



To: THE COMMITTEE ON HEALTH AND SOCIAL SERVICES

Ms M Williams

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**Submission on migration-related aspects of the National Health Insurance Bill (B11B-2019): Collective Voices for Health Access coalition**

Background:

1. This submission is made on behalf of the coalition *Collective Voices for Health Access*. Our Coalition was formed in August 2022 (originally Collective Voices against Health Xenophobia) and consists of more than 60 organisations and individuals in South Africa that resist health xenophobia<sup>1</sup> in all its manifestations and who advocate for Universal Health Coverage for all. We challenge attempts to target and exclude migrant people from accessing healthcare as guaranteed under section 27 of the Constitution, the National Health Act, and other practices defined as health xenophobia and discrimination.
2. Our Coalition was established in response to the increasingly violent and flagrant human rights abuses of migrants in relation to health care. For example, members of the vigilante group

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<sup>1</sup> We define health xenophobia as “encompassing the lack of provision of health services, the experiences of those who cannot access and receive services, and to restrictive legislation and policy as well as informal practices within health care facilities. Health xenophobia, therefore, can refer to patients being turned away from health facilities due to a lack of documentation or inability to pay (often unlawful) fees, to the harassment and abuse of foreign patients by healthcare staff including administrative staff and security, to policy amendments which reduce the rights of migrant people to access basic healthcare services. This includes denying migrant people health care, creating barriers to Universal Health Access or to providing sub-standard care. Health xenophobia can target internal and cross-border migrant people but practices generally focus on cross-border migrant people. See in particular Rebecca Walker and Iriann Freemantle (in press) “To say that we cannot share this life-saving vaccine with you because you are foreign is to say your life doesn’t matter”: Towards strategic and thoughtful action: an audit of responses to counter health xenophobia in the South African public health system 2000-2022”. May 2023, Collective Voices for Health Access, commissioned by the Health Justice Initiative.

*Operation Dudula* have prevented non-South Africans<sup>2</sup> (and South Africans<sup>3</sup>) from entering health facilities, have attacked people outside public health clinics<sup>4</sup> and have removed people from clinic premises<sup>5</sup>. We have called for greater accountability for xenophobia and the sanction of leaders who support or encourage health xenophobia.<sup>6</sup> We have provided evidence and research on how health xenophobia negatively impacts on public health and the health of individuals.

#### Support for National Health Insurance:

3. Our Coalition is in full support of South Africa's committed response to bring about health access to all, and the values encapsulated by the National Health Insurance Bill with particular reference to achieving "universal access to quality health care services in the Republic", as set out in the current Bill (B11B-2019).
4. Many of our member organisations have provided written and oral submissions during the various stages of the conceptualisation of the NHI Bill, including on the White Paper on National Health Insurance and the old Bill (B 11—2019). In the interest of brevity, we will not duplicate these detailed arguments here, but provide key extracts in appendices to this submission.

#### Concerns over unjustifiable violations of rights and migrant exclusions

5. In many of these submissions, Coalition partners have emphasised that there should be no unfair discrimination on the basis of nationality and documentation status in access to health care services. As the Johannesburg Migrant Health Forum pointed out in their submission on the White Paper 'If a decision is taken to exclude certain people from the coverage of the

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<sup>2</sup> Kgaugelo Masweneng "Protesters turn back patients and migrants at Kalafong hospital" *TheTimes* 29 August 2022, available <https://www.timeslive.co.za/news/south-africa/2022-08-29-protesters-turn-back-patients-and-migrants-at-kalafong-hospital/>

<sup>3</sup> "a dark-skinned Venda speaking woman was left hurt and distraught after a confrontation with Operation Dudula members who were barring foreign nationals from entering the [Kalafong] hospital on Monday. "Is it because of the darkness of my skin?" asked the 28-year-old woman who was stopped, questioned and accused of being a foreigner by members of the movement.' - Faizel Patel "Govt condemns actions preventing hospital entry on skin colour and language" *The Citizen* 30 Aug 2022, available <https://www.citizen.co.za/news/south-africa/govt-condemns-actions-preventing-hospital-entry-on-skin-colour-and-language/>

<sup>4</sup> Kimberly Mutandiro "Operation Dudula chases immigrants away from Joburg clinic" *Groundup* 18 January 2023, available <https://www.groundup.org.za/article/operation-dudula-chases-immigrants-away-from-joburg-clinic/>

<sup>5</sup> Video of Jeppe Clinic (19 Jan 2023) showing Operation Dudula members chasing patients out of the waiting room onto the street <https://twitter.com/TheTruthPanther/status/1616074457860435974>

