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NHI BILL DOES NOT PROVIDE ANSWER TO ACHIEVING UNIVERSAL HEALTH COVERAGE

On 29 November 2019, the FW de Klerk Foundation (the Foundation) made a written submission on the *National Health Insurance Bill [B11-2019]* (NHI Bill) to the Portfolio Committee on Health. The NHI Bill envisions the establishment of the NHI Fund - a health financing system serving as the “*single purchaser and payer of health care services*”, - to effectively achieve Universal Health Coverage (UHC) and give effect to the State’s constitutional duty to provide access to healthcare services.

The Foundation unequivocally supports the pursuit of UHC - characterised by the World Health Organisation (WHO) as providing all people with access to health services of sufficient quality, without financial hardship. The Foundation, however, does not believe that the proposed NHI is the only means to achieve this noble goal for South Africa.

Serious flaws in the NHI Bill could hinder the State from finding workable solutions to address the stark inequality in healthcare services.

The Foundation analysed key failures of the NHI Bill under the following broad themes:

- Rule of Law and rationality;
- Impact of lack of information and vagueness on the right to public participation; and
- Governance concerns, coupled with the broad powers of the Minister of Health.

The Foundation also raised potential concerns on provisions of the NHI Bill that could impact on rights in the Bill of Rights, such as an individual’s right to freedom of association and the right to freedom of trade, occupation and profession.

The Rule of Law, which at its core excludes arbitrary power and guarantees equality before the Law, also requires legislation and rules to be devoid of vagueness. It is important for the public to know - with reasonable certainty - the impact of the provisions of the NHI Bill. Failure to provide necessary information on the impact of the NHI Bill also impacts on the public’s right to public participation in the legislative process, as the public cannot meaningfully engage. This omission also importantly deprives the public of the means to test the rationality of the measures proposed, which is a critical failure.

The Foundation submits that one cannot simply state that because the goal of the NHI is to ensure UHC, the objective rationally satisfies the proposed measures. The rationality test not only requires a rational relationship between the objective and the proposed measure, the measure adopted or proposed should also be rationally related to the information considered at the time.

One of the key aspects lacking information, which directly brings into question the rationality of the proposed measures in the NHI, is the lack of detail about the costing of the NHI, coupled with lack of information on healthcare service benefits to be provided. The Memorandum of the NHI Bill vaguely refers to an “actuarial costing model” commissioned by Treasury but this



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information has not been provided to the public and does not form part of the NHI Bill. The only public information on NHI expenditure currently available is that referred to in the NHI White papers, which reference 2010 prices. The public therefore has no means to test whether the proposed measures are rationally related to the information.

Various provisions of the NHI Bill are also vague, such as the role of Medical Schemes and to what extent a person, currently a member of such a scheme will still be covered for healthcare service benefits. In terms of the NHI Bill, Medical Schemes will only be able to offer “complementary cover” once the NHI fund is fully implemented, with no information on what this could entail.

No information is currently available on what types of healthcare service benefits will be provided by the NHI Fund and the NHI Bill vaguely provides that if a person fails to comply with the NHI “referral pathway” they will be obliged to pay for these health services, which a Medical Scheme may cover. However, it is unclear whether a person will be obliged to register as an NHI user to receive healthcare service benefits that a person’s Medical Scheme (at least for primary healthcare services) is prohibited from covering. This also indirectly brings into question the impact on a person’s constitutional right to freedom of association, relating to the choice of healthcare services and how to access these services, which to an extent is also interrelated to a person’s constitutional right to bodily integrity.

The State’s aim to provide UHC cannot simply override the above-mentioned constitutional rights.

One would need to determine whether the means adopted to achieve UHC and to give effect to the State’s constitutional duty to give access to health care services justify the limitation of these constitutional rights in terms of the Constitution’s limitation analysis. However, the Foundation submits that due to the lack of information on NHI healthcare service benefits and what “complementary care” entails, it is impossible to measure the limitation.

In conclusion, the Foundation feels strongly that the State should urgently rebuild the public healthcare sector and attend to the alarming increase in medico-legal claims against provincial health departments as a matter of priority. Concerns relating to the high cost of private healthcare and onerous burden of out-of-pocket payments are addressed in the Competition Commission’s Health Market Inquiry Report, which made significant recommendations to ensure a more competitive private healthcare market. Alternative models to achieve UHC should also urgently be considered. The apolitical approach adopted by Ireland in 2016 to achieve cross-party consensus on health reform and UHC could provide guidance in this instance. The urgent need for health reform and achieving UHC should not hinge on the feasibility of the NHI.

**The Foundation’s CFCR will produce a series of articles unpacking its NHI Bill submission*

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