

NHI excludes asylum seekers from healthcare service coverage, legal advisers warn

By  Katja Hamilton

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Opposition MPs last week slammed Kenneth Leonard Jacobs, parliament's health committee chair, who refused to allow state legal advisers more time to discuss some of the clauses in the National Health Insurance (NHI) Bill, which have been challenged as unconstitutional.



Source: [AMA](#)

The MPs stormed out of the Portfolio Committee on Health's meeting, hosted on 22 March 2023.

The virtual meeting was convened to discuss overarching concerns surrounding the bill, which involved its constitutionality.

At the meeting, the state legal advisers highlighted instances where people's rights to access healthcare are under threat.

While deputy chief state law adviser, Ayesha Johaar, said she was satisfied that the bill's provisions did not infringe any of the fundamental rights entrenched in the Bill of Rights; parliament's legal adviser, Sueanne Isaac, gave a detailed breakdown of the ways in which several sections in the bill potentially presented a constitutional challenge.

She drew attention to the fact that Section 4(2) of the Bill reports that asylum seekers and undocumented foreigners are

excluded from healthcare service coverage.

The treatment of asylum seekers is concerning given the fact that they are a vulnerable group which enjoys special status under international law.

"This will amount to a retrogressive measure that will mean that the state will be impairing existing rights, which cannot be done without compelling justification for imposing these measures," Isaac said.

"The courts have held that a person cannot be deprived of existing access without it being justified in terms of section 36 of the Constitution. The Department of Health (DoH) has not provided any justification for why asylum seekers will no longer be entitled to the healthcare access they currently enjoy."



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Potential constitutional traps

Isaac drew attention to other clauses in the bill that could hold potential constitutional traps, namely:

- Section 3(5), which demonstrates the vague composition of the bill. This section leaves it to the discretion of the NHI Fund to decide on a case-by-case basis what "healthcare services for the purpose of the bill" means.
- Sections 12 and 13 of the bill, which vests too much power in the minister of health, as these were powers exclusively exercised by the president.
- Section 3(5), which replaces competitive bargaining between healthcare providers with a system of price regulation by the fund through blanket exemptions against the Competition Act in the bill, reducing the number of stakeholders to whom the rules of the Competition Act apply.
- Section 33, which restricts the function of medical aid schemes to being simply a provider of complementary cover.

“ The bill does not provide much detail on how medical aid schemes will operate once the NHI Bill is enacted. ”

Clause 33 of the bill provides for the role of medical schemes. The bill does not provide much detail on how medical aid schemes will operate once the NHI Bill is enacted.

"The role of medical schemes will be fundamentally altered once NHI is implemented. Medical schemes in future will offer only complementary cover for services not reimbursed by the fund. This violates access to healthcare," Isaac said.

"The Constitution requires the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of rights, including in respect of access to healthcare. If medical scheme users suffer a reduction in access to healthcare services as a result of the full implementation of the NHI, this will give rise to a Constitutional challenge based on the violation of section 27(1) of the Constitution, which is a right to access healthcare."

International obligations

But Johaar drove home the country's international obligation to implement the NHI.

"International law also finds application in respect of the bill. The Republic, as a state party to a number of international legal

instruments, is bound by the obligations that it took upon itself," Johaar said. "The binding nature of these international agreements, in accordance with section 231(2) of the Constitution, means that the country has a duty to comply with these provisions and to domesticate these obligations into our law.

"As a state party to various international instruments, the country is implementing a legislative measure by introducing the NHI Bill in Parliament to give effect to its international obligation of providing healthcare services, and in furtherance of section 27 of the Constitution."



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Johaar later added: "The provisions of the bill are rationally connected to the objective of providing sustainable and affordable universal access to quality healthcare services for all in the country. The combined Constitutional obligations of section 27 of the Constitution and the binding international obligations which must be given effect to, are key to motivating the rationality of the bill."

Addressing the concerns of asylum seekers, Johaar said the NHI Bill limits the right of access to healthcare for an asylum seeker and undocumented foreigners.

"In terms of clause 4(2) of the bill, these categories of persons are entitled only to emergency medical services and services for notifiable conditions of public health concern. The limitation of the rights of foreign individuals to the extent provided for in the bill, based on references made to available resources in section 27(2) of the Constitution, meets the requirements of the limitation test provided for in section 36, and is constitutionally sound," she said.

The Portfolio Committee on Health met again on Wednesday, 29 March, to further debate the National Health Insurance Bill. Access to the committee meeting report and those for select committees was restricted. The status on the Parliamentary Monitoring Group's website states: "National Health Insurance (NHI) Bill: opposition postponement request to seek additional legal opinion".

ABOUT KATJA HAMILTON

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