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SUBMISSION ON THE DRAFT NATIONAL HEALTH AMENDMENT BILL, 2011[1]

1. INTRODUCTION

SECTION27 welcomes this opportunity to comment on the draft National Health Amendment Bill, 2011 ("the draft Bill"). We see the publication of the draft Bill as the first legislative step towards the establishment of a single, accountable and structurally and operationally independent Office of Health Standards Compliance ("Office") with jurisdiction over the private sector and the public sector at all spheres of government.[2] In particular, we welcome the draft Bill as recognition of the need to implement fully and strengthen – and where necessary amend – key provisions of the National Health Act 61 of 2003 (NHA).

This submission takes as its starting point that the Office requires "the necessary structural and operational independence to be an effective … mechanism".[3] It draws extensively on the majority decision of the Constitutional Court in the *Glenister* judgment insofar as it addresses "the operational and structural attributes of independence".[4] This is not to argue that the Constitution requires the setting up an independent body (as is the case in *Glenister*),[5] but rather that the proposed mandate of the Office cannot be discharged effectively unless it has an adequate level of structural and operational autonomy. *Glenister* is helpful in that it details what is needed to achieve such autonomy.

In considering the draft Bill, we have focused on the following question: does the Office have "an adequate level of structural and operational autonomy, secured through

[1] As published in General Notice 44 of 2011, *Government Gazette* No. 33962 (24 January 2011)
[2] While the draft Bill represents a welcome move away from a departmental directorate to a separate structure, it does not go far enough to ensure that the Office is indeed able to operate with the degree of autonomy required. It is this issue that is at the core of our submission.
[3] See *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6 at paragraph 178. The judgment is available at http://www.saflii.org/za/cases/ZACC/2011/6.html
[4] Ibid at paragraph 208
[5] This submission does not, however, concede that such a constitutional requirement does not exist. The point is simply not considered at this early stage of the legislative drafting process.

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institutional and legal mechanisms, to prevent undue political interference"?[6] In so doing, we recognise that the draft Bill itself identifies the need for some degree of independence, in particular insofar as the complaints mechanism is concerned; proposed new section 77(2)(a) contemplates an "independent mechanism" to investigate properly and deal expeditiously with "complaints from health care users".

Further, proposed new section 77(3) states that "[n]o person may in any way interfere with, hinder or obstruct any member of the Office in the performance of his or her functions." A failure to comply with this provision is an offence. In addition, the title of section 77 makes reference to the Office's independence. Finally, the proposed Office would replace not only a national Office of Standards Compliance, but also nine provincial Inspectorates for Health Establishments.[7] This expanded jurisdiction – over provincial departments of health and the services they provide – underscores the need for structural and operational autonomy.

2. SUMMARY OF FINDINGS AND STRUCTURE OF THE SUBMISSION

This submission comes to the conclusion that the proposed Office, as contemplated by the draft Bill, does not have an adequate level of structural and operational autonomy. In particular, the following aspects of the draft Bill – if adopted – would severely undermine the Office's independence and by extension its effectiveness:

- The direct role of the Minister of Health ("the Minister") in overseeing the functioning of the Office (sections 78(2), 78(3) and 81A(1)(c));
- The role of the Minister in accepting donations (section 79);
- Accountability and reporting requirements (section 80);
- The process in terms of which the Office's Executive Director (ED) is appointed and his or her lack of security of tenure (section 81);
- The proposed relationship between the Minister and ED as contemplated by section 81A(6); and
- The manner in which the Office's decisions (once reconsidered) may be taken on appeal (section 88A).

Before considering these six issues in detail, the submission first addresses the following two issues: why the Office needs to be set up in such a way that it has "the operational and structural attributes of independence"; and whether this requires the establishment

[6] *Glenister* at paragraph 206

[7] Clause 5 proposes that Chapter 10 of the NHA – in its entirety – be replaced. In so doing, it seeks to dissolve the Office of Standards Compliance and the nine provincial inspectorates.

of an independent entity within the public administration but nevertheless outside of the public service (such as the Council for Medical Schemes), or a self-standing agency within the public service whose head reports directly to the Minister and not to the relevant department's Director-General (such as the South African Revenue Service (SARS)).

