THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS & INTERNATIONAL ORGANIZATION FOR MIGRATION

MEMORANDA ON THE HEALTH BILL, 2015

PRESENTED TO

THE STANDING COMMITTEE ON HEALTH, SENATE.
INTRODUCTION


IOM is the leading inter-governmental organization in the field of migration and works closely with governmental, intergovernmental and non-governmental partners. IOM works to help ensure the orderly and humane management of migration, to promote international cooperation on migration issues, to assist in the search for practical solutions to migration problems and to provide humanitarian assistance to migrants in need, including refugees and internally displaced people. The IOM Constitution recognizes the link between migration and economic, social and cultural development, as well as to the right of freedom of movement.

KNCHR submits this advisory brief pursuant to its statutory function to ensure the infusion of human rights into legislation and policy. We believe the health bill will provide an opportunity for the country to ensure that all those in Kenya enjoy the highest attainable standards of health as envisaged in the constitution\(^1\).

We acknowledge some of the positive provisions in the Health Bill in so far as it provides clarity of the roles of the county governments vis a vis that of the national government in terms of provision of health and related services, the coordination of the functions between the national and county government is a plus since there has been challenges in this respect. The bill also scores in terms of making service provision central to the bill and making provision in respect to rights and duties of the various actors in the health sector.

Having acknowledged the positive impact the law will have on the right to Health, the bill is however not properly grounded in respect to the core elements of Economic, Social and Cultural Rights Committee’s General Comment No. 14 on the right to health, the bill does not adequately address the issues of Availability, Accessibility, Acceptability and Quality of health care.

Recognizing that states have different levels of resources, the ICESCR provides that the rights guaranteed by it, including the right to health, are subject to "progressive realization," meaning that a state should "take steps to the maximum of its available resources" to achieve full realization of this right, while guaranteeing that the right will be exercised without discrimination. States must refrain from denying or limiting equal access to health care for all persons, including migrants, regardless of their legal status in Kenya. One of the core obligations of States Parties, regardless of their situation, is to ensure the satisfaction of the right to essential primary health care on a

\(^1\) Article 43 of the constitution provides that every person has the right to the highest attainable standard of health, which includes the right to health care services. It further outlines that a person shall not be denied emergency medical treatment and that the state shall provide appropriate social security for persons who are unable to support themselves and their dependants.
non-discriminatory basis, particularly for vulnerable and marginalized groups, including irregular migrants, asylum seekers and refugees. States are obligated to work towards conditions that would ensure also access to all medical services and medical attention in the event of illness.

In addition, the ICESCR outlines several core obligations for governments, which define "minimum essential levels" of rights that are not subject to progressive realization but must legally be ensured immediately and all times such as non-discrimination.

**PART 1— PRELIMINARY**

Align the definition of Abortion to the implied meaning of Article 26(4) of the Constitution. Furthermore, despite the definition of Abortion being provided for in the bill there is no mention of Abortion in the main text of the bill. Our view therefore is that the definition of Abortion in the definition of terms ought to be deleted.

Broaden the definition of informed consent to include the fact that the consent has to be “free informed consent” Rationale: there is a functional difference between informed consent and the concept of free informed consent; the difference between informed Consent and free informed consent is that whereas consent may be informed it may not be obtained freely. The concept of free informed consent connotes that having been informed of the consequences of the treatment somebody appreciates the need for the treatment and freely consents to the same.

**PART II RIGHTS AND DUTIES**

**Clause 5(1)** whereas the right to the highest attainable standard of health is a right that is to be progressively realized in terms of Article 12 of the International Covenant on Economic, Social and Cultural Rights and Article 43 of the Constitution; there is a need for the provision to recognize the concept of maximum available resources. This will ensure that the health sector is well resourced in terms of budget allocation in keeping with the Abuja declaration of allocating a budget of not less than 15% of the Gross national budget.

There is need for clarity in Clause 6, there is need for the clause to provide for abortion as a reproductive health right for women under the circumstances permitted in Article 26(4) of the constitution, and this will ensure that women do not die due to unsafe abortions and the need to provide post abortion services to women.

**Clause 7** of the bill places onus on health providers to provide emergency treatment, whereas the intentions are noble the bill also must provide for compensation of private facilities that offer this service otherwise the sanctions are punitive.
Clause 9 b-Consider inserting the following words

, “and the consent is given by the spouse or partner of the user or, in the absence of such spouse or partner, a parent. Grandparent. An adult child or a brother or a sister of the user, in the specific order as listed”; between the words by and the next of kin in clause 7 b.

