

UHC Law in Practice

Legal access rights to health care



COUNTRY PROFILE
KENYA

Legal access rights to health care country profile: Kenya

(UHC law in practice)

ISBN 978-92-4-000016-2

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Suggested citation. Legal access rights to health care country profile: Kenya. Geneva: World Health Organization; 2019 (UHC law in practice). Licence: [CC BY-NC-SA 3.0 IGO](https://creativecommons.org/licenses/by-nc-sa/3.0/igo).

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Printed in Switzerland



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Acknowledgements

The country profile was written by Simone Bosch, independent health policy consultant and lawyer based in London (UK) under the technical supervision of David Clarke, Team Leader UHC and Health Systems Law, Department of Health Systems Governance and Financing, World Health Organization, Geneva, with help sourcing laws and valuable input on the Kenyan health care system by Regina Munyiva Mbindyo, World Health Organization, Kenya Country Office and Andre Verani, US Centres for Disease Control and Prevention, Center for Global Health.

Legal recognition of access rights to essential health services, medicines and vaccines

Commitment to achieve UHC

Vision 2030, Kenya's long-term development strategy for economic, social and political planning launched in 2007, contains as one of its flagship projects for the health sector the creation of a mandatory national health insurance scheme. President Uhuru Kenyatta's "Big 4 Agenda" includes 100% UHC coverage by 2022 as one of Kenya's four most important development priorities (alongside food security, affordable housing and manufacturing). And Kenya's Health Policy 2014-2030 includes the provision of essential health care as a key objective. [1-3]

In December 2018, the Kenyan Government launched their UHC programme through pilots in four counties. It is planned to scale the UHC programme to all of Kenya's 47 counties within four years. The underlying UHC strategy was developed in collaboration with the World Health Organization. [4]

Rights-based approach

The Constitution of Kenya stipulates in Article 43 that every person has the right to the highest attainable standard of health, including the right to health care services and reproductive health care; it does not define "highest attainable standard of health". Article 43 also sets out that a person shall not be denied emergency care, and that the State shall provide support to those unable to care for themselves or dependents (including health). Additional health-related rights enshrined in Article 43 encompass the rights to reasonable standards of sanitation, adequate housing, clean and safe water, freedom from hunger and adequate food of acceptable quality as well as social security. [5]

The Health Act also enshrines the right to health, defining health as "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" (Article 2). It includes the progressive access to promotive, preventive, curative, palliative and rehabilitative services (Article 5). The Health Act also enshrines the right to reproductive care (Article 6) and the right to emergency care (Article 7). [6]



Citizens

Based on the National Hospital Insurance Fund Act, the National Hospital Insurance Fund (NHIF) provides social health insurance to Kenyans in the formal and informal sector, their spouses and children. The NHIF is a state corporation which formerly was a department at the Ministry of Health. Anyone is eligible to join the national scheme who possesses Kenyan citizenship, is 18 years of age and has monthly earnings of more than KES 1,000 (ca. USD 10). Applicants are not filtered for pre-existing conditions and there are no limits on included dependents. Salaried persons pay contributions based on income, ranging between KES 150-1,700 (ca. USD 1.5-17) monthly, through statutory salary deductions, remitted to the NHIF via the employers. Self-employed and informal sector workers as well as retirees can purchase the Supa Cover for a fixed monthly rate of KES 500 (ca. USD 5) on a voluntary basis. [7-10]

Salaried persons pay contributions based on income.

Civil servants and disciplined services (e.g. police, prison staff) are covered under the Civil Servants Scheme (CSS). The CSS is funded by the Kenyan Government, with funds being managed by NHIF in a fund separate from its other funds. Paying members are limited to register six dependents for free (additional members can be registered by paying additional fees). Around 600,000 civil servants and their dependents are enrolled in the CSS. [11]

The Health Insurance Subsidy Programme (HISP) is a scheme for poor Kenyans which provides free insurance coverage. It targets those living in extreme poverty, orphans and vulnerable children, the elderly and persons with severe disabilities. In 2016, around 170,000 households were insured through HISP, covering around 600,000 persons. [8, 11, 12]

NHIF offers additional packages targeting specific groups: the Linda Mama programme provides free maternal health care, while the Edu-Afya programme offers free insurance for all students in public secondary schools. [13, 14]

Insurance coverage has been increasingly rising. In 2009, 8.17% of Kenyans had insurance, of which 1.56% were covered by NHIF. By 2014, 19.59% of Kenya's citizens had insurance, of which 15.80% were covered by NHIF. Insured people not covered through NHIF were insured through private or employer-provided insurance, microfinance or community-based health insurance. All others had to pay for treatment out-of-pocket or receive health care via non-governmental organisations or international organisations. [7]