3. NEED FOR "OPERATIONAL AND STRUCTURAL ATTRIBUTES OF INDEPENDENCE"

The objects of the Office, as set out in proposed new section 77(2), are to –

> (a) ensure that complaints from health care users are investigated properly and dealt with expeditiously through an independent mechanism; and
> (b) facilitate compliance by health care providers, health establishments, health facilities and health workers with the norms and standards for the national health system.

That subsection (2)(a) recognises the need for independence is not surprising, given that the investigation of complaints will relate to both public and private sectors. While the majority of public sector complaints may deal with facilities and/or health care workers at the provincial and/or local spheres of government, some may relate to the work of employees of the national Department of Health (DoH). In addition, the DoH plays a key role in the delivery of public health care services in provinces, whether by way of setting national policies, funding and managing conditional grants or the convening and chairing of the National Health Council.[8] The Minister thus has an interest in the perception of quality in the public sector broadly, at all spheres.

In relation to subsection (2)(b), the Office's mandate is varied. Amongst other things, the functions of the Office – as set out in proposed new section 78(1) – include the following:[9]

- An advisory role in the development and review of "norms and standards for the national health system" as a whole;
- A decision-making role in certifying health establishments "as compliant with prescribed norms and standards";
- An enforcement role in ensuring "compliance with prescribed norms and standards"; and
- A monitoring role in respect of "indicators of risk".

[8] The introduction of a system of National Health Insurance (NHI) is likely to see an increased role for the DoH in the delivery of health services.

[9] In addition, section 78(1)(d) requires the Office to "investigate complaints relating to the health system". This is to be done through the work of the Ombudsperson and his or her staff.

While the advisory function – and to a lesser extent the monitoring role – may be carried out by a body that need not have the operational and structural attributes of independence, the same cannot be said of the decision-making and enforcement roles. For the same reasons advanced in respect of the role to be played by the Ombudsperson,[10] these two roles also require operational and structural autonomy if they are to be performed effectively. Each of the functions of the Office cannot be seen in isolation of the others; all fall under the leadership and ultimate responsibility of the ED. And on balance, the majority of the functions – which cannot be separated from the others – require operational and structural autonomy.

4. LOCATION OF THE OFFICE: PUBLIC SERVICE VS. PUBLIC ADMINISTRATION

Glenister makes it clear that operational and structural autonomy does not require actual independence, whether in the form of full independence as is the case with the judiciary, or independence in the form of an organ of state that lies within the public administration but outside of the public service. Instead, it is quite permissible to locate a body with an adequate level of structural and operational autonomy under the executive authority of a minister of state. In the case of the Office, that could mean something similar to the SARS model: a separate agency that reports directly to the Minister.[11]

If this model is adopted, the Office's oversight role over DoH functions means that special care would need to be taken to ensure that it is able to function independently and accountably: independently of the Minister and accounting directly to Parliament. This does not mean, however, that there is to be no relationship between the Minister and the Office; instead, it is simply to state that the nature of the relationship needs to be defined so as to ensure an adequate level of structural and legal protection from executive interference. With these considerations in mind, we now consider those aspects of the draft Bill – if adopted – which would severely undermine the Office's independence.

5. SPECIFIC CONCERNS ABOUT THE BILL

5.1 Role of Minister in functioning of Office (sections 78(2), 78(3) and 81A(1)(c))

While it is not exactly clear what is meant by section 78(2)'s reference to the Minister exercising "final responsibility over the Office", the obligations imposed by subsection (3) on the ED – purportedly "[t]o enable the Minister to exercise his or her final responsibility"

[10] The Ombudsperson will give effect to the complaints function referred to in section 77(2)(a).
[11] We do not endorse the adoption of the full SARS model for the Office, as it plays a very different function.

– constitute a serious encroachment on the Office's autonomy. Subsection (3) requires the ED, at the request of the Minister, to –

> (a) furnish him or her with information or a report with regard to *any case, matter or subject* dealt with by the *Executive Director, an inspector or any other employee of the Office* in the performance of his or her functions; and
> (b) provide him or her with reasons for *any decision* taken by the *Executive Director, an inspector or any other employee of the Office* in the performance of his or her functions.[12]

Our objection here is not to the ED's obligations to furnish the Minister with appropriate information or a report on the work of the Office, or reasons for key decisions taken, but rather the sheer extent of the obligations and the control they effectively give to the Minister. In respect of requested information and reports, the obligation extends to "any case, matter or subject"; in respect of requested reasons, it extends to "any decision". Both obligations cover the entirety of work done by the Office: by the ED, an inspector or any other employee of the Office.

