THE CONSTITUTIONALITY OF THE NHI SCHEME AS A FINANCING SYSTEM FOR UNIVERSAL HEALTH COVERAGE

Submission on the National Health Insurance Bill 2018

Michelle du Toit*

CONTENTS

1 INTRODUCTION 2
2 FINANCING OF THE NHI 2
2 1 Introduction 2
2 2 Collection of funds 3
2 3 Pooling of funds under the NHI 4
2 4 Purchasing off services under the NHI 4
3 COVERAGE UNDER THE NHI SCHEME 4
3 1 Introduction 4
3 2 Population coverage 5
3 3 Cost coverage 6
3 4 Service coverage 6
4 REQUIREMENTS OF REASONABLENESS 6
4 1 Introduction 6
4 2 Facilitating the realisation of the right 7
4 3 Reasonable in conception and implementation 7
4 4 Availability of human and financial resources 8
4 5 Short, medium and long-term needs 9
4 6 Inclusive of population groups, responsive to emergencies and vulnerable populations 9
4 7 Balanced and flexible 10
4 8 Non-discrimination 10
4 9 Measures must be comprehensive, co-ordinated and transparent 11
4 10 Participation and meaningful engagement 11
5 PRIVATE SECTOR 12
6 CONCLUSION 14

* LLB (Rhodes), LLM (Stellenbosch University)
Alumni, Socio-Economic Rights and Administrative Justice Research Project, Faculty of Law, Stellenbosch University
Tekano Atlantic Fellow for Health Equity in South Africa
Law and Development Research Network

1 INTRODUCTION

1. This submission will explore the constitutionality of the National Health Insurance ('NHI') scheme as provided for by the NHI Bill of 2018. The NHI scheme is a financing system for universal health coverage in South Africa. Ultimately, this submission is in favour of implementing the NHI scheme as a means to achieve universal health coverage in South Africa. Subjecting the NHI scheme to constitutional scrutiny could ensure that the development thereof addresses its vulnerabilities which may be challenged.

2. Many issues have been raised regarding the NHI scheme, especially from the private sector. I submit, especially considering the recent Competition Commission Inquiry, that the current trajectory which the two-tier system is on – one of exorbitant price increases in the private sector (surpassing inflation) and a deteriorating public sector – is unsustainable. This alone should justify the implementation of the NHI scheme, even if not guaranteed to succeed. Attempting to implement the NHI scheme will do less harm than the current system which amounts to a violation of rights as the majority of the population do not have access to adequate health care services, whilst there is an abundance of resources in the private sector.

2 FINANCING OF THE NHI

2 1 Introduction

3. The World Health Organisation ('WHO') recognises four facets of health care systems: the collection of funds, the pooling of funds, the purchasing of services, and the provision of services.[2] As the NHI scheme is a financing system is it only concerned with the collection of funds, the pooling of funds, and the purchasing

[2] J Kutzin "A Descriptive Framework for Country-Level Analysis of Health Care Financing Arrangements" (2001) 56 *Health Policy* 171 172.

of services. The NHI scheme is not the service provider. Services will be purchased by the NHI scheme from external service providers, both public and private. Thus, only the first three facets will be considered below.

2 2 Collection of funds

4. To increase revenue for health there needs to be either a reallocation of resources or an overall increase in public revenue or that allocated to health care.[3] Preceding the Bill, the Policy Paper contemplated Value Added Tax ('VAT') as a possible means of increasing revenue for the financing of the NHI scheme. However, a VAT increase is regressive as the tax burden of a product forms a larger share of a poor person's budget than of a rich person's. In April 2018 the VAT increased from 14% to 15%. The Bill however makes no comment on whether this increase in revenue will contribute to the financing of the NHI scheme. As far as collection of funds go, the Bill merely provides sources to include:

> "a) money appropriated by Parliament;
> b) interest or return on an investment made by the Fund;
> c) any bequest or donation received by the Fund;
> d) movable or immovable property purchased or otherwise acquired by the Fund; and
> e) any other money to which the Fund may become legally entitled to."[4]

5. Fundamentally, if seeking to address the inequalities in access to and quality of health care, the NHI scheme needs to be financed progressively. This is so because, firstly, South Africa has great income inequality, and second, over 60% of South Africans would prefer a progressive financing system.[5]

[3] J Kutzin "A Descriptive Framework for Country-Level Analysis of Health Care Financing Arrangements" (2001) 56 *Health Policy* 171 175.
[4] Section 46(3).
[5] J E Ataguba & D McIntyre "The Incidence of Health Financing in South Africa: Findings from a Recent Data Set" (2017) *Health Economics, Policy and Law* 1 18.