NHIF membership is biased towards people working in the formal sector: In 2017, 24% belonged to the informal sector even though 83% of employed persons in Kenya work in the informal sector. [11]

NHIF states that 22million people are insured through them (7.3 million contributing members plus their dependents). Other publications put the number of insured, including dependents, at around 6.6 million members in 2017. [8, 11]

Residents

Foreigners with a work or study permit can enrol for insurance cover through the NHIF just like Kenyan citizens. [9, 15]

Undocumented migrants

Undocumented migrants cannot enrol for insurance cover under the NHIF and have to pay for treatment out-of-pocket or receive health care through non-governmental organisations or international organisations.

Benefit package

Legal mechanism to define the benefit package

An early attempt at defining a benefit package resulted in the Kenya Essential Package for Health (KEPH) laid out in the Health Sector Strategic and Investment Plan 2013-2017. The Plan's aims were to ensure that the KEPH is made available to vulnerable populations (such as prisoners, refugees, minority groups, sex workers, people living in remote areas, women) and to significantly improve access to the KEPH. The KEPH was used as a guide of which services were to be provided at Ministry of Health facilities, but often were not due to lack of funding, personnel or supplies. [16, 17]

The Plan's aims were to ensure that the KEPH is made available to vulnerable populations

The NHIF developed their own benefit packages for their different schemes, modelled on the KEPH as included in the Kenya Health Sector Strategic and Investment Plan (KHSSP) 2014-2017.[18]

As part of Kenya's UHC initiative, the Ministry of Health announced the constitution of a two-year Advisory Panel for the Design and Assessment of the Kenya UHC Essential Benefit Package in June 2018. It consists of 15 members and two secretaries and its Secretariat is housed at the UHC Delivery Unit of the Ministry of Health. The Advisory Panel is tasked to develop criteria for the inclusion of services, medicines and medical supplies, using an evidence-based approach and taking into account cost effectiveness and equity; proposing a benefit package and costing it; and proposing a uniform pricing strategy. The Advisory Panel is required to conduct a consultation with stakeholders, including health professionals, consumer representatives and the private health sector regarding the proposed pricing framework. [19]

The Advisory Panel first developed an initial set of services and products for inclusion in the UHC pilot programme, launched in December 2018. The Advisory Panel considered, and largely adapted, the KEPH and the National Essential Medicines List when developing the initial set of services and products. This set was not widely circulated, but it was used by policy-makers to inform decisions on what services could feasibly be included in the pilot phase until the Advisory Panel develops a full benefit package and

pending necessary administrative reforms, such as consolidation of risk pools and government financing. Furthermore, only limited enabling legislation exists around the mechanisms for decision-making on the package design, the specific mechanisms for ensuring/limiting access, monitoring and redress. Lastly, uncertainties exist on the division of national and county responsibilities. [16, 20]

The Advisory Panel is now in its second phase of work, and significant progress towards the definition of a full-fledge benefit package is expected. It is also anticipated that the ongoing reforms associated with the introduction of UHC will bring some alignment to previously fragmented initiatives and processes. [16]

Entitlements under the NHIF benefit packages

The NHIF's general cover includes outpatient services including general consultations, diagnosis and treatments of common conditions and sexually transmitted diseases, laboratory diagnosis, prescription drugs, chronic disease management (HIV/AIDS, diabetes, asthma, hypertension, cancer), radiology, physiotherapy, referral to specialised services, family planning, midwifery services, ante- and post-natal care, health and wellness education and health counselling, screening and immunization and vaccines according to the schedule of the Kenya Expanded Programme on Immunization. Covered inpatient services include surgical procedures (hospital charge and nursing, prescription drugs, operating theatre charges, health care professionals' fees), specialist consultations, delivery (incl. caesarean section), ante- and post-natal care, renal dialysis, cancer treatment, emergency road evacuation, overseas treatment and rehabilitation for drug and substance abuse. [8, 18, 21, 23]

Cover for civil servants and disciplined services under the CSS scheme is similar to the general NHIF coverage, but includes the added outpatient benefits of optical care, occupational therapy and minor surgical services. Different caps apply depending on seniority level. [11, 22]

The Linda Mama cover includes ante-natal, delivery and post-natal care, referrals as well as infant care. [13]

The secondary school cover Edu-Afya includes inpatient and outpatient care, dental and optical care, overseas treatment as well as air and road emergency rescue. [14]

