


ISSUES IN PUBLIC HEALTH

The role of the Minister of Health in the National Health Insurance Bill: Challenges and options for the Portfolio Committee on Health

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The Portfolio Committee on Health (PCH) is responsible for obtaining public input on the National Health Insurance Bill, reviewing the Bill based on these inputs, and presenting the final Bill to the National Assembly. More than 130 individuals, organisations and institutions requested to make oral presentations, which commenced on 18 May 2021. Drawing on Parliamentary Monitoring Group meeting summaries and the presentations and submissions made by 82 respondents between 18 May and 10 September 2021, we examine governance concerns, especially in relation to the role and powers of the Minister of Health, and respondents' proposals for addressing them, and outline the challenges and options for the PCH in responding to the proposals.

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Parliament's Portfolio Committee on Health (PCH) is responsible for obtaining public input on the National Health Insurance Bill^[1] (the Bill), reviewing the Bill based on the inputs, and then presenting the final Bill to the National Assembly. The PCH conducted public hearings across the country and received over 100 000 submissions. More than 130 individuals, organisations and institutions requested to make oral presentations,^[2] which commenced on 18 May 2021.

Within the wide range of concerns raised, concerns about governance were particularly prominent, