

COMMENTS BY

SOLIDARITY

ON THE

NATIONAL HEALTH INSURANCE BILL

1.

INTRODUCTION:

- 1.1. These comments are submitted by Solidarity Trade Union who has amongst its members health care service providers and a professional guild established to specifically represent their interests.
- 1.2. The purpose of these comments is to comment mainly on the constitutionality of the National Health Insurance Bill as a whole considering the fundamental key elements of the Bill instead of commenting on the wording of the detailed provisions of the Bill.
- 1.3. As will be demonstrated further in these comments, the Bill that had been published is fundamentally susceptible to constitutional challenge should it be legislated in its current form.

2.

KEY ELEMENTS OF THE BILL:

- 2.1. Although the formulation of the Bill is, *inter alia*, premised on international instruments such as the article 12 of the United Nations Covenant on Economic, Social and Cultural Rights of 1966 and certain fundamental rights such as the right to equality and human dignity in terms of the Constitution and an endeavour to promote access to healthcare services and the taking of reasonable legislative measures to achieve the progressive realisation of the right of access to healthcare services, the Bill as a means to achieve these constitutional goals is fundamentally flawed.

- 2.2. In terms of the Bill the National Health Insurance Fund will become a single public purchaser of health services from both public and private health services establishments and other certified and accredited health service providers.

- 2.3. A main feature of the Bill is that the Fund will be State controlled considering all the powers vested in the Minister and Cabinet in respect of the governance of the Fund and appointment of the Board and its other supporting committees.
- 2.4. All eligible persons such all South African citizens and permanent residents and dependants of such persons will be obliged to register as users with the Fund at an accredited public and private health establishment.
- 2.5. Clearly the aim is to directly or indirectly compel health establishments either from the public or private sector to become part of the system of the Fund so as to enable users to receive healthcare services free of charge with as small consolation that a user who is not reimbursed by the Fund may purchase healthcare services through any other private health insurance scheme.
- 2.6. The services that are to be purchased by the Fund from health establishments and service providers will be prescribed and users subjected to a bureaucratic and state-controlled system for the provision of healthcare services to all.

- 2.7. It is apparent that the aim of the Bill is to make also private healthcare services (and not only State and public healthcare services) accessible to all South African citizens.
- 2.8. It is further clear that such a political and legislative aim is likely to place an enormous burden on the current private healthcare system, private healthcare establishments and private healthcare practitioners only likely to lead to the demise of the entire private healthcare system.
- 2.9. If one considers also the rights of users under section 9 of the Bill the entitlement to receive healthcare services is a qualified right which is subject to affordability and within the means of the Republic.
- 2.10. The qualification pertaining to healthcare service benefits are also abundantly clear from section 10 of the Bill with users being left at the mercy of administrative procedures and appeal to a ministerial appointed tribunal in the case where the Fund refuses to provide healthcare treatment to a user.
- 2.11. The choice of services by users are also inhibited by section 11(2) in that a user is not allowed to seek the services of

specialists and hospitals without first obtaining a referral from his or her healthcare provider, except in cases of emergency.

3.

CONSTITUTIONAL DIFFICULTIES WITH THE BILL:

- 3.1. The right to health and right to access to health care services encompass also other fundamental rights such as the right to life, the right to dignity, the right to bodily and psychological integrity, the right to privacy, and the right to social security. They are also part of the cluster of rights grouped under socio economic rights.
- 3.2. As the Bill itself invokes international human rights instruments, the interpretation of the Bill is subject to the interpretation provisions of the Constitution¹ and any interpretation must consider international law. We return to this aspect further herein.
- 3.3. Significantly further the preamble to the Bill only refers to the right to equality and human dignity ignoring another fundamental value

¹ Section 39(1) of the Constitution.

of our Constitution, and that is individual freedom associated with an open democratic society.

3.4. In this regard section 39(1)(a) of the Constitution provides that when interpreting the Bill of Rights a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

3.5. Little consideration has been given to the right and freedom of persons to be able to freely choose the quality of health care services and to continue enjoy and right to obtain such health services through unfettered private healthcare services.

