+SECTION27 incorporating the AIDS Law Project
catalysts for social justice

SUBMISSION ON THE NATIONAL HEALTH AMENDMENT BILL, B24 - 2011

12 March 2012

INTRODUCTION

1. SECTION27 welcomes the opportunity to provide comments on the National Health Amendment Bill, 2011 ("Bill") to the National Assembly Portfolio Committee on Health ("Committee"). We are very encouraged by the move by the Department of Health ("Department") in taking steps to establish a single, accountable and independent Office of Health Standards Compliance ("Office) that has wide and far reaching powers to ensure quality health care services in both the private and public health systems. We consider this to be an important part of the state's responsibility in terms of section 27 of the Constitution of the Republic of South Africa, 1996 ("Constitution") to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to have access to health care services.

2. SECTION27 commented on the draft Bill circulated by the Minister of Health in January 2011. We are pleased that some of our comments were taken on board by the Department in drafting this Bill. In our submission to the Department, SECTION27 addressed the principled reasons why an adequate level of structural and operational autonomy was required by the Constitution, with specific reference to the

Constitutional Court judgment in *Glenister*.[1] The SECTION27 submission on the draft Bill dealt in detail with this issue. The submission can be accessed from http://section27.org.za.dedi47.cpt1.host-h.net/2011/05/04/submission-on-the-draft-national-health-amendment-bill-2011/.

3. The version of the Bill currently before the Committee emphasises the independent nature of the Office. *Inter alia*, the explanatory memorandum attached to the Bill states the following intention:

> "The National Health Amendment Bill (the Bill) seeks to amend the National Health Act, 2003 (Act No. 61 of 2003) (the Act), to empower the Minister to establish an independent entity, namely the Office of Health Standards Compliance (the Office)."

4. The independence of the office is further inferred by the inclusion of the prohibition in section 89(1)(a) against obstructing or hindering a health officer or an inspector in the performance of his or her functions under the Bill. To do so is an offence.

5. The Office is accountable both to the Minister and Parliament, to which it must report annually. SECTION27 welcomes this approach and urges the Committee to play an active role in ensuring that the Office is able to fulfil its functions independently. This submission offers some recommendations in this regard.

6. In considering the Bill, we have again focused on issues of independence and accountability of the Office, its Chief Executive Officer (CEO) and the Ombud.

CONCERNS ABOUT SPECIFIC PROVISIONS OF THE BILL

7. This submission raises concerns about the provisions of the Bill relating to the following:
   7.1. Appointment of the CEO;
   7.2. Functions of the CEO;

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[1] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

7.3. Accountability of and reporting by the CEO;

7.4. Constitutional right to privacy;

7.5. Appeals against decisions of the CEO and the Ombud;

7.6. Offences and penalties; and

7.7. Financial implications of the Bill.

Appointment of the CEO (section 79A)

8. The Bill envisages that the CEO is the administrative head of the Office and responsible for ensuring that the functions of the Office are carried out without fear, favour or prejudice. Given this role, we are concerned that the CEO may be removed on the ground of 'ill health' in circumstances where he or she is capable of continuing to carry out his or her functions under the Bill because the term is vague.

9. Furthermore, the section 79A(4)(c) ground of removal on the basis of 'inability to perform the functions of the Office effectively' is even more vague and out of step with ordinary grounds of removal of those occupying similar positions in independent bodies that are regulated by statute.

10. In order to address the two problematic grounds of removal, we recommend that the Bill is amended to delete subsections 79A(4) (b) and (c) referring to 'ill health' and 'inability to perform the functions of the Office effectively' and replace the two grounds with one ground of 'incapacity', which is a well-understood concept in labour law that addresses the inability to do a job whether for ill-health or any other reason.

11. Alternatively, if the Committee decides to retain the ground of 'ill health', we recommend that the 'ill health' category be replaced with the ground in the following terms: 'serious illness that renders the CEO unable to perform his or her functions effectively' in order to address the vagueness of 'ill health'.

Functions of the CEO (section 79B)

12. According to section 79B(1)(c) the CEO:

> "must appoint suitably qualified persons as employees of the Office in accordance with an organisational structure approved by the Minister".

