



HELEN SUZMAN FOUNDATION

Attention

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10 September 2019

REQUEST FOR AN EXTENSION OF THE TIME FOR COMMENT ON THE NATIONAL HEALTH INSURANCE BILL [BILL-2019]

Introduction

1. This Request is made by the Helen Suzman Foundation (“HSF”), a non-governmental organisation registered with the Department of Social Development. It is submitted by Mr Francis Antonie, the Director, on behalf of the HSF.
2. The HSF’s central objective is to help protect and promote our constitutional democracy and to do what it can to deepen it. To this end, we have two main activities. The first is public interest legal work, both litigation and response to government calls for comment on draft legislation. The second is research into social and economic policy issues with the aim of making South Africa a better place to live in. We publish our findings on our website, and anyone may use them.

Director: Francis Antonie

Trustees: Cecily Carmona • Max du Plessis • Cora Hoexter • Nick Jonsson • Daniel Jowell • Kalim Rajab • Gary Ralfe • Rosemary Smuts
• Richard Steyn • Phila Zulu

3. The aforementioned NHI Bill was released in its entirety for comment on the 8th of August 2019 with a deadline of 11 October 2019. The NHI Bill is far too important and complex to be addressed within this period. Further added to the complexity is the issue that certain documents, relied upon in the drafting of the NHI, such as accompanying Treasury Documents and the Market Health Inquiry have to date not been released. The Request for any extension should see these crucial documents be added to the public participation process.
4. What follows is a summary of the concerns informing the HSF's request for an extension, the more detailed items being set out in the attached addendum:
 - 4.1. We regard the Bill as a framework Bill.
 - 4.2. The lack of clarity concerning the various phases with regard to implementation.
 - 4.3. Costs of the NHI.
 - 4.4. Constitutionality.
 - 4.5. "More haste, less speed".
 - 4.6. Final Report of the Market Health Inquiry.
5. We suggest that an ideal date will be the end of January 2020. However, if this is not practicable, we request that the extension be extended until at least the end of the 3rd term i.e. 06 December 2019.
6. We note from the second term 2019 Parliamentary programme that the 17th, 18th and 20th September are devoted to committees and at the end of the 20th, the National Assembly gives way to a constituency period. Of course, as respectful citizens, we do not seek to prescribe to the National Assembly about how to proceed. But we do urge that a decision be taken and announced by the end of the second term, so that all potential commentators can plan their work accordingly.

We thank you for your consideration and understanding in this matter.

Yours sincerely,



Francis Antonie
(Director)

Addendum – Request for Extension

The HSF's interest in health and what we have done so far

1. For years now, we have been engaged in the debate around Strategic Health Reform. We are seriously concerned about the health systems' current failings. We fully subscribe to the World Health Organisation's goal of quality, affordable health care for all. We want the platform of health care for all South Africans to be as high as it possibly can be at every point in time, given the country's general level of development. We believe that the system needs to be based on a very wide consensus, so that we South Africans can be proud of our health system the way that people in the United Kingdom are proud of their National Health Service. This is manifestly not the case at present.
2. However, we do not think that there is just one way to achieve the desired outcomes. There are as many ways as there are countries in the world, and then some. Nor do we believe that the government has yet spelled out adequately what it wants to do. The shaping of the system has a long way to go, and much honest and open debate about it remains for the future. We are aware of the complexities of health care, and the possibilities of both market failure and regulatory failure. Some may seek to cut the Gordian knot with a sword, but we oppose peremptory strategies, believing that they will result in more harm than good, especially when it comes to consensus building.
3. In pursuit of our interest in health, the HSF has made the following contributions:
 - 3.1. Strategic Health Reform – Round Table (Dec 01, 2009) (<https://hsf.org.za/publications/roundtable-series/issue-thirteen-december-2009>);
 - 3.2. Submission to National Department of Health - National Health Insurance Green Paper (Dec 16, 2011) (<https://hsf.org.za/publications/submissions/nhi-green-paper-submission.pdf>);
 - 3.3. Desperately Seeking Health Reform - Is 'NHI' the answer? (Feb 07, 2012) (<https://hsf.org.za/news/hsf-articles/desperately-seeking-health-reform-is-nhi-the-answer>);
 - 3.4. The NHI is an Opiate not a Cure (Mar 27, 2012) (<https://hsf.org.za/news/hsf-articles/the-nhi-is-an-opiate-not-a-cure>);
 - 3.5. No such thing as NHI (Jun 05, 2012) (<https://hsf.org.za/news/hsf-articles/no-such-thing-as-nhi>);
 - 3.6. Council for Medical Schemes News: What is Troubling South Africa's Health System? (Apr 12, 2013) (<https://hsf.org.za/news/hsf-articles/council-for-medical-schemes-news-what-is-troubling-south-africas-health-system>);
 - 3.7. Submission to National Department of Health - The White Paper on National Health Insurance for South Africa (Sep 15, 2016) (<https://hsf.org.za/publications/submissions/nhi-white-paper-submission.pdf>);
 - 3.8. Enquiry into Pharmaceuticals in South Africa (2016) (<https://hsf.org.za/publications/special-publications/pharmaceuticals-in-south-africa/pharmaceuticals-in-south-africa-an-enquiry-2>);
 - 3.9. Report of Supply of Pharmaceuticals in South Africa (2018) (<https://hsf.org.za/publications/special-publications/pharmaceuticals-in-south-africa/pharma-report-2018.pdf>);
 - 3.10. Submission on National Health Insurance Bill and Medical Schemes Amendment Bill (Sep 26, 2018) (<https://hsf.org.za/publications/submissions/hsf-submission-on-nhi-bill-and-msaa-bill.pdf>);

