

Confidential

The Hospital Association Of South Africa

**Legal Submissions to the Department of Health Regarding
The National Health Amendment Bill Of 2008**



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INTRODUCTION

1. On 18 April 2008 the Department of Health (“**DOH**”) published the Draft National Health Amendment Bill, 2008 (“**the Bill**”) for public comment.¹
2. The Bill intends to amend the National Health Act 61 of 2003 (“**the Act**”) by inserting a new chapter 10A into the Act.
 - 2.1 Chapter 10A provides for the establishment of a Facilitator for Health Pricing (“**the Facilitator**”) and a Health Pricing Tribunal (“**the Tribunal**”).
 - 2.2 In broad terms, the Facilitator is tasked with facilitating the agreement of fee schedules² between various health care players (referred to in the Bill as “*stakeholders*”).
 - 2.3 If the parties are unable (or, it would appear, unwilling) to reach agreement, the Facilitator refers the matter to the Tribunal, which is then empowered to make a determination as to the fee schedule. An agreed schedule and a schedule determined by the Tribunal are binding, at least in relation to the prescribed minimum benefits (“**PMBs**”).
 - 2.4 The Bill thus proposes the establishment of a regime for the regulation of service provider prices in the health care industry.
 - 2.5 The Facilitator has the power to compel the disclosure of information (particularly costing information) from stakeholders, while the Tribunal has court-like powers to summon and otherwise procure information. The Tribunal also has the power to make orders in relation to conduct such as collusion, perverse incentives and undesirable business practices.
3. The Director-General of DOH invited written submissions from interested parties. Pursuant to this invitation, the Hospital Association of South Africa (“**HASA**”) sets out its legal submissions on the Bill below. HASA’s submissions are motivated by its concerns regarding the impact that the Bill will have for private hospitals and health care professionals that work at those hospitals, should it be enacted in its present form. HASA is an association of private hospitals, the members of which

¹ Published under Government Notice 475 in *Government Gazette* 30985 of 18 April 2008.

² Fees are defined as including “tariffs and prices”.



represent 94% of the South African private hospital market. A list of HASA's membership is set out in Annexure "A" to these submissions.

4. At the outset, HASA submits that the Bill is vague in both its objectives and in its detail; that the Bill accordingly provides insufficient guidance to the Facilitator, the Tribunal and inspectors for these functionaries to properly perform their duties under the Bill; and that the problems regarding the Bill's vagueness are exacerbated by the fact that it purports to criminalise certain conduct. A further problem arising from the Bill's vagueness is the lack of clarity regarding the institutional position and independence of the Facilitator and Tribunal.
5. In its current form, the Bill is simply unworkable. For the reasons set out below, we submit that the Bill is fatally defective, both in terms of its specific content and in terms of its objectives.
6. For the sake of convenience, we shall refer to section numbers in the Act as they would be numbered if the Bill were to be enacted into law.



EXECUTIVE SUMMARY

7. Given the unreasonably short time period for comment, these submissions will focus on HASA's principal points of concern arising from the Bill.
8. The Bill is replete with difficulties and does not pass constitutional muster. In particular:
 - 8.1 The Bill violates the rule of law and the guidance principle. That is because the Facilitator, the inspectors and the Tribunal are not provided with meaningful guidance as to their functions and stakeholders that are subject to their powers and decisions are similarly not provided with sufficient guidance on how to regulate their affairs in the shadow of the Bill's provisions.
 - 8.2 There are significant concerns around the apparent lack of independence or impartiality in respect of both the Facilitator and the Tribunal. Given the extensive powers that the Bill proposes to extend to these functionaries, it is simply not acceptable in a constitutional state governed by the rule of law for the Bill to be as opaque as it is regarding the independence and the impartiality or otherwise of the Facilitator and the Tribunal.
 - 8.3 A related concern arises from the constitutional problems presented by the Bill's attempt to criminalise certain conduct. The provisions of the Bill are so vague and open-ended that the criminalising of conduct under the Bill falls foul of the principle of legality as it relates to criminal law.
 - 8.4 The Bill is in any event characterised by vagueness and lack of clarity in relation to many of its provisions and in respect of its overall purpose and objectives.
 - 8.5 A recurring concern is that the Bill's provisions present practical and logistical difficulties which make it more than likely that the Facilitator and the Tribunal will not be in a position to ensure manageable and, above all, expeditious determination of the schedules of fees. The Tribunal and the Facilitator will thus not properly be able to comply with their obligations under section 195 of the Constitution (which demands that there must be "*[e]fficient, economic and effective use of resources*"³ and that the public must be provided "*with timely,*

³ Section 195(1)(b).



*accessible and accurate information*⁴) or section 237 (which provides that “[a]ll constitutional obligations must be performed diligently and without delay”). The clumsy and unworkable process by which the schedules of fees are meant to be determined will have a serious impact on the stakeholders whose businesses will be made subject to the Bill.

- 8.6 The overbearing influence of the DOH (and behind it the Minister) in relation to the schedule of fees will also have a negative impact on the rights of health professionals to choose and practise their occupation. What is more, the Bill appears to be intended to have an impact on the property rights of a multitude of private individuals and entities within the healthcare sector. Such an impact will be constitutionally unacceptable where it occurs under a law that is as vague as the Bill. The state should exercise its powers in terms of clear rules and principles set out in advance. The exercise of power is arbitrary where it does not follow rules or precedents, or where it is unpredictable. It will be contended that the Bill grants the Facilitator and the Tribunal discretionary powers to make decisions that will effect deprivations of property amongst stakeholders. Those deprivations will be unconstitutional since they result from the exercise of discretionary power that is arbitrary by virtue of the Bill’s insufficient or inadequate provision of legal criteria to govern their exercise.
9. Other constitutional rights are also affected by the Bill. Perhaps of most concern is the Bill’s chilling effect on the choice and practice of a profession and the Bill’s potential for arbitrary deprivation of property. The related effect will be to undermine the right of access to healthcare in South Africa. It must be said plainly that if the Bill is enacted there is a real likelihood of the country losing further health professionals, either to emigration in respect of those that are already established in their fields, or because those that are inclined towards the health sciences as a career may decide that the overbearing nature of the Department’s regulation of the industry makes the health profession an unattractive choice for a professional career.
10. HASA’s submissions will be structured as follows:

⁴ Section 195(1)(g).



- 10.1 At the outset, HASA records its concerns around the apparent object of the Bill as a means to regulate prices within the healthcare industry. Given the inappropriately vague and open-ended provisions of the Bill, HASA submits that the Bill constitutes an unjustifiable infringement of the constitutional rights to property and freedom of trade, occupation and profession. HASA also raises a principled objection to the fact that the Bill envisages collective fee negotiations. HASA does so on the basis that a system of collective negotiations is inherently problematic, in that it eliminates competitive forces and essentially amounts to collusion between competitors.
- 10.2 Thereafter, and because of the fundamental constitutional difficulties arising from the Bill's vagueness and failure to provide appropriate guidance, a brief discussion is provided of the legal principles applicable to the Bill:
- 10.2.1 This section begins with a discussion of the constitutional principles applicable to vague legislation that does not provide sufficient guidance to the functionaries that must act under it or fair warning to those individuals or entities that are made subject to it. These principles are applicable to numerous provisions in the Bill dealing with the functions and powers of the Facilitator, the Tribunal, and the inspectors.
- 10.2.2 The above-mentioned principles come sharply into focus where the legislature attempts to use the criminal law to enforce its regulatory scheme. Further discussion is accordingly advanced regarding the principle of fair warning and the rule of law in relation to the various overly-broad provisions in the Bill which establish criminal offences for non-compliance.
- 10.2.3 Discussion is also provided of the principles relating to the independence and impartiality of functionaries, particularly where a functionary (in this case, the Facilitator) must by definition play a neutral role as a "facilitator" within a negotiation process, or where a functionary (in this case, the Tribunal) is accorded extensive court-like powers which must be exercised by independent and impartial persons if those powers are to withstand constitutional scrutiny.
- 10.3 Having set out the legal principles, the submissions then proceed through the clauses of the Bill and a description is provided of the constitutional or practical difficulties associated with the provisions in question. The



submissions deal with the open-ended and under-inclusive definitions clause of the Bill. Consideration is then given to the Bill's apparent objectives, and it is submitted that these objectives are so open-ended as to be virtually meaningless – a major difficulty given that the Facilitator, the Tribunal and the inspectors will look to these objectives for guidance as to their functions under the Bill. Thereafter, the submissions consider the provisions dealing with the Facilitator, the Tribunal and the inspectors, and highlight their constitutional and practical problems.