Rationale-this will make clear the criteria and rank of those who can give consent on behalf of a user who cannot give consent on their own accord

Clause 12 (C) of the bill states that the status of a user may be disclosed to the Next of kin; The proposal is to delete this provision entirely or provide for safeguards as to the rights of the user in the context of the users right to privacy; should it be demonstrated that the user is unable to comprehend the information then the next of kin could be informed only if such information will be beneficial for the health of the user.

Clause 16 creates the office of Director General of Health while Clause 19 creates the office of the County Director of Health; the omission in the sections is that it does not provide for a term limit of the Director General of Health nor that of the County Director of Health; the clauses also do not provision for the procedure for removal of both the Director General for Health and County Director for Health.

Rationale: The qualification for appointment as Director General for Health and County Director for Health is restrictive in that one has to be a medical doctor to be appointed; whereas the intention in respect to the qualification is understandable there are other professionals in the health sector who can undertake the duties stipulated for the DGH and CDH respectively.

Clause 17 (d): Functions of the DG

Whereas there is good intention to prevent disease spread in Kenya from other countries: the phrasing of this function can lead to perception of migrants as bringing diseases to the country, thus overlooking the benefits of migration. In the past this has led to discriminatory policies that lead to migrants falling through the cracks of the health care system. We propose the statement to speak more about responsibility of ensuring better cross-border collaboration for disease prevention through access to non-discriminatory health promotion and disease prevention services to all including non-citizens coming to Kenya.

PART III- PUBLIC HEALTH FACILITIES
Clause 22 – on Public health facilities – has left out dispensaries (level 2 facilities)

Clause 26…..which reads, “The technical….as set out in the first schedule” - there is need to state the first schedule of what (whether this Act or the constitution) to avoid ambiguity.
PART IV – ESTABLISHMENT OF THE KENYA HEALTH PROFESSIONS OVERSIGHT AUTHORITY

Clause 28 (1) (Composition of the Authority) I think KNCHR should specifically be added as a member – in addition to the one member of the consumer rights body to be appointed by the cabinet secretary.

Clause 28 (1)(a) – specify cabinet secretary for which Ministry

Clause 28 (4) – specify “second schedule” of which document.

Clause 29(1) – specify which ministry

Clause 31 (2) – remove section ‘h’ (no body listed there)

PART V - REGULATION OF HEALTH PRODUCTS AND HEALTH TECHNOLOGIES

Clause 32 – does the establishment of a single regulatory body for regulation of health products and health technologies render obsolete the Pharmacy and Poisons Board under clause 31 (2) (f) above?

Clause 37 (3) – For quality control and safety purposes, shouldn’t it be made explicit that The Kenya Medical Supplies Authority becomes the point of first call for procurement of health products at the county and national levels? The use of the word “may” makes it optional especially for counties, giving room for counties to ignore KEMSA and even an avenue for corruption in procurement from other sources.

Clause 37(4) use of the words “at all levels of the national health system” gives the impression that the guidelines for procurement of health products shall apply only to national government-managed facilities, leaving out the counties.

PART X - HEALTH FINANCING

The section is generally reflective of the health financing framework, however, there needs to be clarity as to what kind of hospitals can one visit and what kind of service is on entitled to, the section should also provide for a mechanism for redressing conflicts should they arise out of clause 54(1) (g). There also needs to be clarification about the import of Clause 54(1) (f). Clause 54(1)(h) by deleting the word “as a result” in the second line of Clause 54(1)(h) and replacing it with the word” as a means”
We propose a clarification on health entitlements for persons in Kenya in public health facilities for citizens and non-citizens. Currently, the silence on this has led to differential user fees charges for migrants in different health facilities and counties. This in itself keeps away vulnerable migrants from accessing basic health services, and primary health care including maternal and child health services. This negates the public health approach because when the most vulnerable are not reached, the health of the entire public is compromised. The cost of providing health services to migrants is significantly lower than that of not providing services.

Evidence in other African countries shows that a failure to provide or expand subsidized services to migrants can be expected to increase the risk of communicable disease transmission both within migrant populations, and between migrant and non-migrant populations in countries of destination.

It would also be expected to lead to increased illness and decreased productivity among migrant populations – both a human and an economic cost to the host country.

Leaving out migrants in the UHC agenda is clearly not ‘universal’ at all, and is therefore a huge step backward from achieving its very goal -access to affordable and quality healthcare for all, anywhere, all the time.” Association of South East Asian Nations (ASEAN)”

CONCLUSION

KNCHR is of the view that the bill should articulate more on Availability, Accessibility, Acceptability and Quality of health care services, it’s therefore recommended that the bill ought to be strengthened in these respects.