



**SUBMISSION TO THE PORTFOLIO COMMITTEE ON HEALTH
ON THE NATIONAL HEALTH INSURANCE BILL B11 – 2019**

29 November 2019

To: The Portfolio Committee on Health

Chairperson of the Portfolio Committee on Health, Dr Sibongiseni Dhlomo.

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1. INTRODUCTION

The Dullah Omar Institute based at the University of the Western Cape works to realise the democratic values and human rights enshrined in South Africa's Constitution. It is founded on the belief that our constitutional order must promote good governance, socio-economic development and the protection of the rights of vulnerable and disadvantaged groups.

The National Health Insurance Bill (hereafter referred to as the NHI Bill) is aimed at achieving universal access to quality health care services in the Republic in accordance with section 27 of the Constitution by establishing an NHI Fund.¹

We support the goal of universal health care as defined by Article 12 of the United Nations Convention on Economic, Social and Cultural Rights. Chapter Two (the Bill of Rights) of the South African Constitution provides that "Everyone has the right to have access to health care services, including reproductive healthcare".² The state is obliged to ensure that "reasonable legislative and other measures, within its available resources to achieve the progressive realisation of each of these rights".³

Universal Health Coverage (UHC) is defined in the NHI Bill as aiming to provide South African's with access to needed health care that is of sufficient quality to be effective and financial protection from the costs of health care.⁴

We support the introduction of measures, such as the creation of National Health Insurance, which can move South Africa closer to that goal. We note that the powers and responsibilities proposed for the NHI Fund are instrumental to the realisation of the right to health, a critical right, fraught with violations in this country, and as such every measure must be taken to ensure that this structure and its Board is firmly located within mechanisms for public transparency and accountability.

¹ *National Health Insurance Bill Government Gazette No. 42598 of 26 July 2019*.

² Section 27(1) (a) Constitution of the Republic of South Africa, 1996.

³ Section 27(2) Constitution of the Republic of South Africa, 1996.

⁴ Memorandum on the objects of the National Health Insurance Bill.

An essential Bill such as this, thus requires specific provisions that provide for transparency and increase the confidence of the public.

Given our recent work on the appointments to SOE boards, we focus in detail on the aspect of the Bill relating to the appointments of the NHI Board, drawing lessons from the SOE experience.⁵

We consider three strategies for improving the governance of the NHI Fund, the first relates to dispersing the powers for appointment and oversight, the second to increased transparency to the public, and the third relates to greater mechanisms for public engagement in governance of the NHI Fund.

2. PUBLIC PARTICIPATION AND TRANSPARENCY

Section 59 of the Constitution provides that the National Assembly *must facilitate public involvement in the legislative and other processes of the Assembly and its committees*. The legislatures fulfil critical democratic functions, not only of ensuring political representation of the public, but also to ensure the direct participation of the public on an ongoing basis, and to ensure transparency of executive decisions to the public and public involvement in the process of oversight and holding the executive to account.

This relates to all aspects from the law making through to the oversight of the NHI Fund, the functions and powers of which, place oversight over the NHI fund firmly in the realm of matters that are of great importance to and have significant impact on the public. This public involvement cannot happen without accessible information to the public, and thus, in addition to duties on the NHI Board and the Minister to provide the public with information, this Bill must ensure that those requirements extend to the National Assembly.

⁵ Our research can be found here <https://dullahomarinstitute.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports>.

Doctors for Life v Speaker of the National Assembly provided an overview of what constitutes reasonable public participation in legislative processes, these standards would apply to the oversight and accountability functions of the legislatures. Other case law has stipulated that public participation has become a characteristic of our national ethos.⁶ Based on the existing case law, it is imperative to note for our purposes that members of the public must be provided with reasonable opportunities to participate effectively and are able to take advantage of such opportunities.⁷

3. NATIONAL GOVERNANCE: The NHI Board

The NHI Fund and its Board will have massive powers and a significant role to achieve the intentions of NHI in South Africa. Every effort must be made at this time to ensure that this critical and powerful structure is enabled to fulfil that mandate in the public interest, is transparent, and is accountable to the public.

