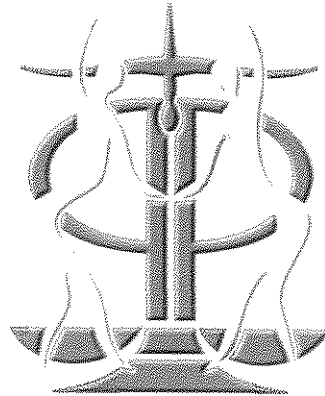


REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION
182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH
AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR
ACT, 1994



PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO. 23 OF 2009/10

State to provide wheelchairs for the indigent

REPORT ON AN INVESTIGATION INTO ALLEGED FAILURE BY THE WESTERN
CAPE DEPARTMENT OF HEALTH TO PROVIDE PROPER HEALTH CARE TO A
DISABLED PERSON

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Executive Summary

- (i) The Public Protector conducted an investigation regarding the alleged failure by the Department of Health: Western Cape (the Department) to provide health care to a disabled person.

The late Mr M D Lobi (Complainant) alleged that:

- (a) His son, Ivanor Lobi (Mr Lobi, jnr) was involved in a serious motor vehicle accident on 29 April 2008 and suffered serious brain damage. He was in a coma since 29 April 2008 but he subsequently regained consciousness.
- (b) His son was initially admitted at a Port Elizabeth Hospital but was transferred to the Apostolic Faith Mission Old Age Home (AFM Home) in Kuilsriver for a period of four months. On 1 December 2008 he was transferred to the Western Cape Rehabilitation Centre (WCRC).
- (c) On 29 January 2009 his son was once again transferred to the AFM Home in Kuilsriver. He was only informed about the transfer at 12:00 on 28 January 2009.
- (d) The Department transferred his son to the AFM Home despite the fact that there is neither any doctor to attend to him, nor medication, social worker, physiotherapist, speech therapist or any other medical treatment to improve his son's medical condition at the AFM Home. He said that the Department "*dumped his son at the AFM Home so that he can die*".
- (e) He requested the Department to transfer his son back to the WCRC, but they refused.

- (ii) The Public Protector found that-
- (a) The Complainant's allegation that the Western Cape Department of Health improperly transferred Mr Lobi, jnr on short notice from the WCRC to the AFM Home was unsubstantiated;
 - (b) Although Mr Lobi, jnr needs permanent long term nursing care and the WCRC could not accommodate him because they do not provide convalescent or long term care, he is still entitled to health care service as provided for in section 27 of the Constitution of the Republic of South Africa (the Constitution), which includes the provision of a wheelchair and assistive devices;
 - (c) It was further found that the Department had failed to inform Mr Lobi, jnr's family timeously that they can request the Department to reclassify Mr Lobi, jnr as a non-medical aid patient if they cannot afford a wheelchair or other assistive devices. This failure resulted in prejudice to Mr Lobi, jnr as he has not been considered to be provided with a wheelchair by the State;
 - (d) The investigation by the Public Protector also interrogated possible systemic deficiencies regarding the provision of wheelchairs and other assistive devices. The investigation revealed that a backlog in this regard has perpetuated for years. It was further found that budget allocations for wheelchairs and other assistive devices are not protected and seem to be somewhat arbitrary. The Public Protector is of the considered view that the Department will not make significant progress regarding the provision of wheelchairs to the indigent unless the budgets and funds allocated for this purpose are protected and spent only for those needs;