<sup>6</sup> 'You are killing my health system': Limpopo MEC under fire over comments on Zimbabweans *News24* 24 Aug 2022, available <https://www.news24.com/news24/southafrica/news/watch-limpopo-health-mec-under-fire-over-comments-blaming-zimbabweans-for-huge-strain-on-hospitals-20220824>

Collective Voices "Open letter – Collective Voices against Health Xenophobia's appeal to the health minister" *Daily Maverick* 6 March 2023 <https://www.dailymaverick.co.za/article/2023-03-06-health-xenophobia-an-urgent-appeal-to-the-health-minister/>

White Paper, such a decision can only be based on clear evidence that the limitation of rights is necessary and justifiable— and done in a clear and transparent manner.<sup>7</sup>

6. These arguments were repeated when the old Bill was released for comment. In their submissions, which are annexed to this submission, SECTION27 remarked that the limitations imposed by the Bill as to who is eligible to registered access health services constitutes a ‘significant and unlawful regression in access to health care services by asylum seekers [and] undocumented migrants... which will be subject to legal challenge on constitutional grounds.’ In their submission, SECTION27 pointed out that this regression is also a matter of public health concern as it would deprive asylum seekers and undocumented persons from access screening and treatment for HIV. This is despite the high prevalence of HIV in South Africa and in the southern Africa region more broadly; and despite South Africa’s commitment to reducing the transmission of HIV.
7. In SECTION27’s and the Scalabrini Centre’s legal opinion to and in meetings with the Portfolio Committee<sup>8</sup>, Parliamentary Legal Advisors, they warned that the treatment of asylum seekers, particularly, is concerning given that they are vulnerable persons who enjoy special protection in international law. In addition to that, the regressive measures being adopted by the State deprive persons of existing rights and access in the absence of a compelling justification.
8. In the context of international law, the comments of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in its concluding observations on the initial report of South Africa in 2018 are instructive. The Committee
  - a. urged the SA government to adopt the NHI Bill to reduce inequalities in health (para 64(a))
  - b. indicated that the SA govt should “Ensure that all people in need of life-saving treatment have access to affordable medicines, in particular antiretroviral drugs for people living with HIV”. All people would include everyone, not just citizens (para 64(c))
  - c. drew South Africa’s attention to the CESCR statement on the duties of States towards refugees and migrants under the Covenant. Paragraph 6 of the statement states that *“The Committee has made it clear that protection from discrimination cannot be made conditional upon an individual having a regular status in the host country. In its general comment No. 20, it emphasized, for instance, that since “the ground of nationality should not bar access to Covenant rights, ... all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care”*<sup>9</sup>
  - d. dealt with austerity quite firmly and notes “where austerity measures are unavoidable, they should be temporary, covering only the period of the crisis,

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<sup>7</sup> Johannesburg Migrant Health Forum, Submission on the White Paper on National Health Insurance, 7 June 2016, available from <https://www.mm3admin.co.za/documents/docmanager/f447b607-3c8f-4eb7-8da4-11bca747079f/00104917.pdf>

<sup>8</sup> Including in oral representations by the Scalabrini Centre of Cape Town to the Parliamentary Portfolio Committee on 9 February 2022.

<sup>9</sup> UN Committee on Economic, Social and Cultural Rights "Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights" E/C.12/2017/1 available from <https://www.refworld.org/docid/5bbe0bc04.html>

necessary and proportionate; should not result in discrimination and increased inequalities; and should ensure that the rights of disadvantaged and marginalized individuals and groups are not disproportionately affected.” (para 19)