We are firstly concerned about the **autonomous powers conferred on the Minister of Health** to appoint⁸ and remove⁹ the eleven Board members of the National Health Insurance Board (The Board) and to appoint the Chairperson of the Board. That power must be diffused from the Minister to include a greater role for other stakeholders. This can assist to ensure a system in which these important positions are protected as far as possible from undue political influence. Our national experiences of the capture of State Owned Entities has taught us grave and costly lessons about the risks of over-centralising these powers in one Minister. It points to the need for increased responsibilities for other individuals and structures in order to create checks and balances against that potential. The Minister should not be responsible for all phases of the appointment process.

⁶ Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005).

⁷ Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

⁸ Section 13(1) of the Bill.

⁹ Section 13(1) (8) of the Bill.

We thus, note the attempt at adding a role for an **advisory ad hoc panel**¹⁰ to conduct interviews of shortlisted candidates and make recommendations to the Minister for appointments, however these provisions are too weak and do not go far enough to limit the centralisation of the Minister's power or to ensure public transparency and accountability for appointments to a structure with the level of powers that the NHI Fund will have.

3.1 Composition of the Board appointments structure

The structures that play a role in appointing Board members, must themselves be diverse, transparent and accountable, to increase protections against undue political and private sector influence.

We recommend a more decentralised approach, with more actors involved and with stronger mechanisms for transparency and public involvement in the appointments. **We note that our submissions on this issue of 'who appoints the Board' that follow are complex and require further and broader deliberation and debate, and they are made in this spirit.**

We propose that the appointments process be located in Parliament with a smaller role for the Minister than is proposed in the Bill, and the advisory panel, as proposed, would be rendered unnecessary. We have considered the frameworks for the appointments of the Public Protector or the SABC board for example, which include a strong role for Parliament. There is no question that the importance of the work of the NHI Fund which will be given significant powers and functions by this Bill relating to the use of public funds for health services, is at least as, if not more, important than these other critical institutions, and that the standards for the process to increase public accountability for appointments to the NHI Board cannot be lower than it is for these.

The lack of role envisaged for Parliament in the appointments process, in the Bill is problematic and further perpetuates the problems that have been identified in State Owned Entity Boards in numerous reports.¹¹

¹⁰ Section 13(3) of the Bill.

¹¹ See *PSC Report on State Owned Entities and Wandrag Paper Two*.

The role of the Minister. We note that the Minister must ultimately exercise authority over the Board and that to remove the Minister completely from the appointments process may undermine that role of ongoing oversight over the NHI Fund. **As such, we would support an arrangement that includes the Minister in the process while diffusing the power of the Minister among a greater range of stakeholders.** However, this could take one of two forms.

The Minister participates as a member of the appointments structure. This would mean that the recommendations for appointments made by the structure are then made to the President who makes the final appointments. This is consistent with the arrangements relating to the Municipal Demarcation Boards, the Public Protector, the SABC board, and the JSC to name but a few.

OR

The Minister does not participate as a member of the appointments structure. The appointments structure would then make its recommendations to the Minister, who would make the appointment.

We do not consider it sufficient, for a structure such as the NHI Board, that the appointments be conducted through elected representatives alone. **We recommend that further roles be expressed in the Bill for other stakeholders, in addition to the Minister, in the appointments process.** Here we recommend that some of the principles inherent in the constitution of the Judicial Services Commission could apply in the context of the NHI Fund¹²

Most notably - along with members of Parliament and the Minister - the structure responsible for NHI board appointments **should include other health sector stakeholders with expertise in Health Governance and Health Financing.** It is critical that those appointing board members, themselves have the necessary breadth of knowledge to ensure that the board members have sufficient expertise and skills to fulfil their functions as Board members. Room must be made that these Health sector experts **include appropriate members of civil society such as academics, and representatives from NGOs.** **There should not be an over representation of individuals representing private sector interests.**

¹² Section 178(1) of the Constitution provides for the composition of 23 representatives to the Commission.

In addition to the abovementioned stakeholders, the Organisation for Economic Co-operation and Development (hereafter referred to as OECD) recommends, in relation to State Owned Entities, that “the board nomination decision should be facilitated by the consistent policy framework *that enables boards to play a role in identifying potential members* with appropriate expertise and knowledge”.¹³ As it stands this Bill does not provide a sufficient framework to enable this. To incorporate this recommendation would require that **nominations, shortlisting, interview and selection processes, should include clear mechanisms for inputs from the NHI Board.**

The people on the appointing structure must be proven to be impartial, and collectively possess the necessary knowledge, skills and expertise in the health sector.