- 3.11. Numerous Briefs regarding various health related issues (2013 – ongoing) (<https://hsf.org.za/publications/hsf-briefs/by-category> – under the “Health” tab).

Background to the present request

4. We are aware that the National Health Insurance Bill has been published, along with accompanying material. We have downloaded it, and we are studying it carefully, and we intend to submit comment on it to the Portfolio Committee on Health in the National Assembly by due date. This Request is not that submission. Rather, we are concerned about the closing date for submissions. For the reasons specified below, we believe it is too soon. We have consulted with a range of people, either as individuals or as members of organisations working in the field of health, and there is an evident concern about the closing date beyond just the HSF.
5. A project which is as extensive and complex as the NHI, requires a much longer period for public comment. However, our concern goes further: there is material which is absent without which rational public comment is impossible, such as for example, the overall financial implications and the precise role of the private sector with respect to the NHI. Insufficient detail on such issues has the potential to invalidate the public consultation process as a whole, irrespective of the period made available for comment.
6. We are thus asking the Portfolio Committee to reassess the date. An ideal date is the end of January 2020 as this would enable all parties to prepare submissions. Should this not be practicable we request that the submission date be pushed to the end of the 3rd term i.e. 06 December 2019.

The reasons for our request

7. **We regard the Bill as a framework Bill.** Section 55 of the Bill authorises the issuing of regulations which, over time, will come to incorporate the details of how national health insurance (“NHI”) will work. These regulations will ultimately be very much longer than the Bill (or Act, if the Bill is passed) and are likely, cumulatively, to stretch over many hundreds of pages. Regulations can be made for one or more of 28 different purposes, the last two of which have catch-all provisions.
8. We know from our own experience that draft regulations are much harder for the public to keep abreast of, especially given that they often come in instalments. We appreciate that Section 55(2) of the Bill requires the Minister to publish regulations for comment by the public (although there are some exceptions in Section 55(3)) before he or she makes the regulation. And, of course, any representation about a regulation has to be made to the Minister, rather than to Parliament.
9. Accordingly, a commitment to the Bill entails commitment to coming regulations we know nothing of and, indeed the government may have not worked out completely - this relates primarily to what Section 55(1)(a) of the Bill terms as “the legal relationship between the Fund and the various categories of health establishments, health care service providers or suppliers as provided for in the National Health Act”. This is causing considerable

concern and insecurity, not just amongst the public in general, but more specifically amongst persons employed in both the public and private health sectors. A later closing date would give the Minister more time to communicate to the public (and we appreciate his work so far on this) and more time for potential commentators to weigh what he has to say.