3.6. In view of the fact that any registered user in terms of the NHI Bill may at any time access health service benefits at any certified and accredited health establishment, which includes public healthcare establishments or private healthcare establishments, common sense dictates that considering the dismal and dysfunctional state of public healthcare services, that users would rather opt to receive the benefits and access to healthcare services from accredited private healthcare establishments which would obviously as a result of a huge demand made upon private

healthcare service providers and private healthcare establishments which in turn would create an enormous additional burden on such service providers.

3.7. The provision of healthcare services by existing private health establishments and private service providers is consequently likely to result in a similar dysfunctional state and most likely their demise, with no distinction between the quality of health services provided between public healthcare establishments and private healthcare establishments.

3.8. The United Nations Economic and Social Council through its Committee on Economic, Social and Cultural Rights in its General Comment nr. 14 of 2000 on the interpretation of article 12 of the International Covenant on Economic, Social and Cultural Rights states, *inter alia*, the following:

“1. Health is the fundamental right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity....; The human right to health is recognised in

numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: 'Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services.'² The International Covenant on Economic, Social and Cultural Rights provides that the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States, parties, recognise "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

3.9. General Comment 14 also emphasises that other rights and freedoms also form integral components of the right to health such as the realisation of other human rights including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, privacy, freedom of association, etc.³

² Emphasis inserted.

³ Paragraph 3 of the General Comment.

3.10. If one considers the comments also in relation to article 25.1 of the Universal Declaration of Human Rights referred to above, it follows that if a person has a right to a standard of living adequate for the health of himself and his family, including clothing, housing and medical care, that the State should not in its endeavour in terms of section 27(2) of the South African Constitution to take reasonable legislative and other measures to achieve the progressive realisation of the access to healthcare services for the vulnerable and the poor, deprive other persons of the right and freedom to have access to quality healthcare services in accordance with their standard of living and adequate for their own health and that of their families through their own private ability and means.

3.11. In other words, in the endeavour to promote the rights of others it would be unreasonable if the measure would result in the deprivation of the rights of others.

3.12. Therefore the State has an obligation not to pass any legislation which is likely to adversely affect or place at risk accessibility to private healthcare through existing private medical aids or other private sources.

3.13. Furthermore the duty on the State to take reasonable legislative and other measures in terms of section 27(2) imposes an objective reasonable standard on the State.

3.14. We contend that it would not be reasonable in the endeavour by the State to improve access to healthcare services to the poor and vulnerable to take measures likely to have a direct or indirect effect on the accessibility to quality healthcare services by persons through private healthcare service providers and healthcare establishments through their own private means and initiatives. Such measures would not be justifiable and reasonable and therefore unlikely to pass the constitutional test.

3.15. Furthermore, any legislation must pass the constitutional requirement of rationality, which is an incident of the rule of law and a founding value of the Constitution. Therefore, when making laws the legislature/legislator may not act irrationally. It may also not act capriciously or arbitrary. It may only act to achieve a legitimate government purposes. In order to achieve a legitimate government purpose, there must be a rational nexus between the

legislative scheme and the pursuit of a legitimate government purpose.⁴

3.16. Therefore, inasmuch as the State endeavours to improve the principle of equality and access and to expand access to healthcare services to the broader population and in particular to the vulnerable and the poor, the State is constitutionally precluded from doing so when such purpose is likely to make serious inroads upon the constitutional rights and freedoms of other citizens. If it is likely to affect other rights and freedoms of other citizens in the process, the legislation would not serve a legitimate governmental purpose and is likely to be found to be irrational. The governmental purpose should then be achieved through other means and measures which are rational and reasonable.

3.17. The sad reality of the current dysfunctional state of public health care and lack of provision of quality health services by the public sector places first and foremost the responsibility upon State to take reasonable progressive measures to improve the quality of healthcare services in the public health sector in terms of section 27(2) of the Constitution. There seems to be a lack of will and

⁴ See for instance: **Law Society of South Africa v The Minister of Transport & Another** 2011(1) SA 400 (CC) at par [32].

endeavour to do the first and foremost in a reasonable and rational manner.

