Protecting critical posts at times of austerity

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It is becoming increasingly clear that the biggest threat to ensuring equitable access to human resources for health in rural communities today is not the shortage of health care workers *willing* to "go rural" but rather finding the *financial resources* to appoint those ready to serve.

While budget constraints will always be a challenge for Provincial Departments of Health (DoH)—owing to the need to balance a growing number of competing priorities—considerable concern is developing among civil society and health managers alike that increasingly austerity measures are being implemented in a way that undermines the progressive realization of the rights of communities to access health care.

We are now seeing how the mismanagement of financial austerity in most provinces is resulting in the deterioration in accessing care. Our contention is that this is unlawful and guidance must be sought from legislation such as the Public Administrative Justice Act as to how critical posts can be protected in times of austerity.

Status quo and causes

In recent years "staffing moratoria" or "freezing of posts" have become a widespread practice that is implemented both officially (such as in the Eastern Cape and North West Provinces where memos and circulars provide instructions on how it should be implemented) and unofficially through repeated delays in filling vacant posts even where candidates are available.

In all instances where moratoria have been implemented, budget constraints are cited as the most significant factor in deciding to take this kind of action.

The compensation of employees is by a long way the most significant proportion of a provincial DoH's budget and combined provincial increased so has become a clear target for control during times of austerity (1). The proportion of provincial health budgets allocated to the compensation of employees has increased from 54% in 2005/06 to 64% in 2014/15. Over-expenditure due to higher than inflationary increases in salaries, snowballing accruals, rampant corruption (2), and a significant slowdown in increases to government revenue, all mean that there is no longer budgetary space for increases to compensation budgets.

This was clearly articulated in the most recent Medium Term Budget Policy Statement (1) where the Treasury argues:

"The revised Medium Term Expenditure Framework (MTEF) provides no funds to expand public sector employment over the next three years. Departments that had planned to expand headcount or fill vacancies need to postpone their plans. Some institutions may need to reduce the number of people they employ… Budgets that would have been available to fund vacant positions will now be required to compensate existing employees."

While controls on expenditure are to some extent unavoidable, approaches that result in blanket restrictions on employment without some flexibility for the filling of critical posts will have severe consequences for access to care, particularly where facilities are already understaffed.

In the absence of an agreed-upon definition of what a critical posts is it becomes difficult to properly control for the potentially disastrous consequences blanket moratoria have on service delivery. In our view the definition is quite simple and critical posts are those that are likely to create a situation that is "disastrous; at a point of crisis", if left unfilled.

This is to some extent implied in the National Human Resources for Health Strategy (2011) (3) which calls upon all stakeholders to:

"Ensure that provinces do not freeze critical health professional posts in under-served and rural areas as part of hiring moratoria resulting from overspending." (Chapter 8, Activity 8.1.3)

The trouble is that this sort of restriction is not being applied during the implementation of moratoria currently in place. North West Province, for example, which has the second lowest doctor-to-population ratio is amongst the worst affected. This is demonstrated by a recent memo (4) by the Office of the Premier (25 September 2015) that signified a total "withdrawal of the approval granted to Departments to fill posts". This signalled the continuation of a moratorium implemented in November 2014 by NWDoH Office of the Chief Financial Officer that announced a:

1. Total embargo on all appointments
2. Total embargo on normal maintenance of physical infrastructure
3. Total embargo on purchase of equipment

The impact on the ground is hard-hitting. Clinics are being closed; bursary graduates can no longer be employed and facilities run on a skeleton basis.

The situation in Eastern Cape Province is not much better, where an announcement was made on 8 September 2015 (5) that the authority to appoint personnel was withdrawn from District Managers, to be centralized in the provincial office and each post requiring approval by the highest official in office, the Superintendent General.

Impact on access to health care

For the poor rural patient the consequences are many and can be fatal. In the words of a rural District Manager, the impact on health care include:

- Poor quality of care & adverse events – a spike in complaints
- Poor patient outcome – affecting poor retention rates such as in TB care
- Long waiting times – impacting negatively on health seeking behaviour
- Poor supervision rates & non compliance to policies
- Poor response time in Emergency Medical Services
- Integrated Chronic Diseased Model & National Core Standards compliance

A health care worker from a District Hospital in Mpumalanga commented that "Specific cases where service delivery has been compromised often involve a lack of professional nurses. The paediatric ward, for example, is run by a staff nurse on the weekend and after-hours (October, 2015)." A North West medical officer explained that:

"Maternal and Child services are severely affected, there are not enough nurses, no midwives, and you will find one midwife on night duty. It goes against protocol because patients cannot be monitored regularly correctly. This results in maternal deaths (August 2015)."

A similar picture if found elsewhere in this rural province, as the following healthcare worker account demonstrates:

"There have been no staff appointments in the district ever since the staffing moratorium (December 2014). Nurses have either resigned or retired. The Doctors that have left have not been replaced. One Family Physician left (our) Sub District. Over 30 nurses positions have not been replaced (…). Three Medical Officers at Hospital X have left. One Family Physician also left. (This) Sub District is a large sub district we need them both. (…) As you can imagine due to staff shortages there is lots of stress on the health care workers that are left behind, they are burnt out and tired. Staff shortages have negatively affected health service delivery in the district. Shortage of personnel affects emergency medical services, because you will find that there are no drivers available to drive ambulances or most times the ambulances are broken. Management is generally aware of all these challenges we are experiencing in the province, they tell us that when the budget is available only then will the problems be attended to. (This) District is a rural district, the various challenges here become severe due to the rurality factor (August 2015)."