6. South Africa spends 8.9% of its Gross Domestic Profit ('GDP') on health care, far exceeding the 5% recommended by WHO.[6] A reallocation of resources can potentially benefit the whole population.

2 3 Pooling of funds under the NHI

7. Financial risk is best managed when the risk is shared by a greater number of people.[7] The NHI Fund will pool resources and purchase health care services on behalf of the whole population. The pool of the NHI scheme is thus the entire population allowing for cross-subsidisation between the old and the young, the rich and the poor, and the sick and the healthy.

2 4 Purchasing off services under the NHI

8. The resources collected and pooled will be used to purchase health care services from service providers. The Bill provides that the NHI will be an active purchaser, operating on performance-based payments.[8] The Bill fails to provide clarity on capitation payments referred to in the Policy Document. There is no clarity on the payment mechanism that will be implemented in contracting with public and private providers. This needs to be made explicitly clear.

3 COVERAGE UNDER THE NHI SCHEME

3 1 Introduction

9. WHO defines universal health coverage as:

[6] World Health Organisation *World Health Statistics* (2015) <http://www.who.int/countries/zaf/eg/> (accessed 2 June 2016).
[7] World Health Organisation *World Health Report: Health Systems Financing: The Path to Universal Coverage* (2010) Geneva 47.
[8] *National Health Insurance Bill* s35(1)(a).

> "[E]nsuring that all people have access to needed promotive, preventative, curative and rehabilitative health services, of sufficient quality to be effective, while also ensuring that people do not suffer financial hardship when paying for these services."[9]

10. Universal health coverage has become a global objective, as per the Sustainable Development Goals,[10] which recognises health as a human right and not an ordinary market commodity.[11] There are three facets of the design and functioning of a system seeking to achieve universal health coverage: population coverage, service coverage and cost coverage. These are addressed below.

3 2 Population coverage

11. A scheme seeking to achieve universal health coverage needs to cover the entire population, else it isn't universal. WHO explicitly provides that those who cannot afford to pay for health care services may not be excluded.[12] The NHI scheme is based on the right of access to health care as provided for in the Constitution to *everyone*.[13]
12. The Bill provides that all South Africans and permanent residents will be covered. It will also cover all inmates. Refugees and asylum seekers will have access to emergency services, services of public health concern, and primary paediatric and maternal health care services. The Bill fails to elaborate on coverage and prioritisation of vulnerable groups as recognised in the White Paper and Policy paper preceding the Bill. The Bill does also not sufficiently address coverage of migrants, an issue which South African socio-economic rights jurisprudence has dealt with. This will be addressed under the reasonableness requirement of non-discrimination below.

---

[9] World Health Organisation *Universal Health Coverage* <http://www.who.int/healthsystems/universal_health_coverage/en/> (accessed 13-03-2017).

[10] United Nations Sustainable Development Goals para 54 of UN Resolution A/RES/70/1 of 25 September 2015 goal 3.8.
[11] E Ataguba & D McIntyre "The Incidence of Health Financing in South Africa: Findings from a Recent Data Set" (2017) *Health Economics, Policy and Law* 1 1.
[12] World Health Organisation *World Health Report: Health Systems Financing: The Path to Universal Coverage* (2010) Geneva.
[13] S27(1)(a) of the Constitution.

3 3 Cost coverage

13. Cost coverage refers to the costs which the NHI scheme will bear for the universal provision of health care services. Covering the cost of health care provides financial protection and enhances access. Services not covered by the NHI scheme will be attainable through medical aid schemes and out-of-pocket payments. The Bill lacks detailed information on how costs will be determined for the services purchased by the NHI Fund.