We concede that a general reporting requirement, as set out in proposed new section 80, may be insufficient. In this regard, we accept the need for the NHA to regulate the types of information and reports that may be requested and the manner in and circumstances within which they should be provided. In respect of requests for reasons, we recognise that the NHA should set out the manner and circumstances in which the Minister may request and be granted written reasons for certain categories of decisions taken by the Office. At this stage, we make no recommendations on where the lines should be drawn.

Linked to the Minister's obligation to exercise final responsibility is his or her power – in section 81A(1)(c) – to approve the organisational structure of the Office. In our view, there is a range of other mechanisms that could be employed to achieve the same result without infringing on the Office's autonomy. Amongst others, these include an organisational structure made by the Minister –

- On the recommendation of the Office or an independent third party;
- In consultation with the Office; and/or
- In terms of regulations issued in terms of section 90 of the NHA, as they stand or as amended.

Implicit in these proposals is our recognition of the Minister's central role in determining the organisational structure of the office. That said, however, we also recognise the need

[12] Emphasis added

for greater legislative control over the Minister's power in this regard. In our view, this power cannot be vaguely defined (as is the case with proposed new section 81A(1)(c)); instead, the empowering statute needs to provide guidance on the process in terms of which the organisational structure will be determined, as well as by whom. If this is not done, the organisational structure could be amended by executive fiat if and when political considerations dictate.

5.2 Role of the Minister in accepting donations (section 79)

In large part, the provisions of proposed new section 79 serve to strengthen the Office's independence: in terms of subsection (a), money is to be appropriated by Parliament; and in terms of subsection (b), the Office may retain fees rendered for its services. But subsection (c), insofar as it effectively gives the Minister a veto over the acceptance of "donations or contributions received by the Office", is cause for concern. While we recognise that the Minister should play a central role in determining the framework in terms of which donations or contributions are accepted, we do not understand why the issue cannot effectively be managed simply by reference to the Treasury Regulations issued in terms the Public Finance Management Act 1 of 1999 (PFMA).[13]

5.3 Accountability and reporting requirements (section 80)

The draft Bill seemingly conflates accountability and reporting requirements, with the Office having to account and report to the Minister. As already indicated, we have no principled opposition to the Office being required to report to the Minister. In our view, however, an adequate level of structural and operational autonomy cannot be achieved if the Office remains directly accountable to the Minister. Instead, we recommend that it account directly to Parliament. Given its role in holding the executive to account and overseeing the implementation of legislation, Parliament is the appropriate body to play such a role.

In terms of reporting requirements, we are in principle in agreement with the substance of the reporting model as detailed in proposed new sections 80(2),[14] 80(3) and 80(4).[15] However, we have concerns regarding subsection (1)(b)'s requirement that the Office's annual report has to be approved by the Minister. While we agree that the annual report

[13] In particular, see Regulation 21 entitled "Gifts, Donations and Sponsorships"

[14] Amongst other reasons, this is necessary because it will provide information on the basis of which the Minister would be able to determine if there is any need to reconsider the statutory mandate of the Office in line with national health priorities.

[15] One concern with subsection (4) is that it does not mention the form that publication should take.

should be published in the prescribed form, we do not see a need for the Minister to play the role as set out in the provision. Instead, as is ordinarily the case with autonomous and independent agencies, the Minister's role is limited to making regulations that prescribe the form of the annual report.

5.4 Appointment of ED and lack of security of tenure (section 81)[16]

We have three concerns with proposed new section 81:

- There is no security of tenure for the ED;
- There are insufficient protections against unfair removals of the ED from office; and
- There is public, open process for the appointment of the ED.

Each of these three issues, on its own, would provide sufficient cause for concern. Together, they raise serious doubt as to the potential for undue political interference in the functioning of the ED and the Office.