THE PRINCIPLE OF PRICE REGULATION IN THE SERVICE PROVIDER INDUSTRY

11. Introduction

- 11.1 The Bill provides for an unusual two-stage process, in which: (a) “*stakeholders*” are invited to participate in facilitated negotiations as to schedules of fees; and (b) if they are unable to agree, the schedules of fees will be determined by the Tribunal. There is, however, no doubt that the Bill amounts to the imposition of a price regulation regime in respect of, amongst others, private hospitals and those who provide services in those hospitals.
- 11.2 Section 89D(5) stipulates that no person may charge a fee higher than that agreed by the parties pursuant to the facilitation process, or determined by the Tribunal, if such fee relates to a PMB. A breach of this provision is a criminal offence (subsection (6)). While the position is unclear in relation to non-PMBs, the Bill thus clearly envisages the setting of a maximum price in respect of PMBs. It is important to note, in this regard, that this price regulation would have a dramatic impact on health service providers in that PMBs have been extended in recent years to cover an ever-growing list of conditions. In practice, a price cap on PMBs amounts to a cap on roughly 70% of the business of private hospitals. This percentage is likely to increase pursuant to the current process in which the Council for Medical Schemes is reviewing the coverage of PMBs.
- 11.3 The Bill therefore contemplates a dramatic interference with, amongst others, contractual freedom; a principle which the Supreme Court of Appeal has emphasised goes to the heart of human dignity.⁵

12. The rights to property and to freedom of trade, occupation and profession

- 12.1 This interference with the contractual freedom of those operating in the areas of health care, their patients and medical schemes is, in our submission, both unconstitutional and inappropriate.

⁵ Entrenched in section 10 of the Constitution. See *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para [15]: “*Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom of contract is an integral part of the fundamental right [to choose a trade, occupation or profession freely].*”



- 12.2 It is unconstitutional in that the regulation of hospital and service provider pricing amounts to an unjustifiable infringement of the constitutional rights to property and freedom of trade, occupation and profession.
- 12.3 For the purpose of section 25(1) of the Constitution, “*deprivation of property*” involves an interference with property rights falling short of compulsory acquisition.⁶ The Bill amounts to a deprivation of property in that a service provider, which may (and in the case of private hospitals, would) have made a considerable capital investment in the assets required for the provision of its service, would no longer be entitled to freely negotiate a particular fee with a patient or a level of reimbursement with a medical scheme. This deprivation is, we submit, without sufficient cause and therefore amounts to an arbitrary deprivation of property as contemplated in section 25(1) of the Constitution.⁷
- 12.4 In any event, section 25(1) of the Constitution provides that a deprivation of property may only occur in terms of “law of general application”. In *The Sunday Times v The United Kingdom* 2 EHRR 245 (1979), the European Court of Human Rights explained the meaning of the related phrase “prescribed by law” as follows (para 49, at 271):

“In the Court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law”. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

- 12.5 We shall indicate below that the Bill fails to comply with these requirements. Given its lack of clarity, the Bill allows for deprivation of property otherwise than by “*law of general application*”.

⁶ *Harksen v Lane NO and others* 1998 1 SA 300 (CC) para 33.

⁷ For the test as to arbitrariness for purposes of section 25(1) of the Constitution, see *First National Bank of SA Limited t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 100.



- 12.6 Aside from the Bill infringing on the right to property, its provisions also amount to an interference with the right to choose and practise a trade, occupation or profession as envisaged in section 22 of the Constitution, particularly since the manner in which price regulation is implemented is likely to dissuade potential health care providers from choosing health care as a profession and to discourage existing providers from remaining in the profession.
- 12.7 The first sentence of section 22 of the Constitution recognises a right to “choose” a trade, occupation or profession. This right can only be limited by a law which is justified in terms of section 36 of the Constitution.⁸ It is submitted that the Bill in its current form unjustifiably impacts upon the choice of profession. Viewed objectively, the Bill’s regulation of prices would have the effect of influencing negatively a person’s decision whether to enter the health services industry. By so regulating the industry in accordance with the unworkably vague criteria set out in the Bill, the Bill negatively impacts upon the choice of profession in a manner which is unreasonable and which, therefore, falls foul of the test set out in section 36 of the Constitution.
- 12.8 The second sentence of section 22 of the Constitution states that ‘*the practice of a trade, occupation or profession may be regulated by law*’. When considering legislative interference with the practice of a trade, the rational-basis standard for review applies (i.e. the law must be rationally connected to a legitimate governmental purpose).
- 12.9 It is clear that the Bill will regulate the practice of a trade, occupation or profession within the meaning of the second sentence of section 22. It is submitted that the Bill does not rationally regulate the health care industry and does not amount to “*regulation by law*”. That is because its provisions are in and of themselves vague. For those that are meant to apply the law (the Facilitator and Tribunal) and for those that are subject to the law (the industry), the law allows for arbitrary conduct by the controlling body.
- 12.10 The Bill is furthermore inappropriate in light of the fact that there is no need, as a matter of policy, to regulate prices in the private hospital or health service

⁸ *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) at para [93].



provider sector. The reasons for this are fully addressed in the accompanying HASA submissions dealing with policy issues. Moreover, regulatory interference in the private health sector is likely to exacerbate the number of specialists and other health care providers that are already leaving the country.

13. Collective negotiations

- 13.1 The Bill appears to envisage that the negotiations that are presided over by the Facilitator will be conducted on either a collective basis or an individual basis. This is apparent from:
- 13.1.1 clause 89C(2)(e), which provides that the Facilitator must record the schedule of fees agreed to "*individually or collectively at such negotiations*"; and
- 13.1.2 clause 89C(6)(iv), which provides that the Minister may make rules relating to the right of "*any association or representative group to make representations on behalf of any stakeholder*".
- 13.2 HASA objects to the fact that these provisions envisage collective fee negotiations. A system of collective negotiations is inherently problematic, in that it eliminates competitive forces and essentially amounts to collusion between competitors. This is not in the interests of health care consumers, and violates a fundamental premise of competition law and policy.
- 13.3 We note that the approach taken in the Bill runs directly counter to the approach of the Competition Commission, which, in 2004 imposed administrative penalties under the Competition Act 89 of 1998 on HASA, the Board of Health Care Funders and the South African Medical Association for participating in collective bargaining in the health care industry. The Bill allows for collective bargaining in a manner that is anti-competitive and that will dramatically reduce competition between medical schemes, private hospitals and any other persons whose fees are determined in terms of a collective process.



- 13.4 It is deeply ironic, in this regard, that the Bill seems to envisage the prohibition of collusive practices, yet allows for a collective system of price negotiation that is inherently collusive.
- 13.5 Another difficulty that arises in the context of collective negotiations is how the confidentiality interests of the participants are to be safeguarded. It seems inevitable that the process will result in the parties to the negotiations becoming privy to the costing information of their competitors. This disclosure of costing information will lead to a lessening of competition.
- 13.6 HASA has several fundamental difficulties with the manner in which the Bill envisages that pricing negotiations can take place either individually or collectively.
- 13.6.1 *First:* it is unclear how this system will operate in practice. An important lack of clarity in this regard relates to when negotiations will take place individually and when collective negotiations will occur. Do collective negotiations mean that all members of a particular service provider grouping will negotiate with all medical schemes in one collective process?
- 13.6.2 *Second:* it appears that individuals (or groupings) engaged in a collective process will be able to frustrate the process by refusing to agree to the proposed schedule of fees, thus leading to fee determination by the Tribunal.
- 13.6.3 *Third:* on what basis will the Facilitator decide which parties should be invited to which negotiations (assuming that he or she decides on this issue, which is itself unclear)?
- 13.6.4 *Fourth:* how would the process deal with a situation in which, for example, an individual service provider does not agree to be represented by a particular association or representative association? Such an individual could legitimately assert that the association cannot speak on behalf of the individual and certainly cannot conclude agreements on schedules of fees that are binding on him or her. To stipulate that a schedule of fees agreed between, for example, medical schemes and representative associations is binding on a non-member would amount to



a dramatic, and unconstitutional, infringement of the individual's right to freedom of association (entrenched in section 18 of the Constitution).