#### Key Changes in the new Bill

9. Regrettably, despite these warnings, very few changes were effected in the current Bill in sections related to migrants. Key changes are:
  - a. The current Bill replaced the term “illegal migrant” with “illegal foreigner” (section 4(3)) to bring the terminology of the Bill in line with that of the Immigration Act 13 of 2002).
  - b. The definition of ‘emergency medical services<sup>10</sup>’ was broadened in the current Bill which increased the health services to which asylum seekers and “illegal foreigners” are entitled. The old Bill restricted access to ‘*pre-hospital* acute medical treatment and transport of the ill or injured’ this created the absurd position where asylum seekers and undocumented persons would have been left on the roadside once pre-hospital services had been rendered. This is a welcome amendment.
  - c. The current Bill replaced “foreign nationals” with “foreigners” in section 5(6).
  - d. The current Bill requires people seeking health care services to be registered with the Fund and show proof of identity (section 4(4)), while the old Bill only required “proof of registration” in the same section.
  - e. Similarly, section 5(8) of the old Bill has been replaced with the requirements of registration of the Fund and providing proof of identity.
10. In the Memorandum of Objects of the current Bill, the clause-by-clause analysis states that section 4 provides that the Fund must purchase comprehensive health service benefits on behalf of, among other persons, all pregnant women. However, section 4 of the current Bill, makes no mention of pregnant or lactating women but should include both. The failure to include pregnant and lactating women in-text of section 4 is clearly an oversight: Section 4(3)(a) of the National Health Act 61 of 2003 currently provides that the State must provide free health services to pregnant and breastfeeding women, and children under six. In a recent court order of the Gauteng Division of the High Court, Johannesburg it was confirmed that this section applies to migrant women and children, irrespective of nationality or documentation status.<sup>11</sup>

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<sup>10</sup> The current Bill defines “**emergency medical services**” as “services provided by any private or public entity dedicated, staffed and equipped to offer acute medical treatment and transport of the ill or injured”; The old Bill defined the same as “services provided by any private or public entity dedicated, staffed and equipped to offer pre-hospital acute medical treatment and transport of the ill or injured”.

<sup>11</sup> S27 and Other v Member of the Executive Council Gauteng Department of Health and Others 2022 -the court order was handed down on 14 April 2023, it can be found here: <https://section27.org.za/wp->

11. The rest of the section 4(3) provides that the State must also provide free primary health services to all persons who are not on medical aid and free health services for those seeking abortions in terms of the Choice on Termination of Pregnancy Act 92 of 1996. By parity of the reasoning elicited from the court order, this provision also applies to asylum seekers and undocumented persons, which means they are currently entitled to free health services.

#### Unconstitutionality of discrimination against asylum-seekers and undocumented persons

12. We believe that the above changes are, to a large extent, superficial and that the provisions in sections 4 and 5 in the current Bill still unfairly discriminate against asylum seekers<sup>12</sup> and undocumented persons and will, accordingly, not pass constitutional muster.

13. Section 5 of the Bill, speaking to eligibility to receive health care services, requires substantial amendment: Accreditation should not be dependent on identity documentation. In the absence of documentation, a declaration or statement should be an alternative that is available.<sup>13</sup> If not then undocumented South African nationals, permanent residents and vulnerable migrants, asylum seekers and refugees would be excluded from access to the health care services.

14. Similarly, the requirement for registration under section 5 and identity documents in s.4(4) would result in stateless people and undocumented South African nationals being among those denied access to services in the current iteration. StatsSA estimates that around 12% of South Africans do not have identity documents<sup>14</sup>.

#### Recommendations:

15. We recommend the following:

I. That “Population Coverage” in section 4 of the Bill is amended thus with suggested changes in **bold blue** text with and deletions in ~~strikethrough~~ text:

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[content/uploads/2023/07/Court-Order-section-27-and-others-vs-MEC-for-health-Gauteng-and-others-case-no-19304-22-Court-Order-Default-Judgment-14-April-2023-Sutherland-DJP-1.pdf](https://www.saflii.org/za/cases/ZAECGHC/2019/126.html).

<sup>12</sup> For a Constitutional analysis of the NHI approach to asylum-seekers in particular, see Moyo PT; Botha J and Govindjee A "The Constitutionality of the National Health Insurance Bill: The Treatment of Asylum Seekers" *PER / PELJ* 2022(25) – DOI <http://dx.doi.org/10.17159/1727-3781/2022/v25i0a12221>

<sup>13</sup> In the case *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019) the Eastern Cape High Court allowed for affidavits in the absence of documentation for school access. Para 135(6) reads as follows: “The first to third respondents are directed to admit all children not in possession of an official birth certificate into public schools in the Eastern Cape Province (the schools), and where a learner cannot provide a birth certificate, the Principal of the relevant school is directed to accept alternative proof of identity, such as an affidavit or sworn statement deposed to by the parent, care-giver or guardian of the learner wherein the learner is fully identified.” Judgement available at <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html>

<sup>14</sup> STATSSA, Statistical release, P0305, Recorded live births, 2018

Section 4(1) of the current Bill be amended to edit subsections (a) to (d) and to include subsections (f) to (i) to read as follows:

....