3.2 The roles of the appointments structure

The role currently envisaged for the ad hoc advisory panel in the Bill is extremely limited, whereby they would only be required to conduct interviews and make recommendations to the Minister. We recommend that the appointments structure must be responsible for calling for nominations, shortlisting from these nominations, and publically interviewing candidates before finally making recommendations for appointments to the President or the Minister (depending on the decisions taken regarding the role of the Minister) for appointment to the NHI Board.

Nominations. If an appointing structure of the nature we propose is accepted, the responsibility to make a public call for nominations would fall to that structure and not the Minister. As noted above, the existing NHI board should be able to make nominations too, through such a process.

Shortlisting. The shortlisting process is critical, it should under no circumstances be at the sole discretion of a single Minister as is currently suggested in the Bill. We note that the Bill does not explicitly state that the Minister undertakes the shortlisting, however the roles described for the advisory panel in clause 13(3) indicate that they must interview ‘shortlisted candidates’, implying that this function is envisaged for the Minister.

¹³ (OECD, 2018) *Professionalising Boards of Directors of State-Owned Enterprises: Stocktaking of National Practices*, 14.

Transparency in such appointments processes includes the public having reasonable access to all phases of recruitment as well as access to the names of successful and unsuccessful nominees.¹⁴ The appointment structure must be required to provide reasons to the public as to why nominees are not shortlisted.

The CVs of all shortlisted candidates must be made available to the public within reasonable timeframes prior to the interview process.

Interviews. We support the current requirement in the Bill that interviews should be conducted publicly.

Recommendations and appointments. The appointing structure must provide reasons for their recommendations and the Minister (as the executive authority responsible for the final appointment) must provide publicly accessible and written reasons in the event that s/he does not appoint candidates who have been recommended by the appointing structure.

WDI recommend that clause 13(4) should read as follows *“The Minister must, within 30 days from the date of confirmation of the appointment of a Board member, give notice of the appointment in the Gazette and provide written reasons to Parliament and other stakeholders for the appointments made and for recommended candidates who are not appointed”*.

In the event that the committee rejects our recommendations regarding increasing the role of Parliament and other stakeholders in the Board appointments process, and removing the provisions relating to the advisory panel as a result. We would recommend that you consider proposals and mechanisms to strengthen the provisions in the Bill relating to the **advisory panel** in line with our recommendations above.

The constitution of and appointments to the advisory panel itself would require greater measures for public transparency and participation. The names of proposed members of the panel, information on the recruitment process, and written reasons for their selection to the advisory panel would need to be provided by the Minister to Parliament. This is aligned with the interest of the constitutional right to access information and in the public interest.¹⁵

¹⁴ De Visser J *SOE Boards and Democracy, Friends or Foes?* (2019) 23-4 (unpublished).

¹⁵ Section 32(1)(a) Constitution of the Republic of South Africa, 1996.

If the advisory panel route is maintained by the committee, then it should fall to the advisory panel, and not the Minister to undertake the shortlisting process from nominations. This would need to be clearly stated in the Bill. Furthermore, the responsibility for providing reasons for not shortlisting nominees would then fall to this panel, as would the requirement to make the CVs of shortlisted candidates publicly available.

We reiterate, however, that the role of Parliament is critical and thus, further consideration must be given, if the current proposals for an advisory panel are maintained, to how to ensure that a role is set out for Parliament, prior to and after the appointments are made.

3.3 General

Section 13(1) of the Bill provides for the **composition of the Board** that is comprised of not more than 11 persons appointed by the Minister and one representative of the Minister. The Bill must clearly state the minimum number of board members as well as the maximum; this requires further consultation. We note that in other similar structures the minimum requirement is often seven members.

To protect against conflicts of interest and corruption, we note that the OECD Guidelines on Corporate Governance of State Owned Enterprises provide good practice standards for SOEs, which may be applicable here. **One of the recommendations is that mechanisms should be in place to avoid conflicts of interest** that would hinder Board members ability to carry out their duties and to limit political interference in its processes.¹⁶

One such measure relates to the question of the interests of spouses and family members of Board members. We propose that the above-mentioned groups must not have any personal or professional interest in the Fund. We therefore submit that clause 13(5)(e) of the Bill could read as follows *“A Board member is appointed for a term not exceeding five years, which is renewable only once, and must— (e) not have any personal (including their spouse or family members) or professional interest in the Fund or the health sector that would interfere with the performance in good faith of his or her duties as a Board member”*. An amendment of the