- (e) South African legislation, departmental policies and the international Convention provide for a duty on the State to progressively realise the right of disabled persons to health care, including assistive and mobility devices. Any practice by health care institutions to divert already limited allocations for assistive and mobility devices to other 'acute' health care demands, is not only considered to be improper, but also disgraceful.
- (iii) The following remedial action should be taken:
- (a) In view of the evidence that Mr Lobi, jnr cannot afford a wheelchair, the fact that he has been lying on his back for more than two years and the Department's failure to advise the Lobi family regarding the possible reclassification of patients from a medical aid "Private" patient to a non medical aid "State" patient, the Department should reclassify Mr Lobi, jnr to a "State" patient with immediate effect for the purpose of acquiring a wheelchair;
 - (b) Following the aforesaid reclassification, the Department is to take urgent steps to provide Mr Lobi, jnr with a wheelchair and associated assistive devices;
 - (c) The Department should introduce adequate measures to ensure that, once the Head of the Medical Institution/CEO has made an allocation for wheelchairs or other assistive devices, such budget is safe-guarded until the backlog in the Western Cape has been addressed by the Department. It is further recommended that the discretion granted to Heads/CEO's of health care institutions regarding funds allocated for wheelchairs and other assistive devices be revisited as it might be a contributing factor to the backlog;
 - (d) The Department should ensure that every patient that is admitted in every hospital, health facility and district health service in the province is

notified on admission, that if s/he is on a medical aid, s/he can request to be reclassified as a non-medical aid patient as well as the requirements of such reclassification; and

- (e) The above notice should be written in all three official languages of the Western Cape in order to ensure that all patients understand the contents thereof and should be placed in all admission areas of hospitals, health facilities and district health services that are under the control of the Department.

REPORT ON AN INVESTIGATION INTO ALLEGED FAILURE BY THE WESTERN CAPE DEPARTMENT OF HEALTH TO PROVIDE PROPER HEALTH CARE TO A DISABLED PERSON

1. INTRODUCTION

- 1.1 This report is submitted to the next of kin of Mr Ivanor Lobi, the Member of the Executive Council responsible for Health in the Western Cape (the MEC) and the Head of the Department of Health: Western Cape (the Department) in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- 1.2 The report pertains to an investigation undertaken by the Public Protector following allegations of failure to provide proper health care to a disabled person by the Department.

2. THE COMPLAINT

The complaint emanates from the late Mr M D Lobi (the Complainant), who approached the Public Protector on 4 February 2009 with the allegations that:

- 2.1 His son, Ivanor Lobi (Mr Lobi, jnr) was involved in a motor vehicle accident on 29 April 2008 and suffered serious brain damage. He had been in a coma from 29 April 2008 but he subsequently regained consciousness;
- 2.2 His son was initially admitted at a Hospital in Port Elizabeth, but was subsequently transferred to the Apostolic Faith Mission Old Age Home (AFM Home) in Kuilsriver for a period of four months. On 1 December 2008 he was transferred to the Western Cape Rehabilitation Centre (WCRC);

- 2.3 On 29 January 2009 his son was once again transferred back to the AFM Home in Kuilsriver. He was only informed about the transfer at 12:00 on 28 January 2009;
- 2.4 The Department transferred his son to the AFM Home despite the fact that there is neither any doctor to attend to him, nor any medication, social worker, physiotherapist, speech therapist or any other medical treatment to improve his son's medical condition;
- 2.5 He said that the Department "*dumped his son at the AFM Home so that he can die*";
- 2.6 He requested the Department to transfer his son back to the WCRC but they refused; and
- 2.7 There is poor service delivery on the part of the Department.

3. JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The institution of the Public Protector was established in terms of Chapter 9 of the Constitution and its additional operational requirements are governed by the Public Protector Act. It was established to strengthen constitutional democracy.
- 3.2 In terms of Section 182(1) of the Constitution the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice. Following an investigation, the Public Protector can report on that conduct and take appropriate remedial action.

3.3 The complaint accordingly falls within the mandate of the Public Protector.

4. THE INVESTIGATION

The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act and comprised the following:

4.1 Key Sources of Information

4.1.1 Numerous written and telephonic communications were exchanged between the Complainant, the Public Protector and the Department.

4.1.2 Several meetings were held between the Public Protector and the Complainant. Furthermore, on 17 June 2009 a meeting was held with Mr M Selida (Complainant's friend), Ms J Hendry: Head of the WCRC, Dr Helen Sammons: WCRC Acting Clinical Manager, Ms Gale Stuart: Social Worker and Mr Cloete of the WCRC's Outpatients Department.