13. We agree that the Minister has an important role in setting the organisational structure, however, there should be greater legislative control over the Minister's power in this regard in order to preserve the independence of the Office and its CEO. There are a range of other mechanisms that can help to strike the balance. For example, the Minister may make an organisational structure –

    13.1. On the recommendation of the Office or an independent third party;

    13.2. In consultation with the Office; and/or

    13.3. In terms of regulations issued in terms of section 90 of the NHA.

14. The empowering statute needs to provide guidance on the process in terms of which the organisational structure will be determined, and by whom. If this is not done, the organisational structure could be amended by the executive from time to time for political reasons.

Accountability of and reporting by the CEO (section 79D)

15. The 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.

16. In terms of reporting requirements, we are in principle in agreement with the substance of the reporting model as detailed in proposed new sections 79D(2), (3) and (4). However, we have concerns regarding subsection 79D(1)(b)'s requirement that the Office's annual report has to be approved by the Minister before being tabled in Parliament. While we agree that the annual report 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 should be limited to making regulations that prescribe the form of the annual report. We recommend that section 79D(1)(b) and (3) are amended to indicate that the CEO is responsible for tabling the annual report to Parliament.

Functions of Ombud (section 81A)

17. Section 81B of the Bill requires that the Ombud must be independent and impartial in carrying out his or her functions. In light of this requirement of independence and impartiality, we are concerned that the framework provided in the Bill does not support the independence of the Ombud. In particular, the reliance of the Ombud on the CEO of the Office and the Minister for resources to fulfil its functions is concerning. For example, the Ombud is not entitled to permanent staff and must rely on the Office to second employees to the Ombud at the discretion of the CEO. According to section 81(2)(c) the Ombud "is assisted by persons designated and seconded by the Office with the concurrence of the Ombud". In other words, although the Ombud has some say in a designation or secondment, he or she will have limited authority in determining his or her own staff complement.

18. Furthermore, section 81B(3) provides that:

> "The Minister, Department and Office must afford the Ombud such assistance and support as may be reasonably necessary for the Ombud to perform his or her functions effectively and efficiently".

19. In other words, the Ombud may receive assistance from time to time as and when such assistance is deemed 'reasonably necessary', as determined by someone other than the Ombud him or herself

20. The Department should not have any role whatsoever in the allocation of staff or resources to the Ombud – as this will compromise the independence of the office of the Ombud.

21. In our view, in order to meet the independence requirement of section 81B(2), the Ombud should have permanent staff and the necessary resources to perform the functions of the role

22. In this regard, we recommend that the reference to the Department in section 81B(3) is deleted. We also recommend that section 81(2)(c) is amended to provide for permanent staff to be allocated to the Ombud.

23. With respect to the provisions dealing with the Ombud and the CEO's relationship, we note that there is a need for greater clarity about the relationship between the Ombud and the Office in general. One example is the lack of clarity around the status of the Ombud's recommendation and whether the CEO is required to carry out the recommendations or not. According to section 81A(9), the Ombud is required to report his or her recommendations to the CEO following each investigation. However, it is unclear what the obligations of the CEO are in relation to the findings and recommendations of the Ombud. On the one hand, the CEO 'may' at his or her discretion, liaise with the relevant provincial or municipal authority in relation to recommendations of the Ombud (subsection 10) but on the other hand if the CEO fails to act on these recommendations, the Ombud has recourse to the Minister (subsection 11). So, is the CEO required to take action in accordance with the recommendations and finding of the Ombud or not? If so, an amendment to subsection 9 may help to clarify the position:

> "(9) after each investigation, the Ombud must submit a report together with his or her recommendations [on] <u>for</u> appropriate action to the Chief Executive Officer"

24. Subsection 11 would remain intact in order to provide some recourse to the Ombud in the event that the CEO does not comply with subsection 9.

25. On the other hand, if the intention of subsection 9 is to afford the CEO a discretion about whether to take action on the recommendations of the Ombud, then it is advisable to put in place some objective criteria to guide the CEO's decision in this regard, possibly by regulations in terms of section 90 of the National Health Act.