Another health care worker from North West Province explains the longer-term and policy implications:

"What has become unfortunate is that the nurses who complete Community Service are not being absorbed into the province they are going to other provinces. The same is happening with the medical interns; after finishing Community Service they are not retained due to budget constraints. You know currently nationally and globally the talk is that Primary Health Care is the corner stone of health service delivery. This initiative is only possible if we have a reliable supply of competent health care workers, the different levels of care are affected from primary to secondary level."

The implications of the Constitution and the Promotion of Administrative Justice Act for decision-making on freezing of posts

In a developmental state the implementation of staffing moratoria without due consideration for the impact on access to health care services is not only contrary to the intent of our Constitution it may also be unlawful.

For instance, the constitutional right to have access to health care services and the immediately realizable right of children to access basic health care necessarily includes the human resources to provide that service. The question is how to realize this right in the context of resource constraints. Is it acceptable to simply freeze all vacant posts as a cost-saving measure?

Sasha Stevenson, a health attorney at SECTION27, explained at a workshop on frozen posts at the recent conference in October by the Public Health Association of South Africa that " we need to look at rights and obligations not just in relation to health directly but in relation to the operations of government."

The law provides good guidance to provincial Treasuries and Departments of Health in this regard. Section33 of the Constitutions (6) prescribes that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, while Section195 confirms the democratic values and principles enshrined in the Constitution that should govern public administration including:

- Efficient, economic and effective use of resources
- Public administration that is development-oriented

The Promotion of Administration Justice Act (PAJA) (7) gives further direction to these Constitutional principles. It defines "Administrative action" as "a decision taken or failure to take a decision by an organ of state when exercising public power which adversely affects the rights of any person and has a direct, external legal effect."

Here administrative action will be unfair "unless it is reasonable" and that in turn means the action must be rational and proportional. In the case of the freezing of posts, decision-makers need to consider whether the decision enables the maximum realisation of the right of access to health care services within available budget. For an action to be rational it needs to be supported by evidence and it needs to further the purpose for which it was made. For an action to be proportional it "must not be disproportionately onerous in effect" - in other words, the impact of the decision needs to be considered.

For reasonable decision making in the case of the freezing of posts, Government - Health and Treasury representatives in this case - need to assess the extent of the budgetary shortfall and identify what decision should be made on the basis of what would be fair administrative action. In terms of evidence the key questions that must be answered is whether the proposed decision will achieve its aims, which must be the maximum realisation of the right of access to health care services within available budget, or will the decision be too onerous to justify its outcome.

This is often not happening. As an insider source complained in one of the affected provinces "Decisions are being made completely outside of the Health Department - by Treasury and by politicians."

Problematic decision making around administrative justice is illustrated in the Eastern Cape where a decision was made to place a moratorium on all hiring including health professionals because of previous moratoria on hiring for non-health professional posts didn't work with people allegedly circumventing the system. A rational response would have been to address this issue through performance management. Withdrawing delegations puts another bureaucratic barrier in the way of hiring and undermines patients' right to access health services through sufficient medical personnel. In the North West Province, the total freeze on posts is arguable the worst – and patients start feeling the brunt of the lack of health care workers as demonstrated above.

Satellite session at PHASA conference

During the session at the PHASA conference on 8 October 2015 in Durban - attended by provincial and district managers, the Office of Health Standards Compliance, North West Treasury and the National Department of Health - the following recommendations were made:

- The National Department of Health should provide guidance through policy on how provinces are expected to protect critical posts at times of austerity
- Critical posts need to be defined locally and these can include health professionals and support staff. The purpose is not to define which categories of staff are to be considered critical. Instead the consequences on patient care should be the determining factor on deciding whether post A in facility B is critical under the given circumstances.
- Districts are expected to develop costed recruitment plans but this does not happen; if such plans are in place it can help District Managers to identify priority posts at times of staffing moratoria.
- Decision–making on cost-saving and cost-cutting must be made at the district level by giving districts the amount to be saved and allowing the district to decide based on PAJA principles of rationality, proportionality and the over-arching constitutional right to progressively realise the right to health, not to stagnate and not to deteriorate.
- Corruption and unauthorised expenditures should be performance managed instead of punishing all managers and districts by withdrawing their authorities for the transgressions of others.
- Government needs to provide guidance for Treasuries on how to exercise their discretion in protecting health rights under Section100 interventions.

Whereas there are no easy solutions to the tight fiscal climate in which health services are to be delivered, it is incontestable that a blanket freeze on posts is unlawful. Provincial Treasuries and Departments of Health are called upon to find reasonable, proportional responses, always aiming to achieve the maximum realization of the right of access to healthcare services within the available budget.

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