3 4 Service coverage

14. Service coverage pertains to which services will be covered by the NHI scheme as a financing system for universal health coverage. The NHI scheme will not be the service provider but will purchase services from public and private service providers. Thus, service coverage refers to the services which will be financed by the NHI scheme. The Bill provides that the NHI scheme will cover primary health care ('PHC') services, hospital and specialised services, and emergency medical services. PHC, per the Bill "means services that include health promotion, disease prevention, curative services, and rehabilitative and palliative services." The "comprehensive set of personal health services to be covered by the NHI scheme will not be the same as the premium minimum benefits under the Medical Schemes Act. The Bill lacks the elaboration that the Policy Document had on these services, and medicines, to be covered by the NHI scheme.

4 REQUIREMENTS OF REASONABLENESS

4 1 Introduction

15. The Constitutional Court adopted a standard of reasonableness by which to review measures taken to realise socio-economic rights. This section will consider the

reasonableness of the NHI scheme as a measure to realise the right of access to health care.

4 2 Facilitating the realisation of the right

16. The NHI explicitly seeks to facilitate the realisation of the right of access to health care. It seeks to do so through reforming the health care system and address the inequalities in access to and quality of health care.

17. Access is an essential element of the right to health care. Per international law understanding, accessibility includes non-discrimination, physical accessibility, economic accessibility and information accessibility.[14] The Constitution explicitly recognises the right of *access* to health care. The NHI scheme seeks to provide health care in a non-discriminatory manner based on health care needs. Through the PHC streams, physical accessibility to health care is increased through the NHI scheme. Financial accessibility is also increased through removing financial risk in seeking health care by the pooling of resources and cross-subsidisation under the NHI scheme. The NHI scheme lacks explicit recognition of information accessibility which also hinders stakeholder engagement and participation. The means available to engage, such as submissions, are not accessible or possible for all. The NHI scheme, in seeking to facilitate the realisation of the right must ensure that information on the development and implementation of the NHI scheme is made known to all in a transparent and understandable manner.

4 3 Reasonable in conception and implementation

18. The Policy Document of 2017 recognised the economic changes that had occurred since the conception of the NHI scheme per the Green Paper. The development of the Bill and the subsequent legislation must be cognisant of the changing circumstances socially, and especially economically.

[14] United Nations Committee on Economic, Social and Cultural Rights General Comment No. 14: *The Right to the Highest Attainable Standard of Health (art 12 of the Covenant)* UN Doc E/C.12/2000/4.

19. The phased implementation of the NHI scheme provides room for the NHI scheme to be constantly reviewed and revised.

20. Additionally, the pilot districts – which were introduced in 2012 – allow for problems arising from implementation to be addressed. The lessons from the pilot districts can influence the development of the NHI scheme. The feedback from these pilot districts and the NHI scheme's consequent ability to adapt to practical challenges regarding implementation, arguably makes it reasonable in conception and implementation.

21. Additionally, the NHI scheme's emphasis on PHC arguably makes it reasonable in conception as per the international recognition of the role in PHC in the pursuit of universal health coverage. PHC provides normative content for what must be achieved through universal health coverage – as the NHI scheme seeks to achieve.

4 4 Availability of human and financial resources

22. For a measure to be reasonable, financial and human resources must be made available. As the NHI scheme is a funding system for universal health coverage, it focuses primarily on the collection and pooling of funds and the purchasing of services.

23. There is contention over the financial feasibility of the NHI scheme. Arguments have been made that the NHI scheme is unaffordable and unsustainable in the current economic climate of the country. However, as per socio-economic rights jurisprudence, reasonableness does not enquire whether a measure is the *most* reasonable.[15] Therefore, the question is not what would be the most reasonable way to achieve universal health coverage, but rather whether the NHI scheme is *a* reasonable measure.

[15] Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC).