4.2 Summary of the Investigation Process and Evidence

4.2.1 The information gathered during communications and interviews with the Complainant and the Department revealed the following:

4.2.1.1 The Department stated that its policies are there to provide equitable care to all patients, including the Complainant's son. Apparently the Department's policies ensure that patients are treated at the most appropriate facility;

4.2.1.2 The Complainant's son has been laying on his back for more than 2 years because there is no wheelchair available for him. The Department responded that, as he is classified as a private patient at the WCRC, his medical aid or family or the trust administered by his *curator bonis* would have to purchase the wheelchair for Mr Lobi, jnr. The Department advised

- the family and the *curator bonis* regarding the correct type and costs of the wheelchair, cushion etc. which Mr Lobi jnr requires, but there was no response;
- 4.2.1.3 Mr Lobi jnr's recovery is very slow as he has suffered an extremely serious and very disabling brain injury. Sitting upright in the correct wheelchair will be highly beneficial to him;
- 4.2.1.4 The physiotherapist and speech therapist that have been attending to the Complainant's son are also frustrated because of the lack of progress, which might also be attributed to the lack of a wheelchair. Mr Lobi, jnr has severe contractures and a wheelchair is his basic need. An inspection *in loco* confirmed Mr Lobi jnr's severe injuries and the fact that he needs permanent long term nursing care;
- 4.2.1.5 Ms Gale Stuart, the Social Worker at WCRC responsible for Mr Lobi, jnr had on various occasions made contact with the Complainant, Mrs Zoliswa Mildred Lobi (Mr Lobi, jnr's wife) and an attorney, Mr Mushtaq Parker, the *curator bonis*. The Social Worker was advised by the *curator bonis* that the trust does not have funds, but he promised to do something regarding the purchase of a wheelchair for Mr Lobi, jnr;
- 4.2.1.6 The *curator bonis* advised the Complainant that Mr Lobi, jnr's estate has financial constraints and he experienced difficulty in obtaining cash from the estate;
- 4.2.1.7 There are very few private or state health facilities which can admit Mr Lobi, jnr for an extended period of stay or for long-term care, which is what the Complainant requires. An example of such facility is the Conradie Care Centre in Pinelands that may consider a request for admission. The Department stated that Mr Lobi, jnr's long-term care/place of residence falls within the domain of the Department of Social Development. Irrespective of

that, the Public Protector established that the WCRC does not provide long term nursing care, but the Complainant is still dissatisfied that his son could not be permanently admitted at the WCRC. Furthermore, the Public Protector met Mr Lobi, jnr and his wife at the WCRC during an inspection *in loco* on 17 June 2009 and observed that his condition clearly requires long term nursing care;

4.2.1.8 The Complainant was advised at a meeting arranged by the Public Protector with the Department on 17 June 2009 that, if the family or the trust established for Mr Lobi, jnr cannot afford to buy a wheelchair, the family should provide:

- (a) Sufficient evidence of Mr Lobi, jnr's income and monthly expenditure;
- (b) Proof that the medical aid does not make provision for mobility assistive devices in their benefits or, alternatively, that all benefits have been exhausted; and
- (c) Proof that there are no funds available in the trust for his mobility devices to be procured.

4.2.1.9 The Department indicated that an application can be lodged for the reclassification of Mr Lobi, jnr from a "Private patient" to a "State patient". However, this will not guarantee that he can be provided immediately with a wheelchair as there is already a backlog. He would be placed on the waiting list. Mr Lobi, jnr needs a special wheelchair, the cost of which is currently about R35 000,00;

4.2.1.10 Every hospital, health facility and district health service (clinics etc) is responsible for ensuring that in their annual operational budget allocations, provision is made for mobility and other assistive devices. This is at the discretion of the Head of such institution. The WCRC allocates approximately

R4 million per annum for this purpose, because it is a rehabilitation centre, while at other hospitals it may be less, depending on the decision of the CEO and the nature of the services rendered;

4.2.1.11 All disabled persons whose needs cannot be met are placed on the provincial waiting list held by the Mobility Assistive Devices Advisory Committee (MADAC). The MADAC is a provincial committee, co-coordinating the waiting list and the backlog for all State and or indigent patients;