- 13.6.5 *Fifth*: if it is envisaged that the negotiations will result in schedules of fees that not only set out the levels of medical scheme reimbursement but also set levels of fees that can permissibly be charged to patients (which is by no means clear), who will negotiate these fees?
- 13.7 Accordingly, HASA submits that the process of individual or collective negotiations envisaged in section 89C is both flawed as a matter of policy (because collective negotiations should not be permitted) and so vague and uncertain as to be unworkable.

FUNDAMENTAL CONSTITUTIONAL PRINCIPLES APPLICABLE TO THE BILL

14. Introduction

- 14.1 Four constitutional principles are of particular significance in relation to the Bill.
- 14.2 The *first* is the rule of law, which requires that affected parties should be afforded fair warning of what the law requires of them and should be able to direct their conduct accordingly. The *second* is the guidance principle, which requires that Parliament must afford adequate guidelines to administrative bodies when it confers delegated powers on them. The *third* is the principle of clear and precise wording of provisions that press the criminal law into service in an attempt to enforce compliance with a regulatory scheme. The *fourth* is the principle of institutional independence, which requires impartiality from a functionary that exercises court-like powers that may impact seriously on the rights of individuals and requires that a "facilitator" in negotiations should be independent and objective in respect of the matters he or she is facilitating agreement on.
- 14.3 We summarise each of these principles in turn, as a prelude to our submission that the Bill violates all four principles in a brazen manner.

15. The rule of law

- 15.1 Section 1(c) of the Constitution proclaims that South Africa is founded on the values of "*the rule of law*". The jurisprudence of the Constitutional Court



establishes that the rule of law is foundational to our new constitutional dispensation, and that state conduct may be set aside if it is inconsistent with the rule of law.⁹

- 15.2 Fundamental to the rule of law is the principle that persons should be afforded fair warning of what the law requires of them. As the phrase itself suggests, “*the rule of law*” requires that there must be *rules of law* which operate at some level of generality in order to indicate what conduct is proscribed. If conduct is to be subjected to the governance of law, then the “*rule of law*” requires that this control must occur by virtue of the operation *of rules* rather than by virtue of a series of *ad hoc* determinations on the part of administrators.
- 15.3 The Constitutional Court has recognised that it is a requirement of the rule of law that persons must be afforded fair notice of what the law expects of them. For example, Mokgoro J stated as follows in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 102:

“The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct according to the law.”

16. The guidance principle

- 16.1 Although Parliament may delegate legislative authority to the Executive, there are limits to that power. One of the limitations is that Parliament may not delegate law-making powers in terms which are so vague that they do not in any meaningful sense fetter the administrative body in the exercise of its delegated powers. The jurisprudence of the Constitutional Court indicates

⁹ See, for example, *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 1 SA 374 (CC), *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 1 SA 1 (CC) para 148; *Pharmaceutical Manufacturers Association of South Africa and another: In Re ex parte President of the Republic of South Africa and others* 2000 2 SA 674 (CC) para 17 and 20.



that Parliament must furnish adequate guidelines in order to indicate how officials are required to exercise their discretionary powers.¹⁰

- 16.2 In circumstances where Parliament confers a discretion on an administrative body, it must thus provide adequate guidance as to the manner in which that power should be exercised, failing which the law will violate the constitutional guarantee of just administrative action. We refer to this as “*the guidance principle*”.
- 16.3 We shall submit below that the Bill clearly violates the rule of law and the guidance principle. In order to indicate the reasons for this, we shall have regard in particular to the provisions in the Bill dealing with the Facilitator and the Tribunal. However, the Bill is generally characterised by a multitude of provisions that are open-ended, without definition, contradictory, and/or vague to the point of being inexplicable. What is more, the Bill in its current form would put in place a system of price determination for the health industry which is unworkably slow, mired in confusion, and practically difficult if not impossible to implement.

17. The criminal law

- 17.1 The constitutional doctrine of legality which we discussed above finds specific reference in the field of criminal law and is supported by the constitutional rights to freedom and security of the person and the right to a fair trial.¹¹
- 17.2 Of obvious concern is that the Bill’s provisions are backed up by criminal sanction in three respects:
- 17.2.1 *First:* in relation to the functions of the Facilitator, any person who “(a) refuses to furnish the Facilitator with any information that is specifically requested in writing by the Facilitator; or (b) hinders the Facilitator in his or her work, commits an offence” (section 89C(5)(a) and (b)).

¹⁰ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 47-55; *Janse van Rensburg NO v Minister of Trade and Industry* 2001 1 SA 29 (CC) para 25; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 34.

¹¹ See for instance Snyman, *Criminal Law*, 4th Edition (2002) at 39-49.



- 17.2.2 *Second:* in respect of inspectors, any person who “hinders an inspector in the performance of the inspector’s functions commits an offence” (section 89E(5)).
- 17.2.3 *Third:* in respect of the Tribunal, once the Tribunal under section 89D has determined a fee, then any person that charges a fee higher than the fee published in terms of this section if such fee relates to prescribed minimum benefits “*commits an offence*” (section 89D(6) read with section 89D(5)).
- 17.3 We shall analyse the constitutional difficulties with each of these provisions further below when considering the functions and powers of the Facilitator, the Tribunal, and inspectors.
- 17.4 The decision to criminalise conduct is a government decision. There are various consequences that flow from an ill-considered or rash decision by Government to criminalise behaviour.¹² Those consequences include the following:
- the moral authority of the criminal law may be diminished (since the criminal sanction should be reserved for what really counts);
 - the criminal sanction may ‘unfairly label’ a class of persons as criminals in circumstances where such labelling is unjustified;
 - the decision may lead to a proliferation of crimes with a consequent increase in the incidence of criminal acts that must be investigated and prosecuted thereby placing further demands on an already overloaded criminal justice system.
- 17.5 Given the above-mentioned vagaries of the Bill and its less than clear import, the creation of the offences under the Bill constitutes an inappropriate use of the criminal law and infringes the principle of legality.
- 17.6 The potential for arbitrary and capricious decision-making under the Bill is constitutionally abhorrent for the reasons set out earlier. Applied in the field of

¹² On the dangers of ‘over-criminalisation’, see Jonathan Burchell, *Principles of Criminal Law*, Third Edition, 2005, 58-61.



criminal law – and with an appreciation of the lack of clarity in the Bill's provisions that identify criminal conduct – the principle of legality dictates that persons must have fair warning of which activities would be considered criminal and that criminal prohibitions must be strictly construed. Fair warning entails both that the legal source materials in which activities are criminalised must be readily available, and that criminal provisions must be formulated with sufficient clarity and certainty so that persons may arrange their affairs so as not to contravene them.

- 17.7 As we show below, the Bill's provisions that attempt to create criminal offences contravene the principle of fair warning in a number of respects.