24. However, the NHI scheme does not provide clarity on the financial resources necessary. The State is obliged to make resources available to implement the NHI scheme. Thus far it only provides for the reallocation of State subsidies to medical aids. The lack of detail regarding the resources necessary for the implementation of the NHI scheme renders it vulnerable to challenges in this regard.

4 5 Short, medium and long-term needs

25. Short, medium and long-term needs can be addressed through the NHI scheme's phased implementation. The phased implementation also complements the obligation to prioritise the vulnerable and make immediate provision for those in need.

26. The re-engineering of PHC encourages preventative care. Preventative care can improve the health status of the population. Medium-term needs can arguably be met through the continuous removal of barriers to access of health care. Thus, the NHI scheme can, in theory, be argued to meet short, medium and long-term needs.

4 6 Inclusive of population groups, responsive to emergencies and vulnerable populations

27. The NHI scheme will provide health care coverage on a needs-basis. A needs-based approach is necessary to ensure that the inequalities in access to and quality of health care are addressed. The NHI scheme will ensure that access to health care will not be dependent on a person's ability to pay.

28. The Policy Document of 2017 recognised rural populations as vulnerable due to their lack of access to health care services. The re-engineering of PHC enhances access for those living in rural areas. Additionally, the Municipal Ward-Based Primary Health Care Outreach Teams, which conduct home visits, aid in alleviating barriers to access to health care services, especially physical barriers.

29. The NHI scheme has very little to say on mental health care. Given the relationship between mental health and the burden of disease in South Africa, and the vulnerability of mentally ill patients, the NHI scheme should make special provision for these needs.

30. Furthermore, reasonableness requires that the NHI scheme be responsive to emergencies. The NHI scheme seeks to improve access to emergency care as per the unqualified provision in section 27(3) of the Constitution. Where the NHI scheme is vulnerable regarding emergency health care services, is that it does not address issues pertaining to the systemic failure of service provision in this regard.

4 7 Balanced and flexible

31. To be reasonable, a scheme must be balanced and flexible. In other words, it cannot be rigid. Arguably, the phased implementation of the NHI scheme allows for flexibility. The pilot districts can be used to aid the development and implementation of the NHI scheme. This provides for a degree of flexibility, as does the 14-year implementation period.

32. The NHI scheme, however, lacks sufficient details on issues such as finance. This lack of detail does not make it flexible. Clarity is needed on issues in a way that reflects flexibility and opportunities for revisions to be made.

4 8 Non-discrimination

33. As mentioned above, non-discrimination is an element of accessibility. The NHI scheme seeks to be inclusive of the population through achieving universal health coverage. For a measure to be reasonable in terms of non-discrimination, it cannot discriminate unfairly against certain groups nor can it restrict or exclude groups of people.[16]

[16] *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC); *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

34. The Constitution does not qualify the right of access to health care with a requirement of citizenship. The NHI scheme provides that all South Africans and legal residents would be covered by the NHI scheme. Refugees and asylum seekers will only have access to some health care services covered by the NHI scheme. The Bill is silent on migrants. It is possible that denial of access to health care on the ground of citizenship could amount to unfair discrimination.[17] To avoid being vulnerable to challenges in this regard the NHI scheme must be cautious in setting parameters on coverage that may unfairly exclude population groups.

35. NHI scheme seeks to remove the financial risk in achieving universal health coverage. The NHI scheme, by being universal, allows for cross-subsidisation between the old and the young, the sick and the healthy, and the rich and the poor. This universality supports the NHI scheme as being non-discriminatory, provided there is no explicit exclusion that is not justifiable.

4 9 Measures must be comprehensive, co-ordinated and transparent

36. To meet the reasonableness standard, a measure must be comprehensive and co-ordinated through being developed by all three spheres of government. The NHI scheme must be designed in a way that enables the State to meet its obligations.

37. Transparency requires that there be effective communication regarding the development and implementation to concerned stakeholders. Transparency arguably requires information to be made available in an understandable manner.

4 10 Participation and meaningful engagement

38. To be reasonable, the NHI scheme must facilitate participation and meaningful engagement between stakeholders. Meaningful engagement is required at all

[17] *Khosa v Minister of Social Development* 2004 6 SA 505 (CC).

stages of development and implementation in order for a measure to be reasonable.

