Act, 1974 prohibits overcharging by all health professionals for services rendered, including those in the private sector;

13.3. The Medicines and Related Substances Act, 1965 sets out a comprehensive framework for the registration, pricing and quality of medicines across the public and private sectors.

14. In addition to the state's obligation to facilitate access to health care services, the private health industry also may have obligations to facilitate that access. Section 8(2) of the Constitution provides that the Bill of Rights binds natural or juristic persons 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. In other words, the Bill of Rights has horizontal application, the extent of which depends upon the nature of the rights and duties imposed. In other words, private entities exercising powers or performing functions that normally fall to the State, should be bound in a similar manner by the relevant rights and obligations in the Bill of Rights.⁶

15. In other words, there is a legal basis for a legislative and regulatory framework that spells out the constitutional obligations of private health service providers in a way that empowers people to seek remedies against private service providers who breach those obligations.

⁶ Marius Pieterse 'Indirect Horizontal Application of the Right to Have Access to Health Care Services' 23 *SAJHR* 158 at 162.

16. The National Development Plan (NDP) also requires all institutions to participate in the country's economic development. The NDP sets out its goals broadly:

‘the NDP aims to eliminate poverty and reduce inequality by 2030. South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society’.⁷

17. The NDP further suggests that a national health insurance should be implemented and should be complemented by a reduction in the relative costs of private medical care.⁸

18. It is therefore appropriate for the Commission to use its powers to inquire into the pricing of health care services and the impact on equitable access to health care services and to make recommendations to relevant state bodies and regulators that will lead to improved access.

Paragraph 3.3.1 Subject Matter of the inquiry: Healthcare providers

19. We recommend inclusion of the impact of the HPCSA's duty to establish ethical tariffs for the provision of health care services for the purposes of assessing complaints about overcharging. Professional Boards are empowered by section 53(d) of the Health Professions Act to publish an ethical tariff:

“a professional board may from time to time determine and publish the fees used by the professional board as norm for the determination of amounts contemplated in paragraph (a)”.

20. In other words, the ethical fees determined by the professional board can be used as a basis to adjudicate complaints from the public against a health care practitioner regarding the fees charged for a service.

⁷ National Development Plan at page 24. Available from www.npconline.co.za.

⁸ National Development Plan Chapter 10: Promoting Health.

21. The HPCSA is currently engaging in a consultation process with health professionals and other stakeholders to determine a method of determining ethical tariffs, which will likely continue in parallel with the market inquiry. We attach the SECTION27 submission on the HPCSA's proposals, which provides a detailed analysis of the constitutional framework related to ethical tariffs.

Paragraph 3.6 Proposed Market Inquiry Process

22. It appears that the Commission envisages a two-part process of hearings. The first set of hearings is directed to members of the public and other stakeholders. The second set of hearings is directed to the industry stakeholders that are the subject of the inquiry. However, it is unclear whether the second hearings will be closed, and, if so, whether any information that may be gathered in the process, having regard to any confidentiality concerns, will be made public by the Commission. Greater clarity on the process would assist members of the public to effectively participate in the market inquiry process.

Paragraph 3.8 Human Resources

23. We note from both the Draft Terms of Reference and the Tender document for Technical, Expert and Administrative Support to the Competition Commission in Conducting a Market Inquiry into Private Healthcare that the skill and competencies required of the panel and support team does not required particular expertise in constitutional law or human rights practice. Given that the primary rationale for instituting the market inquiry is to address competition issues that impact on the right of everyone to have access to health care services, it is critical to include this kind of expertise in the inquiry. The right to health care services must go hand in hand with human dignity and the right to equality in the delivery of health services, and this must be reflected in the Commission's approach. We recommend that the Commission include this expertise either on the panel or within the support team.

Conclusion

24. We thank the Commission for the opportunity to make this submission. For further information please contact Umunyana Rugege 011 356 4120 or 083 458 5677 or by email rugege@section27.org.za.

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