

# SAHPC

South African Health Professionals Collaboration



SADA  
THE SOUTH AFRICAN  
DENTAL ASSOCIATION



South African  
Orthopaedic  
Association



SASA  
SOUTH AFRICAN SOCIETY OF  
ANAESTHESIOLOGISTS



U F F P  
UNITY FORUM OF FAMILY PRACTITIONERS

18 December 2023

## The President of the Republic of South Africa

The Presidency, Union Buildings  
Government Avenue, Pretoria  
Private Bag X1000  
Pretoria, 0001

The Presidency, Tuynhuys Building  
Parliament Street, Cape Town  
Private Bag X1000,  
Cape Town, 8000

## Attention: His Excellency, President M.C. Ramaphosa

Per email: [PresidentRSA@presidency.gov.za](mailto:PresidentRSA@presidency.gov.za) & [president@po.gov.za](mailto:president@po.gov.za)  
cc: [gkoornhof@presidency.gov.za](mailto:gkoornhof@presidency.gov.za) & [malebo@presidency.gov.za](mailto:malebo@presidency.gov.za)

Dear Honourable President Ramaphosa

## PETITION TO THE PRESIDENT TO THE REPUBLIC OF SOUTH AFRICA ON THE NATIONAL HEALTH INSURANCE BILL [B 11B - 2019](S76) (PROVISIONAL)

### Introduction and background

1. On 6 December 2023, the National Council of Provinces (“**NCOP**”) passed the National Health Insurance Bill (“**NHI Bill**”) without amendments which, in terms of section 76(1)(b) of the Constitution of the Republic of South Africa (“**Constitution**”), must be submitted to His Excellency for assent.
2. The South African Health Professionals Collaboration wishes to take this opportunity to appeal to His Excellency to note the constitutional concerns in respect of the constitutional rights affected by the proposed provisions of the NHI Bill and to exercise your powers in terms of section 79(1) of the Constitution read with section 84(2)(b) of the Constitution to refer the NHI Bill back to the National Assembly for reconsideration.
3. The South African Health Professionals Collaboration (“**SAHPC**” or “**we**”) is a national group of 9 medical, dental and allied healthcare practitioners’ associations representing more than 25,000 dedicated private and public sector healthcare workers. The SAHPC currently comprises of the following members:
  - 3.1. the South African Private Practitioners Forum;

### The South African Health Professionals Collaboration (SAHPC) A collaborative group

South African Private Practitioners Forum (SAPPF) | South African Medical Association (SAMA) | Federation of South African Surgeons (FoSAS) | South African Dental Association (SADA) | South African Society of Anaesthesiologists (SASA) | Unity Forum of Family Practitioners (UFFP) | South African Orthopaedic Association (SAOA) | South African Society of Obstetricians and Gynaecologists (SASOG/GMG) | Radiological Society of South Africa (RSSA)

- 3.2. the South African Medical Association;
- 3.3. the Federation of South African Surgeons;
- 3.4. the South African Dental Association;
- 3.5. the South African Society of Anaesthesiologists;
- 3.6. Unity Forum of Family Practitioners;
- 3.7. the South African Orthopaedic Association;
- 3.8. the South African Society of Obstetricians and Gynaecologists; and
- 3.9. the Radiological Society of South Africa,

all of whom have participated, in one way or another, in the public discussion and parliamentary processes related to the NHI Bill and the green paper and white papers that preceded it.

4. As His Excellency is aware, the NHI Bill aims to achieve universal access to quality health care services in South Africa and to further provide a framework for the strategic purchasing of health care services by the National Health Insurance Fund (“Fund”) on behalf of users.
5. The SAHPC recognises the need to improve the quality of life of all citizens by achieving the progressive realisation of the right of access to quality health care services and making progress towards achieving universal health coverage.
1. The SAHPC, notes with concern, however, that the NHI Bill in its current form and as recently passed by the NCOP poses significant constitutional concerns. We note that some of these concerns were also presented by the Parliamentary Legal Adviser to the Portfolio Committee on Health.<sup>1</sup>
2. We wish to highlight that the criticism that the NHI Bill continues to attract is not in respect of the purposed and noble aim of the NHI Bill to achieve universal health coverage but rather the proposed framework and apparent disregard of contributions made by the Parliamentary Legal Adviser, the private health care sector, health care professionals in public and private practice, business leaders, members of the public and other stakeholders to address major constitutional, financial, operational and governance concerns in respect of the NHI Bill.
3. At the outset, we wish to highlight that His Excellency has previously referred five Bills back to the National Assembly for reconsideration where His Excellency “*expressed his misgivings about the constitutionality of the Bills and several other reservations.*”<sup>2</sup>