39. As the NHI scheme seeks to be needs-based, the needs of the population need to be determined. Participation and meaningful engagement are necessary to determine the needs of the population. Submissions made on the Green Paper, White Paper, Policy Document and Bill do not constitute meaningful engagement. The NHI scheme must make provision for collaboration, engagement and participatory decision-making to comply with this aspect of reasonableness.

5 PRIVATE SECTOR

40. The issues raised regarding the NHI scheme and the private sector. Most of the issues concern the extent of the regulation and the potential impact of the NHI scheme on the private sector and its resources. The purposes of the NHI scheme must be balanced against these issues raised. The NHI scheme purports to realise the right of access to health care and to address the inequalities in access to and quality of health care.

41. The NHI scheme will affect the operation of the private sector. Services will be purchased by the NHI Fund from private and public service providers. The NHI Fund will also contract with the private sector for use of resources. Resources – such as State subsidies and tax credits to medical aids - will also be redistributed from the private sector to the NHI scheme. This will necessarily impact on the resources of the private sector, but to the benefit of the majority of the population.

42. With legislative changes, the role of medical aids will change under the NHI scheme. The NHI Fund differs from the role of medical aid administrators as a person's ability to pay will not influence their access to and quality of care as it currently does. Additionally, the NHI Fund will be a non-profit entity.

43. Concerns have been raised about medical aid schemes' potential loss of profits. However, it is constitutionally justifiable for the State to reform and regulate the health care system in a way in which ensures equitable access to health care. Arguably, the profits made by medical aid administrators are an available resource. The reallocation of resources and regulation of the private sector is justified by the obligation to realise the right within available resources coupled with the horizontal obligations imposed on the private sector not to hinder access to health care. A more equitable distribution of resources is warranted by the high costs and exclusivity of the private sector.

44. The Constitution provides for direct and indirect horizontal application of the Bill of Rights. Constitutional Court jurisprudence has held that in determining the extent to which obligations can be imposed on private entities, the nature of the right and the potential of interference by private entities must be considered.[18]

45. The high costs of the private sector are a barrier to access health care. The unequal distribution of resources also contributes to barriers faced by the majority of the population in seeking access to health care. The right of access to health care is implicated by the private sector. Without regulatory intervention or including the private sector in reform of the health care system, inequalities will persist and perpetuate.

46. In seeking to remove the financial risk in access to health care, the NHI scheme prioritises the right to access to health care over business interests. The NHI scheme seeks to achieve universal health coverage in which the private sector and the public sector work together. The transformation of the health care system can not happen in isolation of the private sector. Doing so would limit available resources, nor would it address the inequalities in access to and quality of health care.

[18] *Daniels v Scribante* CCT 50/16 ZACC 13 (11 May 2017).

47. The private sector is subject to changes that will result from the implementation of the NHI scheme. Additionally, the private sector is constitutionally obligated to operate in a way which facilitates the realisation of the right of access to health care. Hindering access through exorbitant prices and financial exclusivity is not constitutionally permitted. The State is obliged to ensure private sector compliance with health reform and constitutional obligations horizontally imposed.

6 CONCLUSION

48. This submission has sought to examine the constitutionality of the NHI scheme to highlight possible vulnerabilities to be addressed in further development and implementation. These vulnerabilities include consideration of:

    a) Mental health care;
    b) Health care for migrants;
    c) Prioritisation of vulnerable groups;
    d) Transparency;
    e) Clarity on resource accumulation and redistribution;
    f) Human resources;
    g) Meaningful engagement and participation; and
    h) Role of the private sector.

49. The NHI scheme's objective of a more equitable distribution of health care resources is harmonious with the transformation goals of the Constitution and the purpose of socio-economic rights.

50. The NHI scheme has the potential to address the inequalities in access to and quality of health care. Without reform, the current health care system will continue to perpetuate the inequalities which reflect past injustices and discrimination. It is submitted that the development of the NHI scheme should place emphasis on meaningful engagement and participation to ensure that the NHI scheme reflects the needs of the population.