

# Through the looking glass: the NHI and human rights



The release of the long-anticipated White Paper on National Health Insurance (NHI) by the Department of Health on 10 December 2015 was followed by a flurry of comments. One argument is that the Bill of Rights guarantees every person the ‘right to freedom of association’, and that the NHI would unfairly and unduly limit one’s right to decide with whom to associate. *Narnia Bohler-Muller* looks at this argument from a socio-economic rights perspective.

The white paper outlines the background and justification for South Africa’s move to join other countries like Brazil, the United Kingdom, France, Estonia, South Korea and Thailand in introducing universal healthcare coverage for its population. The aim is to establish an NHI Fund that pools resources to ensure that all South Africans have equal access to quality healthcare services.

The white paper also outlines the fact that healthcare in South Africa comprises a two-tiered system divided along socio-economic lines. The private medical aid sector consists of 83 medical aid schemes that fund healthcare services for about 16% of the population.

Statistics South Africa says between 2009 and 2013, healthcare inflation surpassed headline CPI (general inflation) by a yearly average of 4.3%. And where health insurance made up 3.4% of a household’s expenditure between 2006 and 2007, that amount rose to 7.2% between 2010 and 2011. The 2013 General Household Survey Report stated that ‘nearly seven in every 10 (69.9%) households reported that they went to public clinics and hospitals as their first point of access. By comparison a quarter (24.2%) of households indicated that they would go to private doctors’.

This two-tiered system has led to fragmented funding and risk pools in healthcare. An NHI Fund would improve healthcare equity by combining fragmented private and public health funding pools and eliminating out-of-pocket payments at points of service.

The minister of health has indicated that the NHI would be phased in over a period of 14 years, with the first phase (five years) focused on improving service delivery in the public sector.

## An NHI Fund would improve healthcare equity by combining fragmented private and public health funding pools

Some negative responses in the media to the white paper relate to the fact that the NHI would be expensive and place an unrealistic burden on the middle class tax base; that it infringes upon the right of the affluent to unfettered access to private health facilities; that it would infringe upon the rights of the provinces to deliver healthcare services, allowing them to access revenue from the national fiscus in the form of an equitable share; and that it would infringe upon the rights of medical schemes to do business.

Why should healthcare be regarded a constitutional right?

Firstly, the preamble to the constitution provides for ‘the need to improve the quality of life of all citizens and to free the potential of each person’. Read together with the preamble, section 7(1) states that the bill of rights is a ‘cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom’. Section 7(2) provides that the state must ‘respect, protect, promote and fulfil’ the rights in the bill of rights.

In addition, the rights to equality, dignity and bodily and psychological integrity are entrenched in sections 9, 10 and 12(2) of the constitution respectively.

Most importantly, the bill of rights includes *justiciable socio-economic* rights that include the right to healthcare for all. Section 27(1)(a) of the constitution says that everyone has the right to have access to healthcare services, including reproductive healthcare. In terms of section 27(2), the state must take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right of access to healthcare services; and in terms of section 27(3) of the constitution, no one may be refused emergency medical treatment.

When it comes to the rights of the child, section 28(l)(c) is also quite clear. The constitution provides that every child has the right to basic healthcare services, which is a right that is not subject to any limitations. Section 35(2)(e) provides that people detained by the state are entitled (without limitation) 'to conditions of detention that are consistent with human dignity, including... medical treatment'.

The purpose of particular provisions, such as the right to healthcare, must be understood with reference to this context and these underlying values of the constitution.

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The central question is, how does the state best ensure the fulfilment of these human rights, in this context of (equal) access to healthcare for all? It is submitted that the NHI is the best mechanism as it would uphold the values of a supreme constitution, ensure equity across the country and improve delivery.

In terms of policy, the National Development Plan (2011) (NDP) envisages a phased approach to NHI. By 2030 there should have been a significant shift in *equity, efficiency, effectiveness and quality* of healthcare provision and universal coverage should be available. Goal 8 of the NDP provides that:

***Everyone must have access to an equal standard of care, regardless of their income. A common fund should enable equitable access to healthcare, regardless of what people can afford or how frequently they need to use a service. (p. 334)***

In addition, NHI contributes directly to achieving the government outcome that calls for 'a long and healthy life for all South Africans' (Outcome 2). Output 4 of this outcome requires 'strengthening health system effectiveness'. One of the ways of doing this is to improve the financing of healthcare and hence the desirability of the fund as a centralised pool (one purchaser, one payer).

Furthermore, Goal 3 of the UN Sustainable Development Goals (2015) aims to 'ensure healthy lives and promote well-being for all at all ages'. Target 3.8 specifically aims to 'achieve universal health coverage, including financial risk protection,

access to quality essential healthcare services and access to safe, effective, quality and affordable essential medicines and vaccines for all'.

The right to health was first expressed as a fundamental human right in 1948 in the Universal Declaration of Human Rights (UDHR). Article 25 provides for the right in a very broad sense that includes food, clothing, housing, medical care and necessary social services.

In addition, South Africa ratified the International Covenant of Economic, Social and Cultural Rights (ICESCR) on 18 January 2015. The ICESCR's right to health emphasises *equal access* to healthcare and *minimum guarantees of healthcare*.

The ICESCR has defined the normative content of the right to healthcare as equal access, based on the principle of non-discrimination, to healthcare facilities, goods and services. These should be available in sufficient quantity; must be physically and economically accessible to everyone; must be ethically and culturally acceptable; and must be of a medically appropriate quality.

The primary regional instrument for South Africa relevant to economic, social and cultural rights is the African Charter on Human and Peoples' Rights. South Africa became a party to the African Charter in 1996. The African Charter includes the 'right to enjoy the best attainable state of physical and mental health' in Article 16.

Both the Protocol to the African Charter on the Rights of Women in Africa (2003) (African Women's Protocol) and the African Charter on the Rights and Welfare of the Child (1990) (African Children's Charter) oblige state parties to provide adequate, affordable and accessible health services and to ensure the provision of necessary medical assistance and healthcare to women and children.

The implementation of NHI is required to transform our society into one that does not... perpetuate apartheid in healthcare service provision

Based on these constitutional, policy, international and regional considerations, the implementation of NHI as outlined in the White Paper is required in order to transform our society into one that does not exclude the majority of the population from access to quality healthcare, and does not perpetuate apartheid in healthcare service provision. When balancing human rights, one must take into account that our constitution is *transformational* and that civil and political rights do not trump the rights related to advancing social justice. The pros clearly outweigh the cons. ■

*Author: Professor Narnia Bohler-Muller, executive director of the African Institute, HSRC. She has been appointed by the Minister of Health, Aaron Motsoaledi, to the NHI working group on developing legislation to provide a framework for NHI within the context of the constitution.*