4.2.1.12 There is currently a serious backlog regarding the provision of wheel chairs and this affects a high number of patients. Progress regarding the provision of wheelchairs and assistive devices is very slow. In 2005 the aforementioned backlog was R2,6 million. The MADAC indicated that if they were to receive additional funds or donations that are specifically earmarked for the backlog, it would take responsibility for prioritising the recipients on the waiting list. During 2009 the MADAC received donations to the extent of R2.3m, which reduced the backlog to R4,081m;

4.2.1.13 The Department indicated that budgets need not be centralised at provincial level and ring-fenced. However, budgets have to be protected in some way at hospital level. Once the CEO has made the allocation it should be safeguarded, but this does not happen in practise. As budget pressures increase e.g. for pharmaceuticals/drugs, blood, laboratory tests etc., funds are always diverted from the mobility/assistive devices allocations;

4.2.1.14 According to MADAC the average waiting time for wheel chairs and assistive devices is three (3) years. In some cases up to 75% of people who were removed from the database passed away before they received a wheelchair! MADAC further indicated that it is distressing that so many people have to spend their last year or two in such an undignified manner, immobile, helpless, and dependent on others; and

4.2.1.15 MADAC also advised that the Department of Health has an appropriate National Wheelchair Tender where a range of devices of appropriate standards exist. However, due to budget and administrative issues, not enough chairs are purchased and issued.

4.3 Evaluation of Evidence

4.3.1 Even though the Department stated that their policies are there to provide equitable care to all patients, including Mr Lobi, jnr, it appears that the rights of the disabled are not accorded the same attention than that of other patients. For example, in some institutions within the Department, the budget allocated for assistive devices is diverted to other programs on the Department's budget. As was noted in the Constitutional Court case of *Soobramoney v Minister of Health (Kwazulu-Natal) 1997(12)BCLR1696 (CC)* the State has a constitutional obligation within its available resources to provide health care.

4.3.2 Mr Lobi, jnr has been lying on his back for more than two years now. He needs specialised devices because he cannot sit in an ordinary chair and therefore, has to be attended to in a lying-down position. The information furnished by the medical staff and the social worker indicates that the provision of a wheelchair to Mr Lobi, jnr can make a significant contribution towards his recuperation and it can improve his quality of life.

4.3.3 There is conflicting information as to whether or not the Complainant and Mr Lobi, jnr's wife were furnished with timely and adequate reasons why Mr Lobi, jnr was being transferred back to the AFM Home. In this regard the Department responded that, prior to admission to the WCRC, the assessment team found Mr Lobi, jnr to have a reduced level of consciousness, dysphagia (difficulty swallowing) and spastic quadriplegia. He was fed via a PEG feeding tube and had limited eye movement, did not respond to instructions and required maximum assistance for all activities of

daily living. The assessment team advised that, considering the severity of his injuries, no improvement in respect of independence in activities of daily living was expected, irrespective of rehabilitation inputs. Apparently the WCRC contracted with the family to only admit Mr Lobi' jnr for short term in-patient treatment for corrective positioning and seating, and provide care-giver training. The Department further stated that, on 15 December 2008 a team discussion was held with the family at which the Complainant and Mr Lobi jnr's wife were present. Apparently the goals for admission as previously explained were re-affirmed and a provisional discharge date was set for 23 January 2009 (the Complainant is said to have signed acknowledgement of this agreement). It is stated that prior to discharge, a follow-up team discussion was held with Mr Lobi jnr's wife, who agreed with the discharge. Finally, the Department stated that although motivations for a wheelchair had been submitted to Mr Lobi's medical aid and authorisation was still awaited, this was not seen as a reason to delay discharge as these services could be provided on an outpatient basis by the WCRC, if or when approval was received.