<sup>1</sup> “National Health Insurance (NHI) Bill: Parliamentary Legal Services & State Law Advisors input” (available at: [https://pmg.org.za/page/National%20Health%20Insurance%20\(NHI\)%20Bill:%20Parliamentary%20Legal%20Services%20&%20State%20Law%20Advisors%20input](https://pmg.org.za/page/National%20Health%20Insurance%20(NHI)%20Bill:%20Parliamentary%20Legal%20Services%20&%20State%20Law%20Advisors%20input)).

<sup>2</sup> “Bill Returned to Parliament by the President” (available at: <https://pmg.org.za/blog/BillReturnedtoParliamentbythePresident>).

4. In *Doctors for Life International v Speaker of the National Assembly and Others* (“**Doctors for Life**”), the Constitutional Court emphasised that the President performs an important check in the legislative process and provided that:

*“[t]he President’s role in the law-making process reflects a careful effort to ensure that the law-making process is kept under check consistent with the principle of checks and balances. The scheme is founded on the trust that our system has for the role of the President, namely, the responsibility it vests in the President to “uphold, defend and respect the Constitution as the supreme law”, and thus to ensure that laws that he or she assents to and signs, conform to the Constitution... During this process, the rights of the public are safeguarded by the President who has the authority to challenge the constitutionality of a Bill consistent with his or her duty to uphold, defend and respect the Constitution.”<sup>3</sup>*

5. It is against the above background that the SAHPC notes the constitutional and procedural concerns set out below and requests His Excellency to refer the NHI Bill back to the National Assembly for reconsideration of the NHI Bill’s constitutionality.
6. While we do not intend to repeat submissions previously made by our members in respect of the NHI Bill, we wish to reiterate that the bases upon which our members are respectfully not in a position to accept the NHI Bill are the concerns, including constitutional concerns, that have previously been raised in the myriad of written and verbal submissions addressed to the National Assembly and the NCOP which have not been addressed in the NHI Bill submitted to His Excellency for signature.

**The legislative process followed to date has been procedurally unfair**

7. Recognising that health reform in South Africa is necessary, our members have made submissions at different stages of the history of the NHI Bill dating back as far as the release of the green paper on the Policy on National Health Insurance in 2011. These submissions were made in an attempt to engage with Parliament and the Department of Health to ensure collaboration between the public and private sectors and to further ensure that the South African healthcare system’s needs are appropriately funded, managed and delivered.
8. At the core of any constitutional concerns raised by the SAHPC is a deep appreciation of the challenges faced in both the private health sector and public health sector in South Africa. The cornerstone of the NHI Bill should be the development of a framework that will ensure that the State can deliver quality health care services to everyone as contemplated in section 27 of the Constitution.
9. The SAHPC notes, however, that the implementation of the NHI Bill will likely have the opposite effect of improving the quality of health care services in South Africa. This is largely attributable to the fact that there is uncertainty in respect of the funding of the Fund where the Fund must purchase health care services for users. In this regard, we note that to date Parliament has not relied on any evidence

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<sup>3</sup> *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 53-54.

demonstrating that the “sources of funding” of the Fund will be sufficient for the Fund to purchase comprehensive health care services on behalf of users. There will be a negative effect on the quality of health care services where the role of private sector funding is severely impacted by section 33 of the NHI Bill as discussed below.

