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## MEDIA RELEASE

### NATIONAL HEALTH INSURANCE (NHI) BILL: PARLIAMENT'S PORTFOLIO COMMITTEE WOULD BE WELL-ADVISED FIRST TO OBTAIN LEGAL CLARITY ON CONSTITUTIONALITY

The National Health Insurance (NHI) Bill, which is currently before the National Assembly's Portfolio Committee on Health, poses several potential problems that may well render it unconstitutional. This was revealed in research undertaken by the Inclusive Society Institute (ISI) as part of its broader investigation into possible pathways to universal healthcare in South Africa.

Despite the state law advisor's certification that the law passes constitutional muster, various stakeholder engagements and the ISI's own internal research have shown that the legislation may in fact fall short of constitutional prescripts across a number of areas. These include the potential infringement of the following provisions:

- **The guaranteed right to have access to healthcare services (section 27(1)(a)).** The state's obligation to provide access to essential health services has both a positive and negative element – the obligation to provide such access (positive), and the responsibility to ensure that such provision does not infringe on people's right to provide for themselves (negative).
- **The guaranteed right to bodily and psychological integrity, which includes the right to security in and control over one's body (section 12(2)(b)).** As the bill is vague on what a fully implemented NHI scheme would look like, drawing immediate conclusions is difficult. However, should this empower the public health system to determine who your doctor will be, and you are not comfortable with the assigned practitioner, it becomes problematic. According to section 8 of the bill, not following the referral pathways set out by the NHI will render you liable to pay for the services you receive. This could be viewed as punitive and, therefore, undermining the individual's right to bodily integrity.
- **Every citizen's right to choose their trade, occupation or profession freely (section 22).** While views differ in this regard, some experts believe that the bill needs to be more forthcoming in respect of the private-sector aspects of health care. Professions cut across both the public and private sectors, and NHI may imply restrictions on the ability to trade freely and work for an employer of one's own choice.
- **The right to property (section 25).** While there is nothing in the bill indicating that the state will appropriate the assets of medical schemes, it does suggest that medical schemes will no longer be able to provide the full suite of medical scheme products to their client base. Diminishing the right of medical schemes to provide products to their clients may imply an expropriation of assets.
- **The limitation clause, which allows the limitation of rights only to the extent that the limitation is reasonable and justifiable in an open and a democratic society (section 36).** In its current form, the bill may not pass the reasonableness test. Since it is not linked to clear, measurable milestones at present, it is impossible to determine the effect of eventual full implementation on individual patients, the healthcare sector and/or practitioners. Not knowing what full implementation would look like in practice, in turn, makes it impossible to weigh it against other, potentially less restrictive means to achieve the same purpose.

In addition, the NHI Bill may be challenged on the grounds of vagueness and lack of specifics. Constitutional Court jurisprudence has established the absence of arbitrary power and unpredictability as essential elements of the rule of law (*Van der Walt v Metcash Trading Ltd* (CCT37/01) [2002] ZACC 4). Furthermore, the court has shown that legislation should indicate with reasonable certainty to those bound by it what is required from them so that they may regulate their conduct accordingly (*Affordable Medicines Trust v Minister of Health* (CCT27/04 [2005] ZACC 3). The current NHI Bill does not make clear whether continued implementation will depend on reaching certain predetermined milestones, nor specifies the suite of benefits to be included as part of the package. Moreover, and perhaps more importantly, it is not accompanied by a financing paper, rendering it impossible to assess the feasibility of the bill's objectives and its ultimate impact on the sector.

The purpose of the research undertaken by the ISI was not to form an opinion regarding the validity of the arguments raised in the public discourse on the NHI Bill. Instead, the aim was to identify those arguments put forward most frequently and strongly. Having achieved this aim, the ISI strongly advises the Parliamentary Portfolio Committee on Health to obtain an additional legal opinion on the potential constitutional issues raised above, and as articulated in a template brief to senior counsel (available at [https://drive.google.com/file/d/1JSCz9MLhSgt-475IXgN\\_MkzsLYOBDHII/view](https://drive.google.com/file/d/1JSCz9MLhSgt-475IXgN_MkzsLYOBDHII/view)).

This is important for two reasons:

- Should the opinion point to unconstitutional elements in the legislation, this could materially affect the future design and outcome of the NHI. Early detection of problem areas in the NHI Bill will accelerate the provision of a form of universal and affordable health care in South Africa that is acceptable to all.
- Without clarity on potential constitutional issues, the NHI Bill is bound to be challenged in court, which could well lead to fruitless expenditure on legal costs to defend the action. More importantly, given the protracted nature of the judicial process, it may cause the NHI scheme to be delayed by a number of years.

The ISI reiterates its support for universal and affordable access to healthcare in South Africa. Its research is aimed at exploring all potential pathways to achieve the goals set out in the NHI Bill. The aim is not to adjudicate on the validity of the various arguments raised in the public discourse, nor to express itself in favour one way or the other. The ISI does however stand firm in its belief that legislators should ensure that the bill will indeed pass constitutional muster prior to it being finalised for assent by the president. Failure to do so could be detrimental to the swift delivery of improved, affordable healthcare services to the most vulnerable in society. Ultimately, it is the poor who will bear the brunt of ill-considered law-making.

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