Constitutional Duties for the Determination, Expenditure, Oversight and Rationing of Available Financial Resources for the Delivery of Health Care Services

24 April 2009

[This submission has been prepared for the Health Financing Task Team of the Ministerial Advisory Committee on Health. Please note that due to the short timeframe in which it was prepared it should be considered a working draft for the assistance of the Committee. Annexed to this submission is a report on the Free State moratorium on ARV initiation prepared by the AIDS Law Project in February 2009.]

1. Introduction

This submission considers some of the constitutional and legal imperatives underpinning public health financing and service delivery. It restricts itself to considering the legal issues that must be considered when decisions are made as to what health services ought to be delivered in the public sector, how this relates to resources and budgeting, the relationship between the national and provincial spheres of government in budgeting for and delivering health services.

It also sets out the steps that must be followed in the circumstances where there are insufficient resources to deliver certain health services due either to poor planning or unforeseen demand.

From the submission it emerges that there are two occasions during which ‘rationing’ decisions need to be made:

- At the outset of the planning process – where the ambit of the package of health services is determined. A reasonable determination that is consistent with the Constitution and that is rooted in health needs is required at this stage.
- On occasions where a budget runs out and some health services have to be curtailed or cut, such as happened in the Free State in 2008-09. In this instance the submission points to particular (and different) constitutional and statutory requirements that must be met before such rationing takes place. The statutory requirements stem mainly from the Public Finance Management Act (PFMA) and the Promotion of Administrative Justice Act (PAJA), and are considered in the final section of this submission.

2. Constitutional and legal imperatives for resourcing the right to health

The Constitution provides that “everyone” has a right of access to health care services, including reproductive health care and that the state “must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of this right. (Constitution s 27). In this submission we attempt to unpack the legal meaning of “available resources” and the duties this imposes on the processes followed by national and provincial government, as well as

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the duties of the Executive, and particularly the Minister of Health in this regard. (This is a necessary background to the particular issues that arise when a health service is cut for budgetary reasons, and if followed properly should indeed prevent such a situation from arising except in exceptional and unforeseen circumstances).

**Determining a package of health services based on health needs**

While there are necessary limitations to the package of health services that may be provided in the public sector, a fundamental legal and ethical principle is that the limits are set fairly. In South Africa, the Constitution reinforces this through a number of provisions including the right to equality (s 9), the right to dignity (s 10), the right to fair administrative action (s 33), the right of access to health care services (s 27) and the limitation clause (s 36).

In order to fairly and constitutionally determine the extent of the package of health care services to which everyone will have access, the starting point cannot be constrained by the extent of resources that have already been allocated to it. Such a determination is inherently arbitrary. The starting point therefore, must begin as an assessment of the health needs of the country including factors such as population size, disease burden, and the need for infection control. Once this assessment has been costed it is possible to rationally motivate for an appropriate allocation of the budget to health. While the costing will likely far exceed what is available fiscally it provides:

- an evidence-based baseline against which limitations to the package of services are determined; and
- a measure for the progressive realization of access to health services.

**Making resources available**

Our Constitution unambiguously imposes positive obligations on the government to advance socio-economic rights. In so doing it requires that the government allocates resources for that purpose, develops reasonable plans to further the rights, finances and implements those plans and monitors both the implementation and the effectiveness of the plans. (See *Grootboom and Others v Government of the Republic of South Africa and Others 2001 (1) SA 46 (CC)* (hereinafter *Grootboom*), *Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC)* (hereinafter *TAC*), *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development 2004 (6) SA 505 (CC)* (hereinafter *Khosa*))

At a general level an adjudication of whether government has approached the issue of ‘available resources’ properly falls within judicial competence. The Constitutional Court has clarified that the inclusion of this term in sections 26 and 27 of the Constitution is not a trump card that may be invoked at will by government. Thus Government will not be found to be free from an obligation because of a bare assertion of resource constraints

Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state
will need to be provided. (Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at 88 (hereinafter Metrorail))

By making this a requirement in cases where resource allocations are contested the Court places great weight on the principle of accountability of the state. Thus, it uses the Constitution to maximise democracy. It reinforces the principle that the state is in service of the people and is obliged to explain its use of resources.

This does not mean that the state need only provide reasons for its assertion that it is unable to meet a demand due to resource constraints. In Khosa, the Court rejected the state’s evidence of the resource implications of fulfilling the demand made there i.e., to extend social security benefits to permanent residents. Mokgoro J found that the state’s contention that the extension will place an excessive burden on state resources was not convincing. (Khosa at 62)

These cases clarified some uncertainty that had arisen as a result of Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC) (hereinafter Soobramoney). There, the Court employed a narrow conception of ‘available resources’ that limited it to the budget of the department concerned. Hence, the reasoning was that since a particular service was not budgeted for, and there was a rational basis for the rationing, the department could not be ordered to provide it. Metrorail and Khosa make it clear that the court will pierce the veil of budgets.

Two key legal principles are thus given effect to by the Court’s interpretation of the Constitution:

• the need for reasonableness in allocation of resources; and
• the need for accountability regarding allocation of resources.

Neither of these legal imperatives can be fulfilled in the absence of a rational budgeting system and appropriate expenditure at all levels in government.

While the allocation of resources is a function of National Treasury (NT), the rationality of the allocation to the health department depends on the evidence-based motivation from the Department of Health (DoH). The duties of the DoH in this regard are explained in section 4 of this submission examining the National Health Act 61 of 2003 (NHA).

A central theme that has arisen in this context is the lack of synergy between national and provincial spheres of government in a) the allocation of resources to health and b) service delivery.

Allocation of finances and service delivery: The relationship between national and provincial spheres of government

A dysfunction has been identified between national allocation of resources (and priorities) on the one hand and provincial allocations on the other. In particular, the lack of alignment between provincial spending and national priorities has been a cause for concern. Some argue that this is an unforeseen result of the federalist nature of the fiscal system and take the position that short of a constitutional amendment, the
national government is unable to intervene in the provinces to ensure service delivery that is compatible with national priorities.

This submission holds that while there are constraints on the national government, there are circumstances where it is appropriate and constitutional (indeed, at times necessary) for national government intervention at the provincial level. Further, there is space for reform of the fiscal system in order to ensure efficiency of budgeting and expenditure within the constitutional framework.

Division of Revenue

The manner in which revenue is raised and the central role of national government in allocation of that revenue (as required by Chapter 13 of the Constitution) justifies the imposition of conditions and controls on provincial expenditure. Section 214 of the Constitution requires that the Division of Revenue Act must, amongst other factors, take into account:

- the national interest;
- the needs and interests of the national government, determined by objective criteria;
- the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them; and
- the fiscal capacity and efficiency of the provinces and municipalities.

These factors place substantive requirements on the determination of allocation of revenue that favours the national sphere.

National Priority setting sensitive to ‘legitimate’ provincial autonomy

The structure of government, and relationship between the national and provincial levels of government, was the subject of intense debate during the constitution-making process. The first post-apartheid Constitution, referred to as the Interim Constitution, was a result of fierce political negotiation. This text contained an annexure, which set out 34 Constitutional Principles that were to guide the drafting of a final Constitution. One of the Constitutional Principles (XX) required that the functions and powers of each level of government must recognize, amongst other things, ‘legitimate provincial autonomy’.

However, in certifying the final Constitution the Constitutional Court was of the view that this phrase is imprecise, and that what is legitimate provincial autonomy must be determined with due regard to the constitutional framework, which allocates powers and functions to the different levels of government. (Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) at para 258 (hereinafter Certification Judgment)).

With regard to how to understand our government structure, the Court made it clear that ours is not a pure federalist system:

The [Constitutional Principles] do not contemplate the creation of sovereign and independent provinces; on the contrary, they
contemplate the creation of one sovereign State in which the provinces will have only those powers and functions allocated to them by the [Constitution]. They also contemplate that the [Constitutional Assembly] will define the constitutional framework within the limits set and that the national level of government will have powers which transcend provincial boundaries and competences. *Legitimate provincial autonomy does not mean that the provinces can ignore that framework or demand to be insulated from the exercise of such power.* (Certification Judgment) [emphasis added]

*Circumstances permitting power of national override*

The inherent principle of a national override power is a thread throughout the text of the Constitution.

A second critical principle for the purposes of this discussion is that of effective public administration. Section 195 of the Constitution provides, in relevant part, as follows:

Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- A high standard of professional ethics must be promoted and maintained.
- Efficient, economic and effective use of resources must be promoted.
- Public administration must be development-oriented.
- Services must be provided impartially, fairly, equitably and without bias.
- People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- Public administration must be accountable.
- Transparency must be fostered by providing the public with timely, accessible and accurate information.
- Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

Schedule 4 of the Constitution sets out the functional areas of *concurrent* national and provincial legislative competence. One such area is ‘health services’. While this means that both spheres of government have the power to make laws related to health services, section 44(1) of the Constitution confers authority on the national sphere to pass legislation that effectively ‘overrides’ or sets the parameters of provincial legislation.