10. The Promotion of Administrative Justice Act 3 of 2000 gives effect to the constitutional right to just administrative action set out in section 33 of the Constitution, which right entitles persons to lawful, reasonable and procedurally fair administrative action, and to receive reasons for the decisions taken.
11. The SAHPC respectfully objects to the passing of the NHI Bill by the National Assembly and the NCOP on the basis that the legislative process followed to date in respect of the NHI Bill has been procedurally unfair.
12. In *Doctors for Life*, the Constitutional Court confirmed that:

*“[I]nterested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions. The requirement that participation must be facilitated where it is most meaningful has both symbolic and practical objectives: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.”<sup>4</sup>*

13. We note our concern that submissions made during the parliamentary processes do not appear to have been considered. In this regard, we note that the Constitutional Court, in *Mogale and Others v Speaker of the National Assembly and Others* provided that the principle of a participatory democracy requires:

*“[a] reasonable opportunity to participate in legislative affairs “must be an opportunity capable of influencing the decision to be taken... This does not mean that the legislature must accommodate all demands arising in the public participation process, even if they are compelling. The public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public’s views. Even if the lawmaker ultimately does not change its mind, it must approach the public involvement process with a willingness to do so.”<sup>5</sup>*

14. We note that there are clear constitutional benefits to the ordinary legislative process. It facilitates the promulgation of sensible, considered and measured legislation. This is fundamental generally, but it is all the more important where there are severe intrusions into the rights in the Bill of Rights, as occasioned under the NHI Bill.

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<sup>4</sup> *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 171.

<sup>5</sup> *Mogale and Others v Speaker of the National Assembly and Others* [2023] ZACC 14 at para 35.

15. The SAHPC is concerned that there has been no effort by Parliament to address proposed provisions of the NHI Bill that stand to be challenged on various constitutional grounds.
16. The SAHPC wishes to highlight the importance of consultations with stakeholders and considering written and verbal submissions (including submissions highlighting potential constitutional concerns in respect of contemplated legislation) for purposes of ensuring a more seamless adoption of legislation with limited legal challenges to same.
17. Notably, on 9 November 2023, the National Department of Health (“**NDoH**”) provided responses to the NCOP Select Committee based on the recommendations contained in the report titled ‘Stakeholders Response to the National Health Insurance Bill [B11B-2019]: An Overview’.<sup>6</sup> In the presentation prepared by the NDoH, the NDoH provided that “[t]he Department will then consult... its legal team on proposed wording for suggested amendments for the Select Committee’s consideration”.<sup>7</sup> Despite the NDoH acknowledging that there is strong motivation for providing amendments and corrections to the NHI Bill, the NHI Bill was nevertheless passed by the NCOP without amendments.
18. Accordingly, the SAHPC joins several interested parties in echoing concerns in respect of Parliament’s reluctance to address constitutional concerns raised by the Parliamentary Legal Adviser, private health sector, health care professionals in public and private practice, business leaders, members of the public and other stakeholders in respect of the provisions of the NHI Bill.

### **The negative impact of section 33 of the NHI Bill**

19. As a starting point, we note that section 11(2)(e) of the NHI Bill provides that the Fund must “*negotiate the lowest possible price for goods and health care services without compromising the interests of users or violating the provisions of this Act or any other applicable law.*” (our emphasis)
20. As has been articulated in many written and verbal submissions made during the parliamentary processes, the NHI Fund will have a reduced pool of health care service providers to contract with if the price for services becomes unsustainable.
21. In addition to the SAHPC’s concerns around the financial and practical shortcomings of the NHI Bill, of particular concern to the SAHPC is the uncertainty in respect of the payment of health care service providers which will have an impact on the private health sector in South Africa.
22. In this regard, section 33 of the NHI Bill provides that:

<sup>6</sup> “Stakeholders Response to the National Health Insurance Bill [B11B-2019]: An Overview” (available at: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiO0Kf2qYyDAXUgRkEAHearAekQFnoECAkQAQ&url=https%3A%2F%2Fpmg.org.za%2Ffiles%2F231109\\_UPDATED\\_PRESENTATION.pptx&usq=AOvVaw1LI62K4ggufcaiLWub6rA6&opi=89978449](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiO0Kf2qYyDAXUgRkEAHearAekQFnoECAkQAQ&url=https%3A%2F%2Fpmg.org.za%2Ffiles%2F231109_UPDATED_PRESENTATION.pptx&usq=AOvVaw1LI62K4ggufcaiLWub6rA6&opi=89978449)).

