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4 March 2019

Dear Prof Lukhele

UNLAWFULNESS OF CIRCULAR 5 OF 2019

1. We represent the Treatment Action Campaign.
2. We note Gauteng Department of Health Circular Letter 5 of 2019, dated 20 February 2019 ("Circular"). The Circular makes reference to a communique from the National Department of Health, which we understand will be withdrawn today, 4 March 2019.
3. Notwithstanding the intended withdrawal of the National Department of Health communique, we are instructed to write to you to inform you of the unlawful nature of the Circular and to convey our instructions that, should it not also be withdrawn, our clients will launch an urgent challenge to the lawfulness of the Circular.

4. We request, therefore, a response to this letter, confirming that the Circular has been withdrawn, before close of business on 7 March 2019.
5. We lay out below the current legal framework as it relates to access to health care services to people who are not citizens of South Africa and detail the reasons for our description of the Circular as unlawful.

Current legal framework

6. The Constitution provides in section 27 that everyone has a right to have access to health care services, including reproductive health care services and that no one may be denied emergency medical treatment. The Constitution provides further in section 28(1)(c) that every child has the right to basic health care services. Children's rights to basic health care services (a term that remains undefined) is not qualified by the availability of resources.
7. The Refugees Act 130 of 1998 further provides in section 27(g) that refugees have the right to the same basic health care services as South Africans.
8. The National Health Act 61 of 2003 provides in section 4(3) that all pregnant and lactating women and all children below the age of six (regardless of nationality) are eligible for free health care services; that all persons (regardless of nationality) are entitled to free primary health care services; and that all women (regardless of nationality) are entitled to free Termination of Pregnancy services under the Choice on Termination of Pregnancy Act 92 of 1996. The Minister may prescribe, but has not prescribed, conditions subject to which categories of persons are eligible for such free services, having regard to the range of free services already available, the categories of persons receiving such services, the impact of any condition on access to services, and the needs of vulnerable groups. Finally, the National Health Act in section 5 confirms the constitutional directive that a health care provider, health worker or health establishment may not refuse a person emergency medical

treatment.

9. The legislative framework is then supplemented at national level by the Uniform Patient Fee Schedule which provides in Annexure H that non-South African citizens attending hospitals are expected to pay the full fees as laid out in the Uniform Patient Fee Schedule, except refugees and asylum seekers and undocumented migrants from SADC states, who are treated in the same way as South Africans and subjected to a means test based on their income. The assessment will determine how much their fees are subsidised.
10. The provisions of the Uniform Patient Fee Schedule and the National Health Act may be supplemented by the MEC for Health in provinces, who may prescribe procedures and criteria for admission to health facilities and a schedule of fees for different categories of users. In Gauteng, the Hospitals Ordinance Amendment Act 4 of 1999 provides that the CEO of a hospital may require identification documents prior to admission to a hospital except where deferring treatment may have "dangerous or detrimental consequences" to the person seeking treatment. There is nothing to suggest that migrants are excluded from this provision and there is no definition of "dangerous or detrimental consequences". The wording suggests that less than an emergency situation is required to trigger this provision.
11. Further, the Gauteng Patient Classification Policy Manual requires the production of identification among other documents, following which a patient is classified into H0, H1, H2 or H3 classifications, depending on the patient's ability to pay. If the patient does not have a South African ID but is a refugee or asylum-seeker or an undocumented migrant from a SADC state, the patient does not fall within the definition of "foreign patient" and does not, therefore, fall as other foreign patients do, within H3 classification (the lowest level of subsidisation). Instead the patient is treated in the same way as a South African and subjected to a means test.
12. Finally, a 19 September 2007 revenue directive from the Department of Health and

directed to Provincial Health Revenue Managers and HIV/AIDS Directorates provided that “refugees/asylum seekers with or without a permit that do access public health care shall be assessed according to the current MEANS test (as specified in the Annexure H)” (sic). A subsequent memorandum dated 4 April 2008 and addressed to all Hospital CEO’s, District Family Physicians and District Managers from Dr Maduna, Chief Director: Region A in Gauteng clarified, in response to reports that some facilities were denying patients without identity documents access to the comprehensive HIV and AIDS care, management and treatment plan, that “no patient should be denied access to any health care service, including access to antiretrovirals, irrespective of whether they have a South African Identification Document or not”.

13. In summary, the current legal framework for access to health care services by anyone other than a South African citizen is as follows:

- a. Everyone (regardless of citizenship or status) is entitled to free primary health care services.
- b. All pregnant and lactating women (regardless of citizenship or status) are entitled to free health care services, including both primary health care services and hospital-based care.
- c. All children under the age of 6 years old (regardless of citizenship or status) are entitled to free health care services, including both primary health care services and hospital-based care.
- d. Refugees, asylum seekers and undocumented migrants from SADC states are entitled, when accessing hospitals, to be treated in the same way as South Africans and to be subjected to a means test to determine their classification as H0, H1, H2 or H3 patients.
- e. Everyone (regardless of citizenship or status) is entitled to access comprehensive HIV and AIDS care, management and treatment.

Unlawfulness of the Circular

14. The Circular is unlawful on a number of bases:

- a. It constitutes an unlawful regression in access to services in that services that have been provided will no longer be provided.
- b. It requires that all non-South African citizens be classified as (PH)F and be required to pay for all health care services including emergency treatment, confinement (maternity) and basic health services. This provision is contrary to section 4 of the National Health Act, among others.
- c. It requires that the cost of services must be paid upfront or on discharge, presenting a potential barrier to access to services, including emergency medical treatment and health services to children – both of which are not subject to available resources qualifications under the Constitution. Depending on how the provision is implemented, the requirement for payment prior to discharge may also lead to violations of the right of people to freedom and security of the person under section 12 of the Constitution.
- d. It constitutes a violation of the rights of people in South Africa who are not South African to dignity and equality.

15. Apart from being unlawful, the Circular also has potentially negative implications for public health given the public health implications of failure to treat people who are living in South Africa and who have communicable diseases but are not South Africans or refugees. Such an approach will have deleterious consequences for South Africa's attempts to reach the goals that it has set itself including reaching compliance with the Sustainable Development Goals and the 90-90-90 HIV treatment target.

16. Please confirm by close of business on 7 March 2019 that the Circular has been withdrawn and that the current legal framework, as described above, remains in effect. We are available to meet with you on this issue, should you wish to do so.

Sincerely



Sasha Stevenson
Attorney
SECTION27