10. Nothing in paragraphs 8 to 10 detracts from the fact that the Bill itself does give us some indication of what the government has in mind, and we shall look at these closely in our coming substantive submission.
11. **Our second reason is this:** Chapter 9 of the 2017 White Paper titled *National Health Insurance for South Africa towards Universal Health Coverage* sets out three phases of the introduction of NHI. Phase 1 was to last from 2012 to (implicitly) 2016, Phase 2 from 2017 to 2022 and Phase 3 from 2022 to 2026. The Bill refers to only two phases. From that, and the dates set out in the White Paper, we infer White Paper Phase I is complete, and since the Bill is forward looking, Phase 2 in the White Paper has been renamed Phase 1 in the Bill, and Phase 3 in the White Paper has been renamed Phase 2 in the Bill. This is fair enough, but it glides over a difficulty.
12. We quote Section 310 in the White Paper in full.

310. The process of policy development started in 2012 and included piloting of health system strengthening initiatives. Activities in the initial phase were funded through a combination of sources which included National Health Conditional Grant such as the direct and indirect NHI Conditional Grants as well as the Health Infrastructure Grants. Work streams were established to further refine the policy and incorporate comments as well as make recommendations for the phased implementation of NHI. As the NHI pilots phase has come to an end, some useful lessons have been learnt in the implementation of integrated school health services, maternal and child health initiatives, district clinical specialist teams and the PHC outreach teams will be taken forward during this phase. These lessons will be scaled up in the next phases of implementation.

We draw attention to the second last sentence in particular. We have been unable to find an account of the lessons learnt, and the evidence supporting the drawing of these conclusions. We did make a PAIA application for the relevant documents, which we only now have access to. But it would be much better if the Department of Health made a full and frank disclosure of what it has learnt and on what basis these learnings rest! For instance, has a comprehensive feasibility study (including its financial implications) been made on the NHI? The Department of Health needs to tell us clearly where to find the relevant documentation. This would build trust. It would provide commentators on the NHI Bill with highly relevant information. We understand it may take a little time to do. Everyone should have an opportunity to consider this material before making their submissions on the NHI Bill. Indeed, the material will help the Portfolio Committee itself. A failure to provide material of this nature will inevitably raise questions about whether adequate disclosure has been made by the Department of Health for purposes of a legally compliant consultation process.

13. **The third reason relates to cost.** Two to three years ago, we had a near-death experience with a wholly unaffordable (and unnecessary) nuclear power programme. Fortunately, that problem has been solved by the

government recognising that this was not the right way to go. We do not want to have another near-death experience with the NHI. In this connection, we make the following points:

- 13.1. We believe that the 2017 White Paper was generally a weak document (to see why, click [here](#)). Chapter 7 on financing was its nadir, an appallingly bad section which stokes much more anxiety about the cost of NHI than it allays. We had expected something better from the National Treasury to be published at the same time as the White Paper, but nothing appeared. **We have been looking for a National Treasury document ever since, but we have found nothing and, in fact, we believe that nothing has ever been published.**
- 13.2. We are in possession of a document published on 11 May 2017 by the Department of Planning, Monitoring and Evaluation titled *Socio-Economic Impact Assessment System (SEIAS) Final Impact Assessment (Phase 2): White Paper on National Health Insurance*. On page 14, a table on consultations starts and the very first consultation reported on is between the Department of Health and the National Treasury. We reproduce the entries in a reformatted form, but otherwise unchanged.

Affected Stakeholder: National Treasury

What do they see as main benefits, costs and risks? Benefits: View NHI as a potential mechanism for improving efficiencies - Costs: Cost and price escalation and impact on taxpayers - Risks: Fiscal space and sustainability issues

Do they support or oppose the proposal? Conditional support - Support limited benefit package - Want to retain a multipayer environment.

What amendments do they propose? The implementation of NHI must be done by both Health and National Treasury - VAT to be increased to fund NHI in part

Have these amendments been incorporated in your proposal? No, a multi-payer environment would undermine the role of a single strategic purchaser especially for economies of scale. No, VAT has been described by many stakeholders and civil society in particular as a regressive tax that will adversely affect the poor.