18. The requirements of independence and impartiality

- 18.1 A further concern is the apparent lack of independence on the part of the Facilitator and the Tribunal.
- 18.2 If the Facilitator is to achieve his or her role as "*facilitator*" between the stakeholders that have been invited to "*negotiate on health pricing of health services*" (section 89C (2)(a)), it will clearly be of the utmost importance to ensure that the Facilitator is independent of both the State and the participants in the provider and funding industries. That is particularly so in respect of the Facilitator vis-à-vis the State, given the role that the State plays both in the service provider industry (particularly through Folateng wards, i.e. private wards in State hospitals) and the funding industry (through the Government Employees' Medical Scheme). In order to engage meaningfully in the act of "*facilitation*" and to make decisions during and at the end of that process, the Facilitator will have to be impartial as between the stakeholders and in relation to the issues that are to be negotiated.
- 18.3 Similar concerns relate to the work of the Tribunal and its role as a regulator. Indeed in this case the concerns are exacerbated because of the court-like nature of the Tribunal's open-ended powers and the apparent finality of its decisions. Because the Tribunal has a wide-ranging discretion to impose administrative penalties and to behave like a Court, it is imperative that its independence and impartiality must be guaranteed under the Bill. An additional reason why the Tribunal should be regarded as independent by the non-state stakeholders is that they will be obliged to proceed with facilitated negotiations in the knowledge that any failure to agree will result in the



Tribunal making “*the final determination of the schedule of fees*” (section 89D(1)).

18.4 Because of the lack of clarity around the Facilitator’s institutional capacity and relationship with the Minister, a fundamental difficulty with the Bill is that no stakeholder can positively conclude that the Facilitator will act as a neutral arbiter between the parties. The Bill in its current form will lead right-minded stakeholders to fear that the facilitator may “favour one side over the other” or approach the issues in a pre-determined way. For the same reason, there will be a reasonable apprehension on the part of stakeholders that the Tribunal will not be impartial and independent. This is particularly disturbing given its court-like institutional capacity and extensive powers.

18.5 As the Bill currently stands, there is little chance of the Facilitator being considered independent or impartial – a fundamental prerequisite, we submit, for someone designated a “*facilitator*” who must preside over the sensitive negotiations that the Bill envisages and who appears to make decisions on pricing disputes and complaints. The Tribunal is also not independent and impartial. Detailed reasons explaining why this is the case will be advanced below when discussing the provisions dealing with the Facilitator and the Tribunal.

19. Conclusion

19.1 In this section we have described four principles that are of particular significance in our new constitutional dispensation. In the discussion that follows, we shall measure the Bill against the yardstick of these four principles and shall indicate that the Bill is deficient in several respects.



CONSTITUTIONAL AND PRACTICAL OBJECTIONS TO THE BILL

20. The definitions in the Bill

- 20.1 The definitions contained in the Bill are vague and unworkable. This compounds the vagueness of the substantive provisions of the Bill.
- 20.2 “*Health care providers*” are defined as including “*health establishments and health professionals*”.
- 20.2.1 A “*health establishment*” is, in turn, defined in section 1 of the Act in the following broad terms
- “... the whole or part of a public or private institution, facility, building or place, whether for profit or not, that is operated or designed to provide inpatient or outpatient treatment, diagnostic or therapeutic interventions, nursing, rehabilitative, palliative, convalescent, preventative or other health services...”*
- 20.2.2 This includes a private hospital (see the definition of “*hospital*” in the Act – “*a health establishment which is classified as a hospital by the Minister ...*” (emphasis added)). It also includes a public hospital.
- 20.2.3 The difficulty is that the phrase “*health care provider*” is also defined in section 1 of the Act. This is a most undesirable situation, in which the same term apparently bears one meaning for purposes of the Act as a whole and another meaning for purposes of Chapter 10A. This lack of clarity will cause considerable uncertainty.
- 20.2.4 Matters are not made simpler by the fact that the Bill also refers to “*health service providers*” (in section 89C(1)(d)), a term that is not defined in the Bill and which may or may not be equivalent to “*health care providers*”.
- 20.3 The other crucial defined term in the Bill is “*services*”, which is defined as including “*hospitality services, consumables; medical devices; health technology and any other health product that is provided at a fee*”.
- 20.3.1 It is assumed that that the reference to “*hospitality services*” is an error and should read “*hospital services*”. But in any event, the definition is far



from clear. Is it meant to cover only the provision *by health care providers* of services, consumables, medical devices and so on, to users? Or does it extend, for example, to the provision of consumables, medical devices by suppliers / manufacturers, *to health care providers*?

20.3.2 Moreover, the ambit of the “*services*” is unclear, overly broad and could even be construed as going beyond the definition of health services as contemplated in the Act.

20.3.3 Furthermore, it is not apparent what is meant by “*any other health product*”..

21. The Bill’s stated objects

21.1 The stated objects of the Bill are extremely vague. This is a major difficulty, given the fact that administrative decision-makers (in this case, the Facilitator, the Tribunal and inspectors) as well as courts often have regard to the objects of legislation in seeking to interpret its provisions. The objects are thus a source of guidance to persons exercising powers under the relevant legislation.

21.2 The lack of clarity starts early – the opening sentence of section 89(B) under the heading “*Objects of Chapter*” states unhelpfully that the objects of this chapter “*are generally, but not limited, to*” those listed in the section. The Bill is not particularly long (11 sections), and its headnote suggests that the drafters had particularly in mind “*the appointment of the Facilitator; functions of the Facilitator; negotiations on prices; appointment of inspectors; contracts with other persons to assist the Facilitator; the Pricing Tribunal; limitation of liability; the protection of unauthorised access to information*”. What other objects, then, did the drafters envisage besides the seven objectives listed in section 89(B)(a) to (g), and why have those not been spelt out?

21.3 The objects listed in the section suffer from the same defect. For example, section 89B(c) states that one of the Bill’s objects is to “*ensure the removal of conflicts in the current price setting framework*”. What is meant by “*conflicts*”? And between which stakeholders is the Bill intending to remove conflicts? For example, there may well be a conflict – in the sense of different bargaining positions taken during the course of price negotiations – between suppliers



and purchasers of “services”. Is the Bill intended to resolve those conflicts? If so, then in accordance with what guidelines?

- 21.4 Section 89B(d) is a further problem: it provides that the Bill aims to “ensure accountability for the cost of health care”. But cost to whom? – the consumer generally, private and/or public users, or the State? Furthermore, there is no clarity on what is meant by ensuring “accountability”. Accountability to whom? – is the Bill ensuring accountability of “health care providers” to the public at large, to the Department, or as between “health care providers”?
- 21.5 Section 89B(e) is no better. It states that the Bill aims to ensure that “health care providers prevent unjustified cost escalations”. But why should health care providers be assisted to “prevent” unjustified cost escalations? And how is this to be achieved? In any event, what does “unjustified” mean in relation to cost escalations? And on the basis of what guidelines and data will the Facilitator and thereafter the Tribunal be in a position to distinguish justified cost escalations from those that are unjustified?
- 21.6 Section 89B(f) says that the Bill aims to “ensure the removal of unfair, collusive and undesirable business practices”. Although it is not clear under the Bill, it appears that both the Facilitator and the Tribunal are entrusted with the task of scrutinising such practices.¹³ However, this would be a poor use of resources. The Competition Act and the Competition Tribunal are the recognised and constitutionally appropriate mechanisms for determining unfair, collusive and undesirable business practices, and the Competition Tribunal is staffed by experts who are able to make such adverse findings. There is no explanation in the Bill for why there should be a duplication of functions in relation to these practices. Even assuming that such practices might be dealt with under the Bill, it is not clear that the Facilitator will be

¹³ Section 89C(2)(c) says that the Facilitator “must” “hear and resolve disputes in relation to pricing”, which disputes could arguably extend to those around unfair, collusive and undesirable business practices”. The Minister may under section 89C(6) (which falls under the heading “Appointment and functions of the Facilitator” in the Bill) make rules relating to “collusive practices” (ix); “perverse incentives” (x); “undesirable business practices” (xi).

While the Tribunal’s jurisdiction is not clearly defined, the fact that it may adjudicate “on matters referred to it by the Facilitator [which possibly includes disputes about unfair, collusive and undesirable business practices] or any person aggrieved by the decision of the Facilitator”, coupled with the fact that the Tribunal may impose administrative penalties in relation to collusive practices, perverse incentives or undesirable business practices (section 89G(6)(c)), makes it clear that the Tribunal will be involved in adjudicating over such practices.



appropriately qualified to make such adverse findings that may impact very seriously on the rights of individuals. Furthermore, there is no guidance given to the Facilitator to determine when such practices exist or how to draw the at times difficult line between acceptable practices and “*collusive practices*”, “*perverse incentives*”, and “*undesirable business practices*”. This problem is compounded by the fact that the words “*collusive*”, “*perverse*” and “*undesirable*” do not denote the drawing of any bright-lines and are subject to personal interpretation.