- 4.3.4 Although Mr Lobi, jnr has been receiving treatment from the WCRC for some time, Mr Lobi, jnr's wife and the Complainant did not know that they could apply to the Department for the reclassification of Mr Lobi, jnr from a medical aid/"Private" patient to a "State"/non-medical aid patient. They were only informed during a meeting with the Department on 17 June 2009 of such procedure. In this regard the investigation revealed that there is documentary proof available that the Complainant (a pensioner) or his family cannot afford to buy a wheelchair for Mr Lobi, jnr. According to the *curator bonis*, Mr Lobi, jnr's estate has serious financial constraints and the trust established for Mr Lobi, jnr cannot afford the purchasing of a wheelchair for him. Furthermore, Mr Lobi, jnr's medical aid, Cape Medical Plan, furnished proof that the medical aid does not make provision for assistive devices. However, the savings portion of the medical aid may be used to purchase assistive devices. On 29 January 2010 the savings portion on Mr Lobi, jnr's medical

aid was R5 720,35 and the cost of the wheelchair that he requires currently amounts to R35 000,00. (The documentary evidence from the *curator bonis* and medical aid scheme is available).

- 4.3.5 Every hospital, health facility and district health service (clinics etc) are responsible for ensuring that, in their annual operational budget allocations, provision is made for mobility and other assistive devices and the Head of those institutions have a discretion in the regard. However, as long as the current system allows the diverting of funds to other programs/items for acute health care in some institutions, the backlogs on mobility and other assistive devices will perpetuate and increase. It is unfair to disabled persons that funds allocated for mobility or assistive devices are not safe-guarded.

5. REGULATORY FRAMEWORK

- 5.1 The legal rules dealing with rights of disabled persons are derived from the Constitution as well as from national legislation, prescripts etc.

5.1.1 Law

5.1.1.1 The Constitution

- (i) The Constitution provides in section 27 that everyone has the right to have access to health care services. Provision is further made that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.
- (ii) Section 9 of the Constitution further provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including disability.

5.1.1.2 Case law

- (i) In 1997 the Constitutional Court heard and considered the case of *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997(12)BCLR1696 (CC). The Constitutional Court had to decide on the constitutional right to health care for everyone in the light of the challenge of scarce resources for the funding of the health care system. The Court accepted that rationing of resources is integral to health service delivery in the public sector.
- (ii) The claimant in the above case suffered from chronic renal failure (among other diseases) and was in dire need of renal dialysis. When he ran out of personal funds with which to pay private providers, he sought service in a state-funded hospital. The hospital refused Soobramoney treatment because his general physical condition did not qualify him for treatment under the criteria or guidelines used by the hospital to determine eligibility for such treatments.
- (iii) On appeal in the above case, the Constitutional Court having found the hospital's standards well within the bounds of reason and fairly applied to Soobramoney, unanimously dismissed the appeal and held that the failure to provide treatment to him did not violate the South African Bill of Rights. The Court held that the right to health care does not have to be inferred from the right to life because section 27 of the Constitution specifically deals with health rights. The case largely related to whether the hospital violated Soobramoney's right not to be "refused emergency medical treatment" (in accordance with section 27(3) of the Constitution). The Court found that Soobramoney's case was not an "emergency" in the sense of a sudden catastrophe, but rather an "ongoing state of affairs". Instead, the case falls under sections 27(1) and (2) of the Constitution which deal with the allocation of non-emergency medical treatment.

- (iv) Justice A Chaskalson remarked that “[w]hat is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.” p 1701.
- (v) Because of limited resources the hospital had adopted a policy of admitting only those patients who could be cured within a short period and those with chronic renal failure who are eligible for a kidney transplant. The Court declared that it could not interfere with decisions taken in good faith by political organs and medical authorities as to how to allocate budgets and decide on priorities. Even though the state has a constitutional duty to comply with the obligations imposed on it by section 27 of the Constitution, it had not been shown in the present case, however, that the state’s failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of those obligations.

5.1.1.3 Promotion of Equality and Prevention of Unfair Discrimination Act, 2000

- (i) The above legislation provides, among others, in section 6 that neither the state nor any person may unfairly discriminate against any person.
- (ii) Section 9 of the above Act provides that:
- “...Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including*

- (a) *denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;*
- (b) *...;*
- (c) *failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.”*

5.1.2 Policies

5.1.2.1 Western Cape Health Department’s Comprehensive Service Plan

- (i) The Department’s Comprehensive Service Plan for the Implementation of Healthcare 2010 states (in pages 73 and 74) among other things, that:

“Assistive devices can be categorised into:

- Communication devices...*
- Mobility devices: include wheelchairs and buggies, crutches etc ...*

All hospitals as well as the DHS (District Health Services) must make adequate budget allocations for assistive devices in their operational budgets over the MTEF period.”