¹⁶ (OECD, 2018) Professionalising Boards of Directors of State-Owned Enterprises: Stocktaking of National Practices, 8.

current clause would ensure that the legislation is consistent with section 50(3)(a) of the PFMA.¹⁷

In terms of section 13(9)(a)(i) – (ii) the Minister has the power to dissolve the Board of the Fund on *good cause shown*. This is too vague, it is imperative that a list of possible reasons for the dissolution should be provided in the Bill. Further, the Bill must require that the information relating to the reasons for dissolving the Board should be made available for public record and scrutiny to ensure public transparency and accountability. The Bill must include that the Minister may only dissolve a board after presenting arguments for this to Parliament.

4. CONCURRENCY/ ROLE OF PROVINCES

Health services are defined as a concurrent national and provincial legislative competence.¹⁸ In the current version of the Bill there appears to be limited clarity on the role of provinces except to have their role possibly delegated by the Minister as management agents. Provinces currently receive the equitable share for health services, which will now be transferred to the NHI Fund. Section 32(2)(a) of the Bill states that the Minister may delegate the provision of health care services to the provinces as management agents whilst the provincial equitable share would be shifted from provinces into the Fund as a source of income.¹⁹ This is significant in shifting power and autonomy away from provinces, leaving a much smaller role for Provinces than envisaged in the Constitution.

We recognise the highly uneven nature of health services provision in different provinces and the profound failures in some. Notwithstanding this, given this significant shift in the envisaged constitutional role for Provinces in delivering health services, the plan for the role of provinces should ideally be more clearly articulated in the Bill. Further, we are concerned with the impact of these decisions on the role played by Provincial legislatures in the oversight

¹⁷ According to the Public Finance Management Act No 1 of 1999, an accounting authority must disclose direct or indirect personal or private business interest by themselves and others.

¹⁸ Schedule 4A Constitution of the Republic of South Africa, 1996.

¹⁹ Section 49(2)(i) of the Bill.

over health services. Further investigations and careful consideration must be given to these questions prior to making these decisions.

5. DISTRICT GOVERNANCE

According to the Bill, the District Health Management Office (DHMO) would be established as a *national component* to manage, facilitate, support and coordinate provisions of primary health care for personal and non-personal services at district level.²⁰ Low notes that a lack of clarity on district governance may cause public mistrust, a lack of adaptability to local needs and accountability issues.²¹ **The Bill must clearly express how district structures will be represented in the DHMO to ensure that it is driven by district-level interests.**

6. ADVISORY COMMITTEES

We note that the Advisory Committees include in two, the inclusion on the committees of persons with expertise in ‘the rights of patients’ and that the ‘Stakeholder Advisory Committee’ specifies that civil society organisations must be represented. We submit that due to the high importance of the work of these structures on the public, these provisions do not go far enough.

There is a failure in the Bill to consider any role for the public, and specifically public health systems users, in these committees. This is essential to ensure that the recommendations and decisions of these committees are cognisant of the direct perspective of health system users. Further, representatives from civil society organisations who can demonstrate a track record in promoting public health rights must be included in all advisory committees.

²⁰ Section 36 of the Bill.

²¹ Low M, *Spotlight on NHI: In search of common ground*, Spotlight 26 August 2019 available at <https://www.spotlightnsp.co.za/2019/08/26/spotlight-on-nhi-in-search-of-common-ground/> (accessed 28 November 2019).

We note that there is a Stakeholder Advisory Committee that includes representatives from the civil society organisations, organised labour, associations of health professionals and other sectors. There is no clarity on what role of the Committee would be in section 27 of the Bill. Although section 29 further provides that the Minister must determine the composition, functions and procedures of the committees, it is submitted that clearer roles must be outlined in the Bill.

7. CONCLUSION

Although the Bill is meant to work towards universal health care, the Dullah Omar Institute submits that the governance problems that have been identified with the Bill at both district and national level, have a detrimental effect towards the realisation of this right.

We thank the committee for considering our submission. In addition, we endorse Section 27 and the Treatment Action Campaign's joint submission to the committee.

The Dullah Omar Institute hereby requests an opportunity to make oral submissions to the Committee.

8. ENDORSEMENTS

This submission has been endorsed by The Organisation Undoing Tax Abuse (OUTA) and the South African Non-Communicable Diseases Alliance (SANCDA).