22. The Facilitator

22.1 In this section we discuss the constitutional and practical concerns that relate to the Facilitator’s role under the Bill.

Lack of guidance and vagueness

22.2 The Bill provides that the Minister of Health (“the Minister”) must appoint “a *suitably qualified person*” as the Facilitator (section 89C(1)).

22.3 An immediate cause for concern is that the Bill does not furnish sufficient guidance to the Minister as to the type of qualifications that the appointee must have or the grounds on which a person should be disqualified from occupying the position of the Facilitator. That problem is an acute one when regard is had to the potentially serious findings that a Facilitator may make and the very broad functions that the Facilitator is expected to perform. It is also of concern given that the Bill does not appropriately ensure the independence and impartiality of the Facilitator – an aspect that is discussed in detail further below.

22.4 The Facilitator annually “*invites stakeholders contemplated in section 90(1)(u) [of the Act]*” to negotiate on pricing of health services in order to arrive at a schedules of fees (section 89C(2)(a)). Given the central role that stakeholders are expected to play within the Bill’s regulatory scheme, it is peculiar that the relevant stakeholders are identified by means of a cross-reference to section 90(1)(u) of the Act. That section describes what regulations the Minister may make regarding “*the processes and procedures to be implemented by the Director-General in order to obtain prescribed information*” from a broad category of stakeholders that are not in fact described in section 90(1)(u). The only thing that is described in section



90(1)(u) is the categories of information to which the regulations may apply, namely, information “*relating to health financing, the pricing of health services, business practices within or involving health establishments, health agencies, health workers and health care providers*”. This is a most unsatisfactory way of describing those categories of persons that are effectively intended to be subject to a dramatic statutory regime of price regulation under Chapter 10A.

22.5 The idea appears to be that the Facilitator will then facilitate negotiations between the stakeholders (including making recommendations to the parties). These negotiations may presumably either take place on a one-on-one basis between a medical scheme and a particular hospital or other service provider or collectively between, for example, the Board of Health Care Funders and the Hospital Association of South Africa. This appears to be what is reflected in section 89C(2)(e), which provides that the Facilitator must record the schedule of fees “*agreed to individually or collectively at such negotiations*”.¹⁴

22.6 The Facilitator is, however, not simply an impartial mediator who endeavours to assist the parties in coming to a voluntary agreement. This is evident from the following:

22.6.1 Sections 89C(2)(c) and (d) state that the Facilitator may “hear and resolve disputes in relation to pricing” and “deal with complaints about pricing conduct between medical funders, health service providers and suppliers”. These provisions blur the Facilitators’ facilitation role with an adjudicative role.¹⁵ This blurring of rules is undesirable since it may undermine the Facilitator’s ability to neutrally and impartially assist the parties in coming to a negotiated schedule of fees where the Facilitator has made a finding against one of the parties, possibly even in relation to an aspect of the fees that are the focus of the negotiations.

22.6.2 The Facilitator has various obligations under section 89C(3), including the obligation to ensure that the negotiations “result in the reduction of

¹⁴ See also section 89C(6)(iv), which provides that the Minister may make rules relating to “*the right of any association or representative group to make representations on behalf of any stakeholder*”.

¹⁵ See also section 89F(5), which states that the Tribunal may adjudicate on matters referred to it by, amongst others, a person aggrieved by “*a decision of the Facilitator*”. This suggests that the Facilitator is empowered to make decisions that affect persons’ rights or interests.



prices where costs have been reduced”.¹⁶ The obvious difficulty is that if the Facilitator is obliged to work towards a pre-determined policy outcome, then the negotiations themselves are unlikely to involve or produce a voluntarily accepted agreement of the parties. Again, this is likely to undermine the effectiveness of the facilitation function.

- 22.6.3 The Facilitator may require “any stakeholder” (which could, presumably, include a person who is not a party to the negotiations) to furnish “any specified information” to assist the Facilitator in carrying out his or her duties (section 89C(4)(a)). A refusal to furnish the Facilitator with such information is an offence (section 89C(5)).
- 22.6.4 If a matter is referred to the Tribunal, the Facilitator makes representations to the Tribunal as to the determination of a schedule of fees. This could undermine the trust that the parties may otherwise place in the Facilitator during the negotiation process and may inhibit candid, without prejudice discussions aimed at reaching an amicable agreement.
- 22.7 Aside from the blurring of roles, the provisions regarding the Facilitator’s functions (section 89C(2)), objectives (section 89C(3)) and powers (section 89(4)) are woefully vague and little if any guidance is given to the Facilitator in the performance of his or her tasks:
- 22.7.1 *First:* there is a complete lack of clarity regarding the Facilitator’s functions, which is not aided by the fact that the words “*disputes*” and “*complaints*” are not defined. There is furthermore no detail given about the procedure by which the Facilitator is to hear the disputes, and no guidelines are provided to aid him or her to “*resolve*” the disputes. It is furthermore unclear what is meant by “*pricing conduct*”, and the meaning of the term “*health service providers*” (which must be different from “*health care providers*” which is already defined in the Bill at section 89A(b)) is not described anywhere. There is thus no way of knowing what disputes the Facilitator may resolve. Similarly, although the Bill provides that the Facilitator must “*make recommendations to the*

¹⁶ The Facilitator must also ensure that the negotiations “*improve transparency on costs*” (section 89C(3)(b)). This emphasises that one of the primary purposes of these provisions is for the Facilitator to obtain costing information.



stakeholders for consideration on possible schedules of fees”, there is no clarity as to the form of those recommendations or what their content might or should cover.

22.7.2 *Second:* it is difficult to understand what is meant by the obligation imposed on the Facilitator (in section 89C(3)(c)) to ensure “*that the negotiations ... result in the reduction of prices where costs have been reduced*”. Even if the meaning of that obligation were comprehensible, the Bill provides the Facilitator with no guidance as to how he or she should proceed to ensure that result, or what the relationship is or should be between reduced costs and reduced prices.

22.7.3 *Third:* the Facilitator may require “*any stakeholder*” to furnish “*any specified information*” to assist the Facilitator in carrying out his or her duties (section 89C(4)(a)). The lack of clarity in this provision includes not being able to tell whether “*any stakeholder*” includes a person who is not a party to the negotiations, and not being told the means or process by which such a request for information might be made. Furthermore, the Facilitator is provided with no guidance to determine when the information he or she seeks may be said to be necessary “*to assist the Facilitator in carrying out his or her functions*”. These problems are compounded by the fact that the Facilitator appears to be accorded overly broad and invasive powers to request the furnishing of “*any specified information*”, and that a refusal to furnish the Facilitator with such information is an offence (section 89C(5)(a)).

22.7.4 *Fourth:* it is unclear whether the Facilitator’s role in resolving disputes and dealing with complaints only extends to disputes or complaints that arise in the context of facilitated price negotiations that are taking place, or whether this role includes hearing disputes and complaints that are brought independently by aggrieved parties.

22.8 In short, the Facilitator’s functions and powers are not adequately described or curtailed. The Bill does not indicate how the Facilitator’s functions (such as resolving disputes and hearing complaints) are to be performed. Of particular concern is that the Facilitator is given a blank cheque to resolve “*disputes in relation to pricing*” and to deal with “*complaints about pricing conduct between medical funders, health service providers and suppliers*” by applying any legal



or non-legal rules that he or she considers appropriate. Such an extraordinary provision violates the rule of law and the guidance principle.

- 22.9 What is more, section 89C(6) provides that the Minister may make rules relating to a variety of matters, including “*collusive practices*”, “*perverse incentives*” and “*undesirable business practices*”. In effect, the Minister is given carte blanche to make rules proscribing conduct that has hitherto been lawful. This falls foul of the guidance principle.

Independence and impartiality of the Facilitator

- 22.10 An equally problematic aspect of the Bill concerns the independence and impartiality of the Facilitator.

- 22.11 It appears open to the Minister to appoint an employee from within the Department to act as the Facilitator. In any event, even if the person appointed were to be from outside the Department, the institutional position of the Facilitator appears to be that of a functionary acting within the DOH and under the remit of the Minister of Health.¹⁷

- 22.11.1 The Facilitator is appointed by the Minister (section 89C(1)) and the process and practices that he or she may in time come to follow are to be determined in rules made by the Minister (section 89C(6)).

- 22.11.2 The Facilitator may be provided with what appears to be bureaucratic assistance through the Director-General’s entering into contracts with “*any person, agency or institution including organs of State to assist the Facilitator with the Facilitator’s functions*” (section 89H).

- 22.11.3 The Facilitator must advise the Minister on the compilation and publication of information, reports and statistics about health pricing (section 89C (2)(g)), a function which he or she is apparently to perform after the “*facilitation*” of annual negotiations around schedules of fees on health pricing of health services as provided for in section 89C.

¹⁷ It is, for example, unclear whether the Facilitator will have an independent office or whether he or she will form part of DOH.



- 22.11.4 The Facilitator may “*enquire into any matter relating to the application of this Chapter and report to the Minister*” (section 89C (4)(b)).
- 22.12 The Facilitator must “*facilitate*” negotiations but his or her discretion is significantly fettered by virtue of the obligation (“*must*”) to ensure that the negotiations result in the reduction of prices where costs have been reduced (section 89C(3)(c)). This suggests that the Facilitator is obliged to work towards a pre-determined policy outcome, one which is consistent with the Minister’s (and DOH’s) oft-expressed policy views on the reduction of medicine prices. That is so for the following reasons:
- 22.12.1 The Facilitator is appointed by the Minister, appears to be an employee of the DOH, “*advises*” and “*reports*” to the Minister, and will in terms of clause 6 of the Bill be made subject to the rules of the Minister.
- 22.12.2 The Facilitator will, as the Bill currently reads, be under pressure to ensure that the objects of the Bill are achieved, in particular, that the negotiations “*result in the reduction of prices*”.

The inappropriate use of the criminal law to support the Facilitator’s work

- 22.13 Of further concern is that the Bill’s provisions in respect of the Facilitator’s work are backed up by criminal sanction. In relation to the functions of the Facilitator, any person who “(a) *refuses to furnish the Facilitator with any information that is specifically requested in writing by the Facilitator; or (b) hinders the Facilitator in his or her work, commits an offence*” (section 89C(5)(a) and (b)).
- 22.14 Various questions are raised by the Bill’s attempt to invoke criminal law, the answers to which are far from clear. For instance: What “*work*” of the Facilitator, if “*hindered*”, will constitute an offence? If a stakeholder refuses to disclose confidential information, will that constitute an offence? If a stakeholder fails to respond to or declines an annual invitation from the Facilitator, will that constitute an offence? If a stakeholder does not timeously respond to such an invitation or some other request from the Facilitator, is that an offence? If in the Facilitator’s view a particular stakeholder is not



sufficiently forthcoming in or committed to the negotiation process, has the Facilitator been “hindered” in his work so that criminal liability follows?

- 22.15 The vagueness of such a provision together with the general lack of clarity in the Bill is such that it amounts to a clearly impermissible and unconstitutional use of the criminal law.

The unworkable process that the Facilitator is expected to engage in

- 22.16 The Bill provides for a process of negotiation and determination of fees that is thoroughly unworkable and thus inconsistent with sections 195 and 237 of the Constitution.
- 22.17 The difficulties begin with the Facilitator.
- 22.18 Section 89C envisages that a single person will be appointed as the Facilitator.¹⁸ This would place a considerable burden on one individual, which will lead to inefficiencies and which will seriously prejudice stakeholders within the industry (who, so it appears, would remain bound by the previous year’s schedule of fees and would suffer by any delays in determining an increase in the next year’s fees).
- 22.19 The burden on the Facilitator is compounded by the fact that there is no bureaucratic infrastructure set in place under the Bill to support the Facilitator in his or her tasks.
- 22.20 The process of facilitating negotiations as currently set out in the Bill appears to involve a multiplicity of stages, each of which is described in broad and vague language:
- 22.20.1 *First*, the Facilitator must annually invite stakeholders to negotiate on health pricing of health services;
- 22.20.2 *Second*, the Facilitator must not only facilitate negotiations, he or she must also chair the proceedings;

¹⁸ Section 89C (1) speaks in the singular of the Minister appointing “a suitably qualified person as a Facilitator”, and everywhere else in the Bill reference is with the definite article to “the Facilitator”.



- 22.20.3 *Third*, during those negotiations, but perhaps also at times other than during the negotiations, the Facilitator must “*hear and resolve disputes in relation to pricing*”;
- 22.20.4 *Fourth*, during those negotiations, but also perhaps at times other than during the negotiations, the Facilitator must “*deal with complaints about pricing conduct between medical funders, health service providers and suppliers*”;
- 22.20.5 *Fifth*, the Facilitator must record the schedules of fees agreed to individually or collectively at the negotiations;
- 22.20.6 *Sixth*, where stakeholders at the annual negotiations are unable to agree on a schedule of fees, the Facilitator must with a view to the finalisation of fees during those annual negotiations, or perhaps in respect of future negotiations left for the next year, make a recommendation to the stakeholders for consideration on possible schedules of fees. The Bill is unclear, but it appears that the stakeholders would be entitled to expect that the recommendation is something that they could negotiate over, and if so, then the Facilitator would facilitate the negotiations and the process set out in section 89C(2) may well begin again;
- 22.20.7 *Seventh*, the Facilitator must advise the Minister on the compilation and publication of information, reports and statistics about health pricing.
- 22.21 An additional difficulty is that the Bill does not provide clarity as to the categories of persons that may participate in negotiations presided over by the Facilitator. Is it conceivable that any member of a medical scheme can assert that he or she is a “*stakeholder*” contemplated in section 89C or an interested party that will be entitled to participate in negotiations in terms of the Minister’s rules contemplated in section 89C(6)(iii). It appears that such a person may unilaterally frustrate the negotiation process, either by not agreeing to the schedule of fees that is the outcome of the negotiation process or by declaring a dispute in relation to the schedule of fees (assuming that such a dispute would fall within section 89C(2)(c), which is by no means clear). This could mean that the entire negotiation process is stymied by a dispute over a particular tariff item with a particular individual or group.



- 22.22 It appears that the price negotiation process set out above must be repeated annually. This is overly-optimistic given that it is unlikely that the process will even be completed within any given year. That is so when regard is had to the fact that the Facilitator's role is further complicated by additional powers accorded to him or her under the Bill to "*require any stakeholder to furnish the Facilitator with any specified information to assist the Facilitator in carrying out his or her functions*", and to "*enquire into any matter relating to the application of this Chapter and report to the Minister*" (section 89C(4)). Resort to these information-gathering and enquiry powers (and the response thereto by stakeholders who may have justifiable privacy or other defences) is likely to further delay the process of annual negotiation.
- 22.23 It should also be borne in mind that the Facilitator's task of facilitating negotiations involves a multitude of stakeholders, each class of which may involve numerous parties from the private sector and the State.
- 22.24 It is not only the Facilitator's heavy burden that is likely to cause untold delays in the process of determining a fee. We highlight below that the Tribunal and the Minister's involvement envisaged in the Bill will inordinately lengthen the process.

23. The Tribunal

- 23.1 In this section we discuss the constitutional and practical concerns that relate to the Tribunal's role under the Bill.