- (a) South African citizens **(with or without documentation);**
- (b) permanent residents **(with or without documentation);**
- (c) refugees **(with or without documentation);**
- (d) inmates as provided for in section 12 of the Correctional Services Act, 1998 (Act No. 111 of 1998); **and detainees at police stations or immigration offices including those under administrative immigration detention**
- (e) certain categories or individual foreigners determined by the Minister of Home Affairs, after consultation with the Minister and the Minister of Finance, by notice in the Gazette.
- (f) asylum seekers (with or without documentation);**
- (g) undocumented migrants from SADC states;**
- (h) all children, regardless of their citizenship or immigration status;**
- (i) special exemption permit holders<sup>15</sup>**

II. That section 4(2) be amended to provide as follows:

(2) An ~~asylum seeker or illegal foreigner~~ **undocumented adult migrant who is not from a SADC state and is not in detention** is entitled to:

- (a) primary health care services;**
- (b) emergency medical treatment;
- (c) services for notifiable conditions of public health concern;
- (d) sexual and reproductive health care services; and**
- (e) services related to HIV.**

III. That section 4(3) be amended to provide as follows:

(3) All children, including children of ~~asylum seekers or illegal foreigners~~ **an undocumented adult migrant who is not from a SADC state and is not in detention**, are entitled to basic health care services as provided for in section 28(1)(c) of the Constitution.<sup>16</sup>

IV. Section 4(4) be deleted.

**II. That “Registration of Users” in Section 5 is amended as follows:**

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<sup>15</sup> Exemption permit holders like Angolan, Zimbabwean and Lesotho Exemption permit holders received reduced requirements permits and are among the most vulnerable as recognised in the Scalabrini Centre case on the extension of Social Relief from Distress Grants - Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others (22808/2020) [2020] ZAGPPHC 308; 2021 (1) SA 553 (GP) (18 June 2020). Similarly, this group should have access to NHI.

<sup>16</sup> Note that this is minimum and the full inclusion of all children under proposed s4(1)(h) would be more in keeping with the spirit and purpose of section 28 of the Constitution.

5(2)(b) A child born to a user **or non-user** must be regarded as having been registered automatically at birth.

[...]

(5) When applying for registration as a user, the person concerned must provide his or her biometrics and such other information as may be prescribed, including fingerprints, photographs, proof of habitual place of residence and— (a) an identity card as defined in the Identification Act, 1997 (Act No. 68 of 1997); (b) an original birth certificate; or (c) **a refugee status certificate<sup>17</sup>** or refugee identity card issued in terms of the Refugees Act **(d) an asylum seeker visa or (e) a ministerial exemption permit or (f) an affidavit in the absence of identification or birth registration documents from anyone covered in section 4(1)(a) to (i).**

(6) The Minister, in consultation with the Minister of Home Affairs, may prescribe any further requirements for registration of foreigners contemplated in section 4(1)(e) **save that an affidavit may be submitted in the absence of any identity documentation requirements introduced.**

(7) Accredited health establishments whose particulars are published by the Minister in the Gazette must, on behalf of the Fund, maintain a register of all users containing such details as may be prescribed. **Such a Register should be kept confidential by the department of health and must not be shared with third parties including other government departments.**

(8) A person seeking health care services purchased for his or her benefit by the Fund from an accredited health care service provider or health establishment must be registered as a user and present proof of identity **which may be in the form of an affidavit** to that health care service provider or health establishment when seeking those health care services

We would welcome an opportunity to make an oral submission on these points to expand further. Please contact Marlise Richter at [marlise@healthjusticeinitiative.org.za](mailto:marlise@healthjusticeinitiative.org.za) for any queries

Yours sincerely



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<sup>17</sup> In practice refugee status certificates are issued to recognised refugees, but the ID cards sometimes takes months or years to be issued by Home Affairs and access to health care cannot be denied in such cases.



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Endorsed by the following organisations

1. Africa Solidarity network (ASONET); Nomvula Maneli
2. Congolese Civil Society of South Africa; Isaiha Mombilo
3. Doctors without Borders Southern Africa (MSF); Claire Waterhouse
4. Embrace, the Movement for Mothers; Nonkululeko Mbuli
5. Health Justice Initiative; Marlise Richter
6. Inchange Community Resource Centre; Goodboy Cyril Gumede
7. Scalabrini Centre of Cape Town; James Chapman
8. SECTION27
9. Sophiatown Community Psychological Services; Johanna Kistner

Appendices:

Appendix A: SECTION27/TAC 2019 submission – (29 November 2019)

Appendix B: Scalabrini oral submission presentation (2019)

Appendix C: SALC submission (22 Nov 2019)