- (ii) With regard to wheelchairs and buggies the documents stipulates that prescription of wheelchairs and buggies must be individualised and must be accompanied by correct postural seating and the necessary pressure relief cushion. This seemingly “simple” rehabilitation intervention is both curative and rehabilitative and has many added benefits such as:

- “Increasing the potential for schooling/employment of the disabled.*
- Preventing secondary complications with increasing disablement.*
- Conservatively correcting hip- and spinal deformities, provided intervention is early.*

•Substantial cost-savings i.e. the cost of corrective spinal surgery or plastic surgery versus the cost of a basic wheelchair and pressure relief cushion which is approximately R2,000...”.

5.1.2.2 National Guidelines by the Department of Health – A guideline For Use In The Public Sector

- (i) The National Department of Health also issued guidelines on “Standardisation Of Provision Of Assistive Devices In South Africa: A Guideline For Use In The Public Sector.” This gives guidelines as to how the process from budgeting to ordering, fitting, prescribing etc should work.
- (ii) It is stated, among others that, a budget allocation applicable to all categories of assistive devices should be promoted at provincial and regional/district level. Budgets should be based on local needs and should also provide for any backlog that may have accumulated in each province. Furthermore, a budget to supply a specified number of assistive devices for short-term loan and rental purposes must be available.
- (iii) The above document also stipulates that the client should be issued with the required assistive device by the institution/organisation discharging the client to his home (i.e. the facility providing rehabilitation to his client) or the referral facility doing the rehabilitation. The assistive device should be issued immediately when prescribed or, at the latest, on discharge. All persons with a disability where the sensory functions are affected (e.g. paraplegic/quadriplegic) shall be discharged from hospital with the basic assistive technology requirements (viz. an appropriate wheelchair, wheelchair cushion and mattress).

5.1.2.3 International Instruments/documents

- (i) South Africa is a signatory to the UN Convention on the Rights of Persons with Disabilities in which the State Parties agreed, among other things, that they are convinced that an integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries.

- (ii) The above convention also indicates in article 4(1)(g) the duty of the State Parties: *“To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;”*.

6. CONCLUSION

- 6.1 Although the Complainant alleged that he was advised of his son’s transfer to the AFM Home a day before the transfer, the available information indicates that there were several meetings between the Complainant, the Social Worker and Mr Lobi, jnr’s wife and they were counselled, trained regarding the changed needs and care of Mr Lobi, jnr and they were also advised that Mr Lobi, jnr will have to be transferred to another institution.

- 6.2 The investigation revealed that Mr Lobi, jnr needs permanent long term nursing care and that the WCRC could not accommodate Mr Lobi, jnr because they do not provide convalescent or long term care. Therefore, the Complainant’s allegation that his son was transferred improperly and on short notice to AFM is unsubstantiated.

- 6.3 However, it is disconcerting that Mr Lobi, jnr has been laying on his back for more than two years because there is no wheelchair for him (and for many other patients in similar circumstances). A person who's life was saved but is left disabled, must have access to the most basic apparatus for his/her needs, such as the correct wheelchair or other assistive devices. Mr Lobi, jnr's recovery is very slow because he has suffered an extremely serious and very disabling brain injury. According to medical experts though, sitting upright in the correct wheelchair will be very beneficial to Mr Lobi, jnr. Assistive devices (in this instance a wheelchair) are also known, to promote the independence, the functioning in society, communication and improvement of the quality of life of disabled people.
- 6.4 The Complainant's family was not advised timeously that they can request the Department to reclassify Mr Lobi, jnr as a non-medical aid patient if they cannot afford to buy a wheelchair or other assistive devices. The Complainant was advised of this on 17 June 2009 at a meeting arranged by the Public Protector with the Department. The aforementioned failure resulted in prejudice to Mr Lobi, jnr because he was not reclassified as a non-medical patient which entitles him to be considered for a wheelchair.
- 6.5 There is currently a serious backlog regarding the provision of wheelchairs and other assistive devices, which affects a high number of patients. The Department has failed to attend to and address the backlog which has perpetuated for years. The backlog currently stands at R4,081m.