- 13.3. We are the more concerned, because the same pattern is repeating itself now. On page 57 of the NHI Bill we read:

8.1 (c) Actuarial costing model: Treasury commissioned a simplified intervention-based costing tool for 2019/20 which provides simple estimates of costs of a set of 15 or so interventions. These include for example removing user fees, extending chronic medicine distribution programme (CCMDD), extending ARV rollout, increasing antenatal visits, rolling out capitation model for General Practitioners (GPs), cataract surgery programme, establishing Fund. The full set of interventions costs in the longer term around R30 billion per annum. The Department will adapt the tool to find a set of priority interventions. Most of these interventions can be scaled up progressively as funding becomes available and does not need significant new funds in Budget 2020.

Where is the document? The study should be published in full and made available to commentators for critical assessment well before the closing date for submissions.

13.4. Public concern as to the affordability of the NHI continues to increase not only as a result of a lack of detailed financial forecasts, but also as a result of comments such as “The demand that the NHI Bill should indicate costs is unfair because costs change over time” (Dr Olive Shisana, Special Advisor in the Presidency, as quoted by *BusinessTech* on 22 August 2010). This decade-long refrain is simply disingenuous.

13.5. In our view, the greatest economic challenge right now is to get our fiscal position back under control. The October Medium Term Budget Policy Statement must show significant progress. If it is badly received, adverse developments for the economy are bound to follow swiftly. The MTBPS is another document that commentators need to have before them as they consider the problem. As things stand, it will be delivered on 23 October, nearly two weeks after the closing date for NHI Bill comments.

13.6. We read the following in Business Day of 22 August 2019 that:

The Treasury has told government departments to draft plans to slash their budgets for the next three years, beginning with a 5% cut in 2020 and 6% and 7% for the years thereafter. The proposal is set out in the Treasury’s medium-term expenditure framework technical guidelines, which are distributed to departments to guide their preparation of their budget proposals.

If this is true, even R 30 billion is a lot of money, and it makes access to the MTBPS even more important.

13.7. In summary, a failure to provide a comprehensive financial analysis of the NHI will make it impossible to provide rational comment on its sustainability and will therefore endanger the lawfulness of the public consultation process.

14. **Our fourth reason relates to constitutionality:** Section 3 of the Bill contains the following provisions:

3 (3) If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law, except the Constitution and the Public Finance Management Act or any Act expressly amending this Act, the provisions of this Act prevail.

(4) The Act does not in any way amend, change or affect the funding and functions of any organs of state in respect of health care services until legislation contemplated in sections 77 and 214, read with section 227, of the Constitution and any other relevant legislation have been enacted or amended.

What we are debating among ourselves, and with our lawyers is whether or not the NHI Bill, as it stands, is compatible with the Constitution. The initial answer is that there is a very real probability that a range of provisions are unconstitutional. We and others however need more time to address this question than is permitted in the current deadline.

15. **Our fifth reason follows:** The saying ‘more haste, less speed’ is highly applicable here. We would not like to see the whole process drowning in a sea of litigation. As we often say in lawyers’ letters and court papers, we reserve our rights in law. But we are not the only potential litigators in town. By no means. People are fired up about the NHI, because health policies affect quality of life, and even the distribution of life and death. We also know

that litigation takes years. The law is slow, as is widely known. Is it not sensible to take some more time now in order to reduce the probability of getting the whole debate snarled up in the courts?

16. **A sixth reason relates to the final report of the Health Market Inquiry** which is due to be published on 30 September 2019. This Inquiry was established by notice in the Government Gazette on 29 November 2013 and has been in operation since January 2014. Its provisional findings were published in a 484-page report in July 2018. Given the extensive nature of this Inquiry and its importance for the South African health sector in general, it is imperative that sufficient time be given for this to be studied in detail, before making comment on the NHI Bill.
17. The recent Treasury Document of 27 August 2019 on Economic Strategy for South Africa reiterates the importance of evidence-led decision making in policy formulation. So, too, should that caveat be applied to the NHI Bill.

Conclusion

18. This is an urgent Request to the National Assembly and, in particular, the Portfolio Committee on Health, to reconsider the closing date for comments on the NHI Bill.