3.18. Should the National Health Insurance Fund finally become law in its current form with the already mentioned direct or indirect effect on public healthcare services, it is likely to result in the denial of the right of access to quality healthcare services provided by the both the private and public health care system.

3.19. In this regard it needs to be borne in mind that the deprivation of access arises when the State, through legislative or administrative conduct, deprives people of the access they enjoyed to socio-economic rights, which is unconstitutional.⁵

3.20. The measures intended to be legislated in terms of the Bill is likely to adversely and unconstitutionally affect also the socio-economic rights of those persons and citizens in the Republic that wishes, in accordance with their standard of living and means , to have free and unfettered access to private healthcare services.

⁵ See: *Foundational Principles of South African Medical Law*, Carstens and Pearmain, 2007 Lexis Nexis at p. 42.

3.21. Furthermore, against the background of the current context of dysfunctional state of other major public entities as a result of poor corporate governance and corruption such as Eskom, Transnet, and others causing a significant drain on the State's financial resources, the establishment of the Fund essentially controlled by the State at every level of its function, is likely to follow the same path with an increased and more disastrous effect on healthcare services likely to surpass even the current dismal state of public healthcare services. All citizens simply stand to be seriously and irrevocably prejudiced.

3.22. In order to achieve the purposes of section 27(1) and section 27(2) the State should rather focus all its efforts to improve the quality of healthcare services and primary healthcare services throughout the Republic in all public health care establishments.

3.23. Lastly, if consideration is given to section 22 of the Constitution, namely the practice of the occupation of medicine and other professional healthcare services, the Bill if enacted finally, is likely to adversely affect [as a result of the various constraints and prescripts under which healthcare service providers will have to practice and render services], the independence of health care

service providers on the exercising of sound clinical independent judgment for the benefit of the users (the patients) as the rendering of the service will to a large extent be dictated by the Fund as purchaser of the services and no longer the individual patient or user.

3.24. The individual patient will be left at the mercy of the administrative function and decisions of the Fund being the purchaser of the services on behalf of the individual patient.

3.25. The inroads upon the independence of health care service providers is evident from section 38 of the Bill which prescribes, *inter alia*, adherence to treatment, protocols and guidelines, including prescribing of medicines and adherence to healthcare referral networks and adherence to the national pricing regimen for services delivered.

3.26. Furthermore, it has a major and significant impact on the law of contract of which the doctor patient relationship is founded of which informed consent is a vital ingredient of the contractual relationship between a doctor and patient. In terms of the Bill (section 38(4)) the rendering of professional healthcare services is based on a contract between the Fund and the public or private

service provider accredited in terms of the Act. The fundamental principle of patient autonomy under our current constitutional order stands to be adversely affected.

3.27. Lastly, there is no clear provision in the draft Bill which guarantees payment to private healthcare providers within a required time. Against the background of dismal performance by other public entities in terms of timeouts payment to service providers, there is no specific measure or guarantee to avoid a similar fate to private service providers.

4.

CONCLUSION:

4.1. Solidarity is aware that serious concerns on a broad basis have previously been raised after publication of the White Paper on National Health Insurance and despite the serious concerns raised previously from civil society and other interested parties, they have simply being ignored by the Minister and Cabinet.

4.2. Solitary wishes to appeal to the Minister and government at large to seriously reconsider this envisaged scheme and rather embark on a thorough and serious exercise to consult civil society and other stakeholders widely through a national convention in order to establish ways and means in order to progressively improve the public healthcare system, and secondly, to discuss difficulties that may be experienced with regard to private healthcare service in order to seek and find a solution which would be beneficial to all citizens from all walks of life and towards the achievement of reasonable measures towards the progressive realisation of the rights pertaining to access to healthcare services in terms of section 27(1) of the Constitution.