In terms of security of tenure, we have identified two concerns: the reference to "an agreed term not exceeding five years"; and the discretion granted to the Minister regarding the renewal of the ED's term of office. In our view, the first concern could be addressed if the term is expressly defined as being five years; the second concern could be addressed if the draft Bill were amended to make provision for a public, open process for the appointment of the ED. As the provisions currently read, they place undue pressure on the incoming ED to toe the line to ensure that he or she has the opportunity to serve two five-year terms.

In terms of the protections against unfair removals of the ED from office, we have also identified two concerns: the use of the word "misconduct" (as opposed to the term "serious misconduct"); and the mere reference to ill health (as opposed to serious illness that renders the ED unable to perform his or her functions effectively). In our view, mere misconduct should not ordinarily be a reason for the ED's dismissal. Further, we recommend that the draft Bill should be amended to do away with subsections (3)(b) and (3)(c), referring instead to "incapacity", a well-understood concept in labour law that addresses the inability to do a job whether for ill health or any other reason.

[16] This submission only considers the issue of independence. Proposed new section 81 raises additional concerns: the citizenship requirement for holding the office of ED; and the lack of provisions dealing with disqualifications from office, which are ordinarily present in such legislation.

Finally, the lack of a public, open process for the appointment of the ED provides serious cause for concern. We are of the view that the Minister should appoint the ED, on the recommendation of Parliament, following a public interview process of candidates shortlisted after a call for nominations from the public. Not only would such a process be appropriate given the role we envisage for Parliament, but it would also help to strengthen public perceptions of the independence of and confidence in the Office. In addition, this model would help to develop a relationship between the ED and the institution to which the Office accounts.

5.5 Relationship between Minister and ED as contemplated by section 81A(6)

The loose language of sections 81A(6)(a) and 81A(6)(b) has the potential to undermine the Office's autonomy. This is because the two subsections do not make it clear whether the Minister has the power to refuse to approve the "norms and standards for the national health system" and the "quality assurance and management systems for the national health system" developed and recommended by the Office, and if so, what would then happen. In our view, the appropriate resolution of this concern would entail the Minister being empowered to adopt such "norms and standards" and "quality assurance and management systems" on the recommendation of the Office.

5.6 Appeals of reconsidered decisions (section 88A)

The manner in which the draft Bill seeks to address appeals against decisions of the Office raises further concerns. In principle we have no concerns about the provisions of proposed new section 88A(1) relating to internal reconsiderations of decisions, provided that the reconsideration is processed within a reasonable time period (which should be set out in regulations). Our concerns begin with the appeal process, which effectively could render decisions of the Office subject to executive veto. In particular, we are concerned about the following aspects of the proposed appeal process:

- The Minister is vested with a wide discretion for determining whether to decide the appeal himself or herself, or to refer it to an "independent tribunal", without any guidance as to the factors that should be considered in making such a determination;
- The Minister is empowered effectively to overturn decisions of the Office;
- The proposed new section 88A is almost completely silent on the structure of the "independent tribunal", its operations and composition and who appoints its

members; the only reference to regulations in this regard is subsection (5), which mentions condonation of late filing "in the prescribed manner"; and

- Subsection (4) may be read to suggest that once a panel has been established, all future appeals against any decision of the Office should be dealt with by the "independent panel"; this simply begs the question: why not let all appeals, from the very beginning, be processed by the tribunal?

In our view, the integrity of the appeal process requires that it should indeed form the mandate of a tribunal that itself has an adequate level of structural and operational autonomy. We therefore recommend that subsections (2), (3) and (4) be removed and replaced by new subsections that provide, amongst other things, for the following:

- All appeals against decisions of the Office should be processed by an independent tribunal;
- The Minister's role should largely be limited to the development and promulgation of regulations that set out the structure of the tribunal, its operations and composition and who appoints its members; depending on the process chosen, it may be appropriate for the Minister to play some role in making appointments; and
- The legislation should expressly deal with further appeals and/or reviews to the High Court.

6. CONCLUSION

Given the nature of this submission, which raises fundamental questions of principle and law, we have refrained from commenting on the draft Bill more broadly. In addition, we have not considered alternative wording at this stage; instead, we have simply focused our attention on identifying the principled areas of concern and making broad recommendations. Should the DoH be in agreement with these recommendations, we would be willing to assist in reformulating the text of the relevant provisions. We are also willing to provide input to the DoH on any future version of the draft Bill, should this be deemed necessary.

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