<sup>7</sup> *Ibid.*

*“[o]nce National Health Insurance has been fully implemented as determined by the Minister through regulations in the Gazette, medical schemes may only offer complementary cover to services not reimbursable by the Fund.”*

23. As noted by the Parliamentary Legal Adviser, the role of medical schemes will be fundamentally altered once the NHI Bill is implemented where section 33 of the NHI Bill significantly limits the role of medical schemes to only offering complementary cover to services not reimbursable by the Fund.
24. It is important to note the composition of medical scheme beneficiaries who will be covered by the Fund. A large number of medical scheme beneficiaries have severe life-threatening chronic diseases. Furthermore, the medical scheme beneficiary population is older than the general population. We note that the responsibility to provide cover to such beneficiaries, who currently receive quality health care services by means of medical scheme coverage, will transfer to the State. This will have the effect that a large tranche of higher than average health risk patients, will become the responsibility of the State where, in terms of section 6(a) of the NHI Bill, users of health care services purchased by the Fund are entitled to receive necessary quality health care services free at the point of care from an accredited health care service provider or health establishment.
25. Accordingly, section 33 poses a risk to the financial viability and sustainability of the Fund. While section 6 of the NHI Bill sets out a wide range of rights of users of health care services purchased by the Fund, the NHI Bill, as currently drafted, poses a direct impediment to the rights of users as they relate to receiving necessary quality healthcare services within a reasonable time period.
26. While health care professionals want better access to quality health care services for their patients both in the public and private sectors, the SAHPC notes that the framework contemplated in the NHI Bill will unreasonably frustrate/delay the access of such patients to quality health care services. This will be the case where there will be little to no incentive for private sector investment in the healthcare system in anticipation of and following the implementation of section 33 of the NHI Bill.
27. While we do not intend to deal with the specific concerns raised in submissions in respect of the lack of certainty regarding the application of section 33 of the NHI Bill, including the contemplated ambit of complementary cover in section 33, we wish to highlight the SAHPC's broader concern that limiting the role of medical schemes has the effect of reducing access to quality healthcare services and undermines collaboration between the private and the public health care sectors. This is because the private health sector in South Africa is primarily funded by medical schemes where the impact of the limitation of the role of medical schemes will have a direct impact on health care service providers both in their professional and personal capacity.
28. Section 33 of the NHI Bill is one of a number of provisions that threaten the constitutional right to access to health care services enshrined in section 27 of the Constitution.

29. The SAHPC notes that the efficiency and sustainability of South Africa's healthcare system, and health reform such as the NHI, is contingent on collaboration between the public health care and private healthcare sector which can drive better outcomes for South Africa's healthcare system.
30. Provisions of the NHI Bill, such as section 33, that have the negative effect of limiting funding for the entire private healthcare sector, undermine the South African government's ability to achieve the objectives contemplated in the NHI Bill.
31. In this regard, we note that several members of the SAHPC have conducted surveys that indicate that a significant number of health care professionals plan to emigrate from South Africa or leave practice due to the planned introduction of the NHI Bill.

### **The NHI Bill undermines section 27 of the Constitution**

32. The negative effect that the NHI Bill will have on South Africa's healthcare system has been demonstrated in both written and verbal submissions made to Parliament, where it has been highlighted that the NHI Bill will have the effect of decreasing the overall amount of funding available for national healthcare in South Africa. A reduction of healthcare resources at the national level will reduce access to healthcare for all South Africans, particularly the most vulnerable members of society (i.e., the poor and sick). This is irrational and unconstitutional as the implementation of the bill will have the opposite effect of achieving the (ostensible) purposes of the NHI Bill. This is over and above the fact that it is reported that the implementation of the NHI Bill will result in the 9 million South Africans that have medical scheme coverage being required to pay 31% more tax for 69% less health care benefits in return.<sup>8</sup>
33. In light of the fact that the SAHPC's members comprise of medical, dental and allied healthcare practitioners' associations, we note our concern that the provisions of the NHI Bill undermine section 27 of the Constitution and the need to preserve existing access to health care services.
34. The SAHPC is cognisant of the fact that majority of people in South Africa, who do not have medical scheme cover, are treated at public health facilities and comprise of the most vulnerable persons in South Africa. Consequently, it is of the utmost import that the State (working alongside the private sector) does everything it can to improve the current access these persons have to medical treatment. The SAHPC and its members have previously emphasised that this can be achieved by monitoring and improving health outcomes within both sectors through collaboration.
35. Furthermore, the SAHPC notes the importance of the State to preserve the access to medical treatment of people in South Africa who are members of medical schemes.
36. Section 27 of the Constitution places a negative obligation on the State to abstain from impairing existing rights to access to health care. Where a category/group of persons already enjoy access to