7. FINDINGS

- 7.1 The Complainant's allegation that the Department improperly transferred Mr Lobi, jnr on short notice from the WCRC to the AFM Home was found to be unsubstantiated.

- 7.2 Although Mr Lobi, jnr needs permanent long term nursing care and the WCRC could not accommodate him because they do not provide convalescent or long term care, he is still entitled to health care service as provided for in section 27 of the Constitution, which includes the provision of a wheelchair and assistive devices.
- 7.3 It was further found that the Department had failed to inform Mr Lobi, jnr's family timeously that they can request the Department to reclassify Mr Lobi, jnr as a non-medical aid patient if they cannot afford a wheelchair or other assistive devices. This failure resulted in prejudice to Mr Lobi, jnr as he has not been considered to be provided with a wheelchair by the State.
- 7.4 The investigation by the Public Protector also interrogated possible systemic deficiencies regarding the provision of wheelchairs and other assistive devices. The investigation revealed that a backlog in this regard has perpetuated for years. It was further found that budget allocations for wheelchairs and other assistive devices are not protected and seem to be somewhat arbitrary. The Public Protector is of the considered view that the Department will not make significant progress regarding the provision of wheelchairs to the indigent unless the budgets and funds allocated for this purpose are protected and spent only for those needs.
- 7.5 South African legislation, departmental policies and the international Convention provide for a duty on the State to progressively realise the right of disabled persons to health care, including assistive and mobility devices. Any practice by health care institutions to divert already limited allocations for assistive and mobility devices to other 'acute' health care demands, is not only considered to be improper, but also disgraceful.

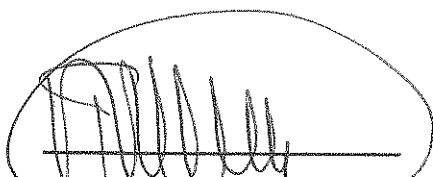
8. REMEDIAL ACTION

- 8.1 The following remedial action in terms of section 182(1)(c) of the Constitution is to be taken:
- 8.1.1 In view of the evidence that Mr Lobi, jnr cannot afford a wheelchair, the fact that he has been lying on his back for more than two years and the Department's failure to advise the Lobi's family regarding the possible reclassification of patients from a medical aid or "Private" patient, to a non medical aid "State" patient, the Department should reclassify Mr Lobi, jnr to a "State" patient with immediate effect for the purpose of acquiring a wheelchair;
- 8.1.2 Following the aforesaid reclassification, the Department is to take urgent steps to provide Mr Lobi, jnr with a wheelchair and associated assistive devices;
- 8.1.3 The Department should introduce adequate measures to ensure that, once the Head of the Medical Institution/CEO has made an allocation for wheelchairs or other assistive devices, such budget is safe-guarded until the backlog in the Western Cape has been addressed by the Department. It is further recommended that the discretion granted to Heads/CEO's of health care institutions regarding funds allocated for wheelchairs and other assistive devices be revisited as it might be a contributing factor to the backlog;
- 8.1.4 The Department should ensure that every patient that is admitted in every hospital, health facility and district health service in the province is notified on admission, that if s/he is on a medical aid, s/he can request to be reclassified as a non-medical aid patient as well as the requirements of such reclassification; and

8.1.5 The above notice should be written in all three official languages of the Western Cape in order to ensure that all patients understand the contents thereof and should be placed in all admission areas of hospitals, health facilities and district health services that are under the control of the Department.

9. MONITORING

9.1 The Member of the Executive Council responsible for Health in the Western Cape and the Head of the Department of Health: Western Cape are required to submit a report indicating the action taken with regard to the implementation of this report within three months of the date of this report.



ADV T N MADONSELA

**PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA**

DATE: 08/09/2010

Assisted by: Adv M Lebeko, Investigator: Western Cape