Excluded from outpatient coverage are cosmetic procedures and fertility treatments. Workers who receive compensation or damages for work-related injuries and disability under the Work Injury Benefits Act are not entitled to benefits under their NHIF cover to the extent to which such compensation or damages are recoverable. [9, 23-25]

Even though the benefit package provided by the general cover of the NHIF is comprehensive, the actual range of benefits beneficiaries can access is oftentimes limited due to non-availability of services and medicines at health care providers. In addition, it is skewed towards the CSS which pays six times more per enrolled member than the national scheme for its beneficiaries. [11, 26]

The Health Act contains a complaints process which can be used to lodge a complaint about the manner of treatment received at health facilities.

Legal mechanism to enforce access rights to health care

Beneficiaries of one of the NHIF insurance schemes can lodge complaints by email. However, neither the NHIF website nor the National Hospital Insurance Act set out a complaints process. The Health Act contains a complaints process which can be used to lodge a complaint about the manner of treatment received at health facilities. However, it is unclear if this complaints process may be used to enforce entitlements under the NHIF schemes. It seems that patients lack recourse if they are refused services to which they are entitled to under their NHIF insurance cover, or if they are made to pay out-of-pocket for covered services and medicines. [6, 9, 10]

Access barriers

One of the main access barriers to insurance coverage is the lack of affordability of premiums. The NHIF increased its premiums in 2015, the first increase since 1988, resulting in significant raises in monthly fee payments of 400% for lowest-paid formal sector employees and 213% for informal sector workers.¹ Probably as a result of affordability issues, the attrition rate of informal sector workers insured through the NHIF was 73% in 2017, and 75% of informal sector workers state that they cannot afford the insurance premiums. [11]

To counter affordability issues, the NHIF introduced the HISP for poor Kenyans with support from the World Bank Group and Rockefeller Foundation in 2014 with the aim to insure nine million Kenyans living in extreme poverty by 2020. However, an impact evaluation conducted in 2017 showed there was no statistically significant impact on health care utilisation and out-of-pocket payments by beneficiaries of the Programme. [11, 12]

The lack of knowledge on insurance options and enrolment procedures impedes access to insurance, as does a bias to service provision in urban facilities, resulting in geographic access barriers for rural populations. In addition, informal sector workers cite differential treatment of CSS members and beneficiaries of the national scheme of the NHIF by health care providers as reasons not to sign up for insurance cover. [11]

Irregular migrants choose to avoid health care due to distrust of authorities and fear of deportation. Additional access barriers for migrants are stigma, language barriers and lack of health literacy. As a result, many prefer to seek treatment at private, oftentimes not licensed health care facilities. [27, 28]



Anti-discrimination provisions applicable to health care

Ratification of international human rights instruments

Kenya has acceded to the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Elimination of All Forms of Discrimination against Women; and has ratified the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities. Kenya has also ratified the African Charter on Human and Peoples' Rights, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child. [29-31]

National anti-discrimination provisions and complaint mechanisms

Equality, human rights, non-discrimination and the protection of marginalised groups² are enshrined as national values in the Kenyan Constitution, and the Constitution's non-discrimination clause protects from discrimination based on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Children's rights to health care (as well as health-related rights to basic nutrition and shelter) are separately mentioned. The

Out of Art. 59 was also borne the Commission of Administrative Justice (CAJ), the Kenyan Ombudsman Office, which is governed by the Commission on Administrative Justice Act. These three commissions are referred to collectively as the "Article 59 commissions". [32-35]

The Kenya National Human Rights Commission has two main functions: it monitors the Government in the area of human rights and provides human rights leadership. It investigates human rights complaints, reports on them and makes recommendations. The Kenya National Gender and Equality Commission monitors the Government regarding gender inequalities and discrimination and provides leadership with respect to equality and freedom from discrimination. It investigates discrimination complaints, reports them and makes recommendations. Both Commission do not have jurisdiction where a person has a right of appeal or other legal remedy, unless the Commission deems it unreasonable to expect a claimant to appeal or take other legal remedies. [34-37]

The CAJ investigates maladministration in the public sector at national and county level, such as complaints of delay, abuse of power, unfair treatment, manifest injustice or discourtesy. The CAJ's complaints handling includes inquiries, investigations, adjudication or alternative dispute resolution. It can also join public interest litigations (as a party, an interested party or friend of the court). CAJ decisions can be reviewed by the CAJ or challenged in court. [32, 38]

Based on the Health Act, every person has the

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