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<sup>8</sup>See: <https://www.moneyweb.co.za/news/south-africa/nhi-means-more-tax-less-benefits-for-medical-aid-members-discovery/#:~:text=Expressed%20another%20way%2C%20that%27s%20the,69%25%20less%20benefits%20in%20return.>

health care services, provisions of the NHI Bill that have the effect of preventing or impairing the right of such persons to access to health care services would amount to a retrogressive measure. Such retrogressive measures are prohibited by section 27 of the Constitution. Accordingly, the State has a negative obligation to maintain the existing right to access to health care services, that such persons were previously entitled to.

37. The Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others* found that the State will be in breach of its obligation to progressively realise socio-economic rights where it reduces or removes an existing right without justification.<sup>9</sup>
38. The Constitutional Court confirmed that the obligation on the State to progressively realise socio-economic rights is incompatible with the State taking retrogressive measures, and that to the extent that retrogressive measures are introduced, they “*would require the most careful consideration and would need to be justified by reference to the totality of...[rights] ... and in the context of the full use of the maximum available resources.*”<sup>10</sup>
39. We note that any provision of the NHI Bill that:
- 39.1. is a retrogressive measure (i.e. amounts to a limitation or the removal of existing rights of certain groups of persons);
  - 39.2. removes the existing rights of certain persons thereby having the opposite effect of progressively realising the right to access to health care;
  - 39.3. will have the effect that the State does not meet the immediate needs of vulnerable persons in South Africa due to the irrationality and impracticality of such provisions; and
  - 39.4. unjustifiably infringes the right to life (section 11) and the right to freedom and security of the person (section 12) by diminishing the quality and/or scope of existing access to health care services,
- is unlikely to pass the constitutional muster.
40. In addition to section 27 of the Constitution, we note that the NHI Bill also restricts free choices of healthcare enjoyed through medical scheme benefit options, thereby violating section 12(2) of the Constitution, the right to bodily and psychological integrity, being a subcategory of the right to freedom and security of the person.

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<sup>9</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 at para 45.

<sup>10</sup> *Ibid* at para 45.



## The NHI Bill undermines section 25 of the Constitution

41. It is important to note the significant role that health care practitioners currently play in the South African healthcare system and will play in future as health care service providers under the NHI.
42. Accordingly, the negative impact of the NHI Bill on the practices of health care professionals is inextricably linked to the ability of the Fund to purchase quality health care services on behalf of users, as well as the integrity and sustainability of the healthcare system as a whole.
43. In addition, as the NHI Bill is currently drafted, there is a real risk that health care practitioners will effectively be deprived of all or part of the value of their practices and the goodwill that attaches to those practices, as the transition is made from an environment of private sector medical scheme reimbursement for services to a national pricing system in terms of which health care practitioners will have their services purchased by the Fund, a single monopsony purchaser, at the “lowest possible” price which will be prescribed.
44. In light of the impact the provisions the NHI Bill will have on the sustainability of the private healthcare sector, we note that the NHI Bill will have a negative impact on the revenue and businesses of health care practitioners where the Fund, in consultation with the Minister, is empowered in terms of section 41 of the NHI Bill to determine the nature of provider payment mechanisms.
45. Further to section 11(2)(e) of the NHI Bill as described in 19 above, the SAHPC notes, with concern, the legitimate fear that health care professionals will be required to do more work for significantly less money. Furthermore, our members have previously raised concerns regarding the uncertainty in respect of how medical malpractice insurance (in respect of medico-legal liability) will be dealt with in the NHI environment and who will bear the cost of professional indemnity insurance for health care professionals under the NHI.
46. Section 25(1) of the Constitution provides that:
- “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”* (our emphasis)
47. The Constitutional Court has cautioned that this section 25 right is not absolute and not intended to protect against State interference, “*but to safeguard it from illegitimate and unfair State interference*”.<sup>11</sup> Hence deprivation of property may take place through a law of general application provided that it is not arbitrary.
48. In order to succeed with a section 25(1) Constitutional challenge, a person must establish:
- 48.1. such person’s right to exploit the person’s property;

<sup>11</sup> *Reflect-All 1025 CC and others v MEC for Public Transport, Road and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) at 32.