The difficulty with understanding where to draw the line with regard to concurrent competences is the vagueness of Schedule 4. The National Health Act constitutes national legislation that attempts to set the parameters between national and provincial legislative competence for health. This is elaborated on below.
Schedule 5 of the Constitution sets out the areas of exclusive provincial legislative competence. Even here, it is significant of the legislative intent that in terms of section 44(2) national is given limited powers to ‘intervene’ where it is necessary in order to:

a) to maintain national security;
b) to maintain economic unity;
c) to maintain essential national standards;
d) to establish minimum standards required for the rendering of services; or
e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

[emphasis added]

This power, and the principles that underlie it, is reinforced by section 100 of the Constitution which provides that:

(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including -

(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
(b) assuming responsibility for the relevant obligation in that province to the extent necessary to -

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;
(ii) maintain economic unity;
(iii) maintain national security; or
(iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole. [emphasis added]

As explained below in relation to the Free State, these powers have special relevance to the delivery and financing of health services.

Unity of purpose in relation to constitutional duties

With regard to the executive powers of the provinces, these are set out in section 125 and those sections following it. Section 125(3) provides that the provinces have the executive authority to implement national legislation (within the functional areas set out in schedules 4 and 5):

only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist the provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions [in this regard].
With regard to conflicts between national and provincial legislation, section 146 states that national legislation prevails where any of various conditions are met. These include:

- where national legislation deals with a matter that cannot be regulated effectively by provincial legislation; (146(2)(a))
- where national legislation deals with a matter that requires uniformity across the nation and where that legislation established norms and standards and national policies; (146(2)(b))
- where the national legislation is necessary for ‘the promotion of equal opportunity or equal access to government services’; and ‘the maintenance of economic unity’. (146(2)(c))

Co-operative government

Finally, while it is clear that national government prevails in a number of ways, the Constitution also requires that all spheres of government must act in a co-operative manner. Section 41 of the Constitution sets out the principles that govern the way that different spheres relate to each other. These include the duties to:

- secure the well being of the people of the republic;
- provide effective, transparent, accountable and coherent government for the Republic as a whole;
- co-ordinating their actions and legislation with one another;

Ultimately what is necessary is a balancing act between three core principles: the need to respect legitimate provincial autonomy; effective and accountable public administration and co-operative government. This means that immediate and extreme use of the override powers should not be the first means of resolving the failure by a province to fulfill its functions. The national government does not have carte blanche to intervene in provincial functions. However, in circumstances where attempts to address problems in a co-operative manner fail, or where a province simply does not have the capacity to carry out national policies and law, it is reasonable, necessary and incumbent on the national sphere to intervene.

3. Parameters set by the National Health Act

The NHA fully embodies the constitutional principles and duties regarding the determination and expenditure of available resources and co-operative government that have been outlined above. In the section below we set out the schema that the NHA envisages when it comes to issues of planning, budgeting and implementation of national health policy.

At the outset it is noteworthy that the NHA states that its aim is “to provide a framework for a structured uniform health system … taking into account the obligations imposed by the Constitution and other laws on the national, provincial and local governments when it comes to health services” [emphasis added] in order to:

Provide for a system of co-operative governance and management of health services, within national guidelines, norms and standards, in which each
province, municipality and health district must address questions of health policy and delivery of quality health services. [emphasis added]

The way in which this is intended to happen is set out in the manner in which the NHA assigns complementary duties to the Minister of Health, the Director General, the National Health Council, the Provincial MECs for Health and the Provincial Health Council.

When it comes to integrated financial planning and implementation the NHA requires that the DG:

- Issue guidelines for the implementation of national health policy. (s 21(1)(b))
- Issue, and promote adherence to, norms and standards on health matters; (s 21(2)(b))
- Facilitate and promote the provision of health services for the management, preventing and control of communicable and non-communicable diseases; (s 21(2)(k))
- Co-ordinate health services rendered by the national department with the health services rendered by provinces and provide such additional health services as may be necessary to establish a comprehensive national health system; (s 21(2)(l))
- Must integrate the health plans of the national department and the provincial departments annually and submit the integrated health plans to the National Health Council. (s 21(5))

It is notable that the National Health Council includes Health MEC and heads of provincial health departments and that its functions are to advise the Minister on:

- Targets, priorities, norms and standards related to the equitable provision and financing of health services; (s 23(1)(a)(ii))
- Efficient co-ordination of health services; (s 23(1)(a)(iii))
- Human resources planning, production, management and development; (s 23(1)(a)(iv))
- Equitable financial mechanisms for the funding of health services (s 23(1)(a)(vi))
- The national and provincial integrated health plans contemplated in section 21(5); (s 23(1)(f))

Finally, it is significant that in the Chapter of the NHA dealing with Provincial Health the MEC for health “must ensure the implementation of national health policy, norms and standards in his or her province.”
The problem of a national/provincial dysfunction therefore appears not to be in the scheme of the NHA, but with its implementation and with the lack of capacity and resources within the National Health Department to carry out its multi-layered and complex duties.

4. Rationing where resources are strained due to unforeseen circumstances

In 2008 the Free State Department of Health (FSDOH) made a decision to cut back health services due to financial constraints. As part of this, a moratorium on ARV initiation was imposed. The decisions to cut back health services in general, and the moratorium on ARV initiation in particular, were imposed unlawfully. Not only did it violate the Constitution at the most basic level, but there was also no attempt at compliance with substantive and procedural fairness at the stage of cutting back health services. That the crisis occurred at all appears to reflect on the financial planning inefficiencies in both the provincial treasury and provincial department of health. The manner in which the relevant provincial departments responded reflects a lack of awareness of the legal imperatives that guide public administration and the delivery of essential social services.

The moratorium was attributed to various causes by the MEC for Health in the Free State. These were: implementation of the OSD for nurses; the taking over of local authority health services and the global economy. This is an insufficient explanation of the cause, and does not help us to understand how to prevent the crisis from re-occurring.

It has been reported that all provinces have been facing severe financial shortfalls. Over-expenditure on parts of health budgets by provinces affects the delivery of health services in other parts. This points to a broader problem than either a mismanagement of the OSD or the unanticipated cost of planned activities where demand outstrips budgets. The imperatives of reasonable planning and implementation by health and treasury departments that are referred to above will begin to alleviate the disconnect between financing health and health outcomes. However, what ever the cause of the crisis, in this section we are concerned with how the government should respond in a manner that is constitutional and lawful.

Below we set out the steps that ought to have been taken by government (at various levels and portfolios) in the context of the Free State financial crisis. The focus on the Free State is not intended as a shaming exercise. Rather it is an attempt to use this case study in order to learn from it.

A further issue that it is important to note at the outset is that an active decision was taken in the Free State to scale back health services. That we don’t have evidence of moratoria in other provinces does not mean that rationing of health services are not in fact taking place there. It may be argued that the situation in the other provinces is all the more egregious for this. It means that in those provinces, where people may just be denied a service as they seek it, there is not even an attempt to manage the crisis. In this way, in addition to the violation of fundamental rights, the provincial and local authorities, and public health facilities themselves, fail at the first rung of effective, responsive and accountable public administration.
Acting lawfully in a financial crisis

Broadly, there are four key areas of the law that are directly implicated in the context of sudden resource constraints: the Constitution, the PFMA, PAJA and the NHA. The responsibilities arising from these acts are not easy separated out, especially since the statutes are drafted specifically to give effect to parts of the Constitution. Therefore various aspects of these laws will be referred to as duties that should flow from each other in a chronological continuum.

The finance side

An effective finance framework will provide an early warning system so that crises may be averted or controlled. The PFMA regulates the effective and efficient financial managements of all state organs. At the national level there is a responsibility on the NT to ensure sound financial management by departments. It bears a direct role in monitoring the implementation of provincial budgets (section 6(1)(e)).

In the course of this monitoring it should become aware of pending crises. In order to give effect to this responsibility, the PFMA empowers the NT to take certain action, including assisting provincial departments and investigating systems and internal controls in any department. In more extreme cases of failures by a department to comply with the PFMA, the NT is enjoined to take appropriate steps, including using its override power in terms of section 100, to address that failure. (s 6(2)).

At the provincial level, the provincial treasury bears similar responsibilities. In carrying out its monitoring function it ought to become aware of pending crises before they take place. The importance of this cannot be underestimated. Where there is a warning of a potential shortage of resources - especially for departments that deliver essential services – the ability to respond effectively (including to seek further or alternative funding, where appropriate) is enhanced.

In order to ensure a proper interface with the treasury at both levels, the PFMA designates accounting officers for every state department. At the national level the person who assumes the office of Director-General is the accounting officer. While there is a limited role for the national accounting officer in provincial departmental affairs, there is a clear responsibility for those funds that are transferred by way of conditional grants. This is so because the purpose of the ring-fenced allocation is to impose conditions to ensure a compliance of a province with nationally determined priorities. The overall responsibility on the DoH to ensure uniformity of standards in health service delivery across the country requires oversight. The role of the DoH is addressed further below.

At the provincial level the heads of departments are ex officio accounting officers. The accounting officer has detailed responsibilities for the effective and transparent management of finances within the department. Inherent in these responsibilities is the prevention of financial crises, or the ability to avert potential crises. With regard to the budget, the accounting officer is directly responsible for taking ‘effective and appropriate steps to prevent overspending of the vote of the department or a main
division within the vote’ and to report to the executive authority and relevant treasury any such overspending (section 39(2)). A continual and co-operative engagement between the accounting officer and the provincial treasury is essential in averting or managing financial setbacks. There is no evidence of this co-operation in the Free State.

Emergency funding

Where it is clear that there is no means of averting an impending shortfall through other means, emergency funding will be necessary. These are to be sought from the treasury and other possible external sources.

With regard to the treasury, sections 16 and 25 of the PFMA empower the Minister and MECs to authorise the use of funds (from the national and provincial revenue funds respectively) -

- to defray expenditure of an exceptional nature;
- which is currently not provided for in any budget;
- which cannot wait for a future budgetary process; and
- without which serious prejudice to the public interest will result.

While the amount of the authorization is limited and the section evidently requires certain conditions to be met, there is a strong argument for invoking the provision in a situation such as that faced by the Free State. Indeed the failure to invoke the provision in such a situation may well constitute a constitutional violation in that reasonable measures were not taken to ensure access to services.

The failure to ‘bail-out’ the FS provincial department in order to maintain health services had both life and death consequences for users of the health system and adverse implications for public health. It was estimated that an additional thirty deaths a day occurred as a direct result of the moratorium. But the failure to address the financial shortage also fuelled a larger public health crisis by trebling the waiting list for ARVs (estimated by the DG to have risen to 15,500 people by March 2009); caused increased opportunistic infections thereby increasing the burden on health services; led to treatment interruptions and probable drug resistance, thereby decreasing the benefits of public expenditure on ARVs and increasing future medicine costs; caused more vertical HIV infection and avoidable further transmission of TB.

These facts underline the importance that in health financing the Treasury is aware that stopping or reducing health services provides a false economy, the costs are merely deferred and escalated to another point in the provision of health care. It is also relevant here to stress that efficient and reasonable health budgeting should also calculate the cost of not providing essential health services and that rationing decisions weigh up the cost effectiveness of each decision.

The health side

During its investigation of the Free State crisis the ALP wrote a number of letters to the FS Treasury and Health Department. Unfortunately, important questions were not answered.
As with the measures outlined above, the health department (national and provincial) is similarly under an obligation to take all reasonable steps to avert a crisis such as occurred in the Free State. The constitutional implications of failing to do so are multiple. Apart from a non-compliance with the positive obligation to increase access to health care services, there is a direct infringement of the existing access to services (so called ‘negative infringement’). Removing essential health services to which people previously had access is a grave step that ought only to be undertaken after every attempt has been made to prevent that result. Even then, the violation takes place. In order for it to be justifiable it must comply with section 36 of the Constitution (the limitation clause). This section requires, in the first instance, that rights may only be limited by a law of general application. As reflected earlier in this submission there is a framework of laws that are relevant to rationing decisions: The Division of Revenue Act, the PFMA and PAJA (more on the latter below).

The most immediate rights that are implicated by cutting or curtailing health services are the right of access to health care services, the unqualified right of children to basic health services, and the right to administrative justice.

At the national level the department of health is responsible for providing uniformity in respect of health services across the nation (s 2 of the NHA). Section 100 of the Constitution empowers national intervention. As stated earlier, while this has to be balanced with co-operative government, the drastic impact on life and the fabric of the public health service warrants a due consideration by the national sphere of its powers in terms of this provision.

In a situation like the Free State, where the delivery of most health services is seriously threatened, the national department has a duty to intervene. The national department may do so partly through an exercise of its powers in terms of section 100 of the Constitution. This power would be exercised where it is necessary to meet minimum essential standards for the delivery of a service. But the national department is also required to intervene simply because the duty to provide access to health care services lies with the government at all levels.

The national and provincial departments, working together, are required to engage with the provincial and national treasuries in order to seek the necessary funding. In the Free State, while some funds were made available to the provincial department by the NT, this was insufficient to cover the need. As a result, the national department turned to external donors for support. Again, while this provided some relief, it was insufficient. In addition, donor funding is accompanied by various conditions – particularly regarding the procurement of drugs. The issue of donor funding and drug procurement will be developed in the next draft of this submission.

In engaging with the relevant treasury the health department (provincial in particular) must have already assessed the scale of the crisis, the impact on the delivery of health services, the cost of not delivering health services, cost-savings that could be made on non-essential items and the amount of funds required in order to maintain services.

It is only after these steps are taken - ie that a clear and objective determination is made that there are no resources that can be made available as required by the Constitution - that a decision to ration services can take place.
When rationing cannot be avoided

The manner of rationing health services in the Free State was unlawful because it did not comply with constitutional obligations as required in terms of section 27 and the PFMA. It was instituted without consideration of legal duties, it was not based on assessment of available resources, there was insufficient communication with patients or health care workers and it was instituted without informing the National Department. But it was also unlawful because it failed to comply with procedural and substantive fairness that is demanded by the right of administrative justice. A fundamental requirement of administrative action is that those affected by such action are entitled to reasons and accountability.

The Free State moratorium was an executive decision to cut health services. This constituted administrative action that affects rights. PAJA requires that fair procedures are followed in making administrative decision that affect rights or interests of people.

In terms of section 4 of PAJA, where administrative action materially and adversely affects the rights of the public, the administrative official must decide, in order to give effect to the right to procedurally fair administrative action whether to hold a public inquiry, whether to follow a notice and comment procedure, or both, or other fair procedures that are required by law or policy.

Section 4 goes on to describe further requirements in following these procedures, including:

- proper communication
- consultation; and
- consideration of the views that are provided through the process.

The decision that is made can be reviewed by a court on a number of grounds, including that the action that was taken is procedurally unfair, not rational or unconstitutional.

In addition to the procedural requirements, the action taken by the department is required by PAJA to be reasonable. The Constitutional Court has provided guidance on how to interpret this requirement. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC), the Court reinforced the need for a context-driven approach:

Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and the well-being of those affected. (*Id* at para 45)

Hence, apart from the need to follow a thorough process as outlined earlier, the health department would also have to evidence (with some degree of specificity):
• cost-saving measures on non-essential health items;
• a consultation with the relevant experts regarding which services to scale-back;
• why those particular services are scaled-back;
• how the scaling-back would be undertaken;
• a triaging plan for how to respond to those in desperate need of health services; and
• a plan to restore health services to their previous level.

The purpose of the requirements of procedural and substantive fairness is to improve the quality of the decision. It is not just an albatross around the neck of administrators. Carefully thought through processes and facts yield more effective decision-making.

Finally the reasons underlying rationing decisions should be made publicly available. A member of the public who is affected by the decision has a right to request adequate written reasons (s 5 of PAJA). The right of any member of the public to written reasons means that a court need not be approached to obtain those reasons. Subject to certain conditions, where an administrator fails to furnish adequate written reasons, it may be presumed that the administrative action was taken without good reason. (ss 5(3) and (4) of PAJA). This entitlement in PAJA is a reflection of the inherent principle of accountability – a thread which runs throughout public administration, and which was reinforced in the TAC case (para 123).

5. Section 27(3) emergency services

Time was not sufficient to address this issue. This section will be developed in the next draft of the submission. The key concern is the lack of a definition of emergency medical treatment. While the Soobramoney case began to give some content to the definition, it is far from sufficient. The expectation was that national legislation would define the term with great precision. However the National Health Act fails to do that. In addition to a definitional concern, given that this aspect of health care services cuts across public and private health sectors, a legislative framework which establishes roles and responsibilities of relevant parties, as well as a funding arrangement is necessary.

[ENDS]