26. In any event, we request that the Committee seek clarity from the Department on the accountability structure between the Ombud and the CEO in order to ensure that the Ombud plays a meaningful role in improving confidence in the health system by attending to complaints referred to the Ombud by members of the public.

Constitutional right to privacy (section 86A)

27. The inclusion of section 86A - which states the application of the constitutional right to human dignity, freedom of the person and privacy – appears to simply emphasise that individual rights must be protected in the conduct of any function or act in terms of the Bill. We have no objection to the inclusion of such a clause, however, we suggest that the heading is amended to reflect the wording of the clause - which encompasses more than the right to privacy. Furthermore, given the origin of the wording is found in section 29 of the Criminal Procedure Act, 55 of 1977, we recommend that the wording of the heading of section 86A is deleted and replaced by the following heading: 'search to be conducted in decent and orderly manner' in order to remain consistent with the legislative regime to which it refers.

Appeals against the decisions of the Office or Ombud (section 88)

28. On our reading, the Bill provides that any aggrieved person is entitled to lodge an appeal against a decision of the Office or the Ombud. The Bill empowers the Minister to appoint an independent *ad hoc* tribunal in relation to each and every appeal lodged

with the Minister. This simply begs the question: why not let all appeals be processed by an independent tribunal established for a certain period to deal with all appeals against decisions of the Office or the Ombud. In our view this is an important aspect of an independent tribunal. As with similar regimes, the role of the Minister is limited to making regulations that prescribe the appointment and functions of an independent tribunal.

Offences and penalties (section 89)

29. We are concerned about the offence created by section 89(1)(g) relating to the disclosure of information, which provides as follows:

> "(1) A person is guilty of an offence if he or she-
> (g) discloses any information acquired in the performance of any function in terms of this Act which relates to the financial or business affairs of any person, to any other person, except if –
> (i) such other person requires that information in order to perform any function in terms of this Act;
> (ii) the disclosure is ordered by a court of law; or
> (iii) the disclosure is in compliance with the provisions of any law
>
> (2) any person convicted of an offence in terms of subsection (1) is liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment".

30. In our view, the offence – which relates to the disclosure of financial or business affairs of any person - is too broad. Given that the information is collected in the context of the protection of public health, it is unclear why there is a need to criminalise the disclosure of such information, regardless of whether any harm may result from the disclosure of the information. Such information may already be in the public domain

in the form of records lodged with public authorities or could be available to the public by way of a request in terms of the Promotion of Access to Information Act. Furthermore, such information may have the potential to reveal corruption. Any personal information that may come to light in the course of an investigation by the Office or the Ombud may be protected by existing law and could alternatively be protected further through administrative rather than criminal penalties.

31. In the case of disclosure of information, the right to privacy of the person concerned trumps any other right that may be served by its disclosure – without providing an opportunity to weigh the two interests and the possible prejudice to either party. In other words, the offence is unreasonable and disproportionately harsh compared to the interests that the offence seeks to protect.

32. We strongly recommend that section 89(1)(g) be removed in its entirety.

Financial implications for the state

33. We note that R28 million has been set aside for the costs of setting up the Office – we presume that this will include the set up of a physical premises, human resources and necessary equipment. We believe that this is a reasonable start-up budget for an institution of this nature. However, we urge the Committee to seek from the Department further information about the envisaged structure of the Office, for example, in the form of an organogram in order to determine whether the budget allocation is adequate.

34. We would like to stress the need for the adequate funding of the Ombud, particularly in light of the Ombud's role in addressing concerns of the public in relation to access to health care services. We would also like to note the importance of ensuring that the institution as a whole must be sufficiently funded in order to be able to properly use its wide and far-reaching powers to ensure the health and safety of users of the health system.

General

35. We would like to draw to the attention of the Committee that section 36 of the National Health Act, to which section 82A(5) of the Bill refers, has yet to be proclaimed by the President.[2]

CONCLUSION

36. Once again, we thank the Committee for the opportunity to make this written submission. This submission is endorsed by the Rural Health Advocacy Project.

ENDS

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[2] The recent proclamation bringing into operation certain sections of the National Health Act does not include section 36 or section 37 (Proc. 11 / GG 35081 / 20120227).