Lack of guidance and vagueness

- 23.2 Section 89D(1) states that where the negotiating parties cannot agree on the schedule of fees, the Facilitator must refer the matter to the Tribunal for "*final determination of the schedule of fees*". The Tribunal operates in a court-like fashion: conducting hearings in public according to the rules of natural justice; hearing evidence; summoning witnesses and information; and hearing argument. In addition, its rulings must be in writing, must be accompanied by reasons and are enforceable as orders of the High Court (see section 89G).¹⁹

¹⁹ Unlike a court, the Tribunal may conduct its proceedings informally and in an inquisitorial manner (in which the decision-maker plays a more active role in questioning witnesses and calling for evidence than a court would do) (section 89G(2)(b)).



- 23.3 Given its court-like features, and the potentially serious impact of its orders, it is unconstitutional for the Bill to provide so little guidance or clarity as to the functions or objectives of the Tribunal.
- 23.4 The Bill provides that the Tribunal “*adjudicates on matters referred to it by the Facilitator or any person aggrieved by the decision of the Facilitator and who has a material interest in any such matter*” (section 89F(5)). In effect, the Tribunal is given a blank cheque to resolve “*matters referred to it*” by applying any legal or non-legal rules that it considers appropriate. Such an extraordinary provision contravenes the rule of law and the guidance principle.
- 23.5 Other issues of grave concern include the following:
- 23.5.1 After hearing submissions from all interested stakeholders and the Facilitator, the Tribunal makes a determination on the schedule of fees (section 89D(2)). It is unclear whether the Tribunal is to adjudicate disputes on a piecemeal basis as and when the parties to the negotiations fail to agree on a particular schedule of fees, or whether the Tribunal will await the conclusion of the negotiations between all the invited stakeholders and then collectively deal with the Facilitator’s referral for determination of all the schedules of fees over which the parties were unable to agree.
- 23.5.2 It is also not spelt out how the Tribunal’s members must arrive at a decision.
- 23.5.3 The schedule (or schedules) that the Tribunal determines must then be published by the Minister and will become effective from the date of publication (section 89D(3)). There is no time-period in which the Minister must publish the schedule/s.
- 23.5.4 The Tribunal may conduct its proceedings by way of telephone or videoconference (section 89C(2)(c)). This is inappropriate, given the extensive court-like powers that the Tribunal is accorded and the very serious impact that its decisions may have on the parties. While it may be acceptable for the Tribunal’s proceedings to be conducted informally and in an inquisitorial manner, proceedings by telephone or videoconference will be a step too far in the direction of informality. By



proceeding on that basis the Tribunal is unlikely to garner the trust and/or buy-in of the affected stakeholders.

- 23.5.5 Section 89G(4) provides for public access to the records of the Tribunal's proceedings. In its current form the Bill says nothing about the protection of confidential information being disclosed by the Tribunal as part of the record. That is peculiar, given that the Tribunal is empowered during its proceedings to exclude members of the public or certain members of the public from the hearing if "*the evidence led constitutes confidential information*" (section 89G(2)(d)(i)).
- 23.6 The lack of guidance and clarity raises serious constitutional concerns when regard is had to the types of orders that the Tribunal may make. In this regard, we respectfully submit that section 89G(6) is particularly offensive:
- 23.6.1 The orders envisaged in section 89G(6) are of a remedial nature (to interdict individuals, to order reimbursement, to impose administrative penalties, to prohibit certain practices, to declare agreements invalid). These orders are incongruous with the primary function that the Tribunal is expected to perform: making the final determination of the schedule of fees in circumstances where the negotiating parties cannot agree on such schedule (section 89D(1)).
- 23.6.2 Although section 89F(5) suggests that matters come to the Tribunal as a result of an unsuccessful negotiation process, section 89G(6)(c) provides that the Tribunal may impose administrative penalties in relation to "*collusive practices, perverse incentives or undesirable business practices*". This suggests that the Tribunal's jurisdiction may extend far beyond the determination of an appropriate schedule of fees. Aside from this being undesirable (given the fact that collusion is already regulated by the Competition Authorities and perverse incentives are governed by the Health Professions Council of South Africa), the Bill does not give any content to these prohibited forms of conduct.²⁰ This raises serious concerns about the Bill's consistency with the principle of legality.

²⁰ We note that section 89C(6)(ix) to (xi) states that the Minister may make rules relating to collusive practices, perverse incentives and undesirable business practices.



- 23.6.3 The orders listed in section 89G(6) present constitutional difficulties because of their far-reaching nature and the vague terms in which they are expressed. The following provisions are so vague as to violate the rule of law:
- 23.6.3.1 “*interdicts against certain acts*” (emphasis added) -- the Tribunal and those that may be made subject to its jurisdiction are given no guidance as to what “*certain acts*” may entail.
- 23.6.3.2 “*ordering a party to reimburse or supply services to the other party*” - - the wording of this order is curious in that it suggests that the Tribunal’s focus will be on matters of the past, whereas the Bill suggests that the Tribunal’s primary focus is on determining a schedule of fees for the future. Furthermore, it is inappropriate to allow the Tribunal to compel one party to supply services to another party.
- 23.6.3.3 “*imposition of administrative penalties in relation to collusive practices, perverse incentives or undesirable business practices or failure to comply with its orders*”. It is unclear what is meant by these practices. What is more, the Tribunal – consistent with its court-like status – is effectively afforded the power to impose penalties for contempt of its orders. That is wholly inappropriate given that the Tribunal is not a court of law.
- 23.6.3.4 “*prohibition of certain practices*” (emphasis added) -- it is startling that the Bill would allow the prohibition of “*certain practices*” without any elaboration. It is impossible for the Tribunal to know what the limits of its powers are or on what basis it ought to exercise those powers to prohibit “*certain practices*”. This is a particularly stark violation of the rule of law.
- 23.6.3.5 “*declaring agreements or parts thereof invalid*” -- this type of order will significantly interfere with contractual freedom and the right of parties to freely agree on matters so long as what is agreed on is not unlawful or contra boni mores. This is a far-reaching power that even Courts of law are wary to exercise and then only on the basis of clear illegality.



23.7 It is difficult to conceive of language that could be more vacuous or lacking in content than the language used to describe the orders that the Tribunal is empowered to impose under section 89G(6).

23.8 The provisions relating to the Tribunal are accordingly inconsistent with the rule of law and the guidance principle. To make matters worse, the jurisdiction of the Tribunal is so extensive as to allow for matters to be referred to the Tribunal within three years from the date on which the “*cause of action ... arose*”. This suggests that the Tribunal is not simply concerned with the annual determination of schedules of fees, and leaves the question as to what type of issues can be referred to the Tribunal, by who and in what circumstances.

Independence and impartiality of the Tribunal

23.9 The Bill does not provide adequate safeguards for the independence and impartiality of the Tribunal.

23.9.1 The Tribunal is established by the Minister (section 89F(1)).

23.9.2 The members of the Tribunal are appointed either by the Minister “*on the Minister’s initiative*” or, it appears, by the Minister “*in response to a call for nominations which must be published by the Minister in the Gazette*” (section 89F(2)).

23.9.3 The Tribunal is empowered to adjudicate matters referred to it by the Facilitator (section 89F(5)), and is obliged (“*shall*”) to take into account representations from the Facilitator (section 89D(2)). However the Facilitator is an individual whose independence and impartiality under the Bill is already compromised, and who is similarly appointed by the Minister (section 89C).

23.9.4 While the Tribunal has court-like powers and processes and its orders are “*enforceable as a High Court order*” (section 89G generally and section 89G(7)(a) in particular), the Tribunal members are not required to be judicial officers or even to swear an oath of independence and impartiality.

23.10 It is most telling that the Tribunal’s members are appointed by the Minister and they are not required to be judicial officers or swear an oath of



independence. It is furthermore of special significance that the Tribunal itself appears to have no separate or independent existence outside the Department.

23.11 Given the court-like nature and competence of the Tribunal, the invasive and extensive powers at its disposal, the apparent finality of its decisions and the equation of its decisions with that of a court order, there are good reasons for insisting that the standard of independence of its members should be as high as that required in the case of a judicial officer such as a magistrate.

23.12 That is particularly so because of the sweeping orders that the Tribunal is empowered to impose under section 89G(6), which have been discussed above.