48.2. that the interference of the NHI Bill on the use of such person's property amounts to deprivation; and

48.3. that such deprivation is arbitrary.

49. The Constitutional Court has previously interpreted deprivation as “*any interference with the use, enjoyment or exploitation of private property*”,<sup>12</sup> where the Constitutional Court has subsequently noted that:

*“[S]ome deprivations of property rights, although not depriving an owner of the property in its entirety, or depriving the holder of a real right of that real right, could nevertheless constitute a significant impairment in the interest that the owner or real right holder has in the property.”*<sup>13</sup>

50. The Constitutional Court, in *First National Bank v Commissioner, SARS; First National Bank v Minister of Finance*, confirmed that deprivation would be arbitrary if the law “*referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.*”<sup>14</sup>

51. Although the NHI Bill is a law of general application, if the NHI Bill amounts to an arbitrary procedure for reducing the property or interest in property of persons, having regard to the requirement to provide sufficient reason for the particular deprivation in question, then the NHI Bill would be regarded as being designed to target a particular person or category of persons.

52. Furthermore, we note that the deprivation could be held to be arbitrary if there is no link between the restriction to the property of persons in terms of the NHI Bill and the (ostensible) purposes of the NHI Bill.

53. Accordingly, we respectfully submit that the provisions of the NHI Bill could face constitutionality challenges in light of their impact on the property rights of persons.

### **The NHI Bill undermines section 22 of the Constitution**

54. The NHI Bill has been passed by Parliament at a time where South Africa has an alarming shortage of health care professionals evidenced by the ratio of health care practitioners to patients in South Africa. By way of example, in 2021 South Africa recorded 8.09 medical doctors per 10,000 population.<sup>15</sup>

55. Section 22 of the Constitution provides that every citizen has the right to choose their trade, occupation or profession freely. Although section 22 of the Constitution mentions only the right to “choose” a trade, occupation or profession rather than the right to “engage” in it, the Constitutional Court has held

<sup>12</sup> *Phumelela Gaming and Leisure v Gründlingh and others* 2007 (6) SA 350 (CC) at 57.

<sup>13</sup> *Reflect-All 1025 CC and others v MEC for Public Transport, Road and Works, Gauteng Provincial Government and another* 2009 (6) SA 391 (CC) at 36.

<sup>14</sup> *First National Bank v Commissioner, SARS; First National Bank v Minister of Finance* 2002 (4) SA 768 (CC) at 100.

<sup>15</sup> See: <https://www.statista.com/statistics/1413514/medical-doctors-per-10-000-population-in-south-africa/#:~:text=In%202021%2C%20South%20Africa%20registered,overall%20population%2C%20is%20significantly%20low.>

that section 22 also includes the right to practise a chosen profession.<sup>16</sup> Furthermore, the right to choose a trade, occupation or profession freely is more than a right to provide materially for oneself but is aimed at enabling individuals to live profitable, dignified and fulfilling lives.<sup>17</sup>

56. Section 22 further provides that the practice of a trade, occupation or profession may be regulated by law. It has been widely held that the power of government to control or regulate the practice of a trade, occupation or profession involves the power to place such restrictions on the practice of a particular trade, occupation or profession as are considered necessary or desirable,<sup>18</sup> but these restrictions must be reasonable.<sup>19</sup> Without protection against arbitrary regulation of the practice of an occupation, the freedom to choose an occupation would make little sense.
57. We note the impact provisions of the NHI Bill, including some of the extensive requirements set out in section 39(2)(c) of the NHI Bill, will have on regulating how health care professionals engage in their chosen profession. Furthermore, the NHI Bill, particularly section 11(2)(e) of the NHI Bill, does not contemplate payment rates for health care service providers being set at a level that allows providers to cover their costs and make a reasonable return.
58. In *Affordable Medicines Trust and Others v Minister of Health and Others* (“**Affordable Medicines Trust**”) the Constitutional Court concluded that where a law regulating a profession has a negative impact on citizens’ choice of profession, the statute must be subjected to the rationality test. In this regard, the Constitutional Court confirmed that the question is whether the law that regulates the practice of a profession (i.e., provisions of the NHI Bill regulating the accreditation and payment of health care professionals), viewed objectively, would affect negatively the choice of a profession.<sup>20</sup> The NHI Bill has the effect of regulating the conduct of health care professionals in South Africa who are qualified to practise as such.
59. In *Affordable Medicines Trust*, the Constitutional Court provided that:

*“[t]here is no suggestion that this requirement, viewed objectively, would have the effect of influencing negatively a person’s decision whether to become a medical practitioner. Indeed it is difficult to fathom how a person who has chosen to pursue a medical profession and is prepared to undergo some six years of academic training to that end, can ever be deterred from that ambition by the requirement that, if, upon qualification, he or she wishes to dispense medicine as part of his or her practice, he or she would be required, among other things, to dispense medicines from premises that comply with good dispensing practice.”*<sup>21</sup> (our emphasis)

<sup>16</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 3 SA 247 (CC) at para 63.

<sup>17</sup> *Ibid* at para 59.

<sup>18</sup> *Gaming Association of South Africa, Kwa-Zulu Natal and Others v The Premier of KwaZulu-Natal and Others* [1997] 2 All SA 171 (N) at 181; *JR 1013 Investments (Pty) Ltd v Minister of Safety and Security* 1997 (7) BCLR 925 (E).

<sup>19</sup> See, by way of example, *Van Rensburg v South African Post Office Ltd* 1998 (10) BCLR 1307 (E) at 1322E.

<sup>20</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 3 SA 247 (CC) at para 68.

<sup>21</sup> *Ibid* at para 71.

60. While health care professionals want better access to quality health care services for their patients, the threat of the implementation of the NHI Bill, which will leave health care practitioners with more patients while being required to render their services at the lowest possible price, has already demonstrated that the provisions of the NHI Bill will affect the choice of the medical profession of health care professionals in a negative manner. This has already been evidenced by surveys conducted by SAHPC members that indicate that a significant number of health care professionals plan to emigrate from South Africa or leave practice due to the planned introduction of the NHI Bill.
61. Accordingly, it is not clear whether the power to regulate the practice of a profession contemplated in the NHI Bill, in its current form, will be held by a court to be exercised in an objectively rational manner. This is particularly given the legislature's failure thus far to present proper financial feasibility studies.
62. Where the regulation of the medical profession, viewed objectively, is likely to impact negatively on the choice of a profession by health care professionals due to the increase in patients and decrease in the amount payable to such health care professionals for rendering their services, such regulation will limit the right of health care professionals to freely choose a profession guaranteed by section 22 of the Constitution.

### **Conclusion**

63. We wish to highlight that the delay that will be caused by challenges to His Excellency signing the NHI Bill can be avoided by referring the NHI Bill back to the National Assembly to address the constitutional concerns raised in several submissions made during the parliamentary processes. We note that such a delay caused by potential legal challenges will affect the implementation of much needed reform in the healthcare system.
64. We remain hopeful that His Excellency will note the constitutional concerns raised above and by other interested parties and direct the National assembly to reconsider the current form of the NHI Bill.
65. We trust that His Excellency will continue to safeguard the constitutional rights of the people of South Africa by noting any doubts/reservations His Excellency has in respect of the constitutionality of the NHI Bill and refer the NHI Bill back to the National Assembly, similarly to the five Bills His Excellency has previously referred back to the National Assembly.
66. Should His Excellency require any further information or clarification regarding any aspect of the above, the SAHPC would be pleased to make further submissions to His Excellency.

Yours sincerely



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**For: The South African Private Practitioners Forum**

**Name: Dr Simon Strachan**



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**For: The South African Medical Association**

**Name: Dr Mvuyisi Mzukwa**



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**For: The Federation of South African Surgeons**

**Name: Prof Timothy Hardcastle**



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**For: The South African Dental Association**

**Name: Mr KC Makhubela**



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**For: The South African Society of Anaesthesiologists**

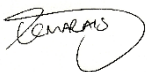
**Name: Dr Caroline Corbett**



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**For: Unity Forum of Family Practitioners**

**Name: Dr Mphata Norman Mabasa**



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**For: The South African Orthopaedic Association**

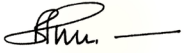
**Name: Prof Len Marais**



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**For: The South African Society of Obstetricians and Gynaecologists**

**Name: Dr Coen Groenewald**



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**For: The Radiological Society of South Africa**

**Name: Dr Richard Tuft**