The inappropriate use of the criminal law to support the Tribunal's work

23.13 We pointed out earlier that the constitutional doctrine of legality finds specific reference in the field of criminal law and is supported by the constitutional rights to freedom and security of the person and the right to a fair trial.²¹

23.14 The Bill's provisions in respect of the Tribunal's work are backed up by criminal sanction in the following way: Once the Tribunal under section 89D has determined a fee, then any person that charges a fee higher than the fee published in terms of this section if such fee relates to prescribed minimum benefits "commits an offence" (section 89D(6) read with section 89D(5)).

23.15 The Bill does not provide clarity on how individuals will be given fair and public warning of the schedule of fees and/or fair or public warning of any adjustments thereto. Those affected by the Bill may accordingly find it all but impossible to know whether or when they may be committing an offence under section 89D(6). This is a clear violation of the principle of fair warning and the rule of law.

The unworkable process that the Tribunal is expected to engage in

23.16 The Bill envisages, in the event of negotiations failing, that the schedules of fees that the negotiation process is meant to produce must be determined by

²¹ See for instance Snyman, *Criminal Law*, 4th Edition (2002) at 39-49.



the Tribunal. However, the court-like process of the Tribunal may lead to delays in the finalisation of fee schedules. Unless fee schedules are successfully negotiated at the initial stage, it is likely that a great deal of time would be spent in attempting to resolve matters before the Tribunal. What is more, it is far from clear that the Tribunal will dedicate its resources to the determination of fees alone. As we highlighted earlier, the Bill envisages a Tribunal that will also be involved in resolving disputes between parties and hearing complaints.

23.17 After the Tribunal has done its work, the Minister too is expected to play a role. Section 89D(3) provides that once the Tribunal has made a determination on the schedule of fees, such schedule of fees “*must be published by the Minister and the schedule of fees so published becomes effective on the date of publication*”. Section 89D(4) provides that “*the schedule of fees agreed to in terms of section 89C(2)(e) shall also be published by the Minister*”. The Bill does not stipulate a time period by which the Minister must have done so, but any delay in this respect will further hamper the process.

23.18 For these reasons, together with our discussion of the process as it relates to the Facilitator, it appears that the process of determining fees under the Bill is unlikely to be a smooth, expeditious or manageable one. The process is thus likely to lead to delays in finalising pricing negotiations; something which stakeholders simply cannot afford.

24. Inspectors

24.1 We turn now to consider the constitutional and practical objections to the rule of “inspectors” in the Bill.

Lack of guidance and vagueness

24.2 Clause 89E provides for the appointment of “*any suitably qualified person*” as an inspector for purposes of Chapter 10A. An inspector is provided with a certificate of appointment at the time of his or her appointment, and must produce such certificate to any person affected by the performance of the inspector’s functions.



- 24.3 Inspectors are then given far-reaching powers under section 89E(4) to enter premises where business is conducted under the Act, search those premises, examine any article or document on the premises that “*has a bearing on what is being investigated*”, use any computer system on the premises, and attach and if necessary remove from the premises, for examination and safekeeping, anything that has a bearing on the investigation.
- 24.4 Clause 89E(5) goes on to state that sections 84, 85 and 86 of the Act apply to an inspector performing his or her functions in terms of Chapter
- 24.5 In assessing the constitutionality of this clause, it must be borne in mind that the powers contained therein amount to a serious infringement of the constitutional right to privacy. In this regard, section 14 of the Constitution stipulates that the right to privacy includes the right not to have one’s property searched or possessions seized. It should also be borne in mind that the powers of the inspector may impact not only on the privacy and confidentiality of the service providers themselves, but also on the privacy of their patients and customers. In this regard, it should be stressed that a patient’s privacy interest in his or her medical records goes to the core of the protection of the right to privacy.
- 24.6 Our courts, and those in other jurisdictions, have established rules relating to the constitutional permissibility of search and seizure operations. In the context of criminal investigations, and the investigation of other forms of misconduct aimed at the imposition of administrative penalties, a variety of requirements must generally be met in order for a search and seizure operation to be considered reasonable and justifiable.²² For example, there must be a system of prior judicial authorisation for the conduct of the search (usually in the form of a valid warrant), and the judicial officer issuing the warrant must be satisfied that there are reasonable grounds for the invasion of privacy which will occur when the warrant is executed..

²² *Janse van Rensburg NO en 'n Ander v Minister van Handel en Nywerheid en 'n Ander* 1999 (2) BCLR 204 (T) at 220; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC) at para 28; Iain Currie and Johan de Waal *The Bill of Rights Handbook* 5th ed (2005) at 325-329; *Hunter v Southam Inc* (1984) 9 CRR 355 (SCC) at 361, 367-373; *Thomson Newspapers Limited v Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)* 67 DLR (4th) 161 at 214; *R v McKinlay Transport Limited* [1990] 1 SCR 627; *Katz v United States* 389 US 347 at 357.



- 24.7 Viewed against this legal backdrop, we submit that clause 89E falls well short of the constitutional requirements for the valid exercise of search and seizure powers.
- 24.8 The most obvious difficulty with clause 89E is that, while the clause confers extensive powers on the inspectors, it does not specify the purpose for which those powers are to be exercised. This clause simply states that the inspectors are appointed "*for purposes of this Chapter*". This is woefully inadequate in that it is not known what conduct or matters the investigators are required to investigate. One of the uncertainties to which this gives rise is that it is not known whether the searches conducted by the inspectors amount to investigations of alleged contraventions or regulatory inspections. Given the fact that a search and seizure operation amounts to a dramatic interference with privacy rights, we submit that this uncertainty renders clause 89E unconstitutional.
- 24.9 Clause 89E(4)(c) provides that an inspector may examine any article or document on the searched premises "*that has a bearing on what is being investigated*". The stark problem is that the Bill does not state what the inspectors can lawfully investigate. The effect of this is that the inspector is given no guidance as to what he or she can lawfully examine during the course of a search. Perhaps more importantly, the subject of the search is not able to assess whether the search is lawful, and thus whether his or her privacy rights are being lawfully infringed. The subject of the search is thus not in a position in which he or she can assert and protect his or her privacy rights in any meaningful way.
- 24.10 We note that one of the cross-references in clause 89E(5) is to section 84 of the Act, which provides for the search of premises with a warrant. The difficulty is that clause 89E(5) states that this section applies "*with the necessary changes required by the context*". This creates the impermissible situation in which it is left to the discretion of the inspector to decide the extent to which the warrant requirement applies to the search and seizure operation. This is, again, impermissible.

The inappropriate use of the criminal law to support the inspectors' work

- 24.11 We reiterate that the constitutional doctrine of legality discussed earlier finds specific reference in the field of criminal law.



- 24.12 In this respect, it is of concern that the Bill's provisions are backed up by criminal sanction in support of the inspectors' functions. Section 89E(5) provides that any person who "*hinders an inspector in the performance of the inspector's functions commits an offence*"
- 24.13 Given the vagueness problems already identified above, it is clearly a violation of the principle of legality for the Bill to set out a wide array of powers that an inspector may exercise while nowhere explaining what an inspector's "*functions*" are. Yet it is the "*hindering*" of these functions that is criminalised.



CONCLUSION

25. In *S v Makwanyane* 1995 3 SA 391 (CC) para 156, Ackermann J provided the following description of the constitutional state:

“We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.”

26. For the reasons set out above, we submit that the Bill, if enacted, will undermine the idea of the constitutional state. The rule of law means that people must be subjected to legal regulation by means of rules which have an ascertainable content. The rule of law also implies the absence of wide discretionary authority on the part of government, since the existence of unconstrained discretion is likely to lead to arbitrary outcomes. The Bill is entirely at odds with these principles. It fails to furnish affected parties with fair notice of what forms of conduct are proscribed, and does not afford them any opportunity to regularise their affairs in the shadow of the law's demands. This is the very antithesis of the rule of law.
27. Accordingly, we submit that the Bill is fatally flawed and will not withstand constitutional scrutiny. Its provisions in combination and at times singly are vague, unworkable, and inconsistent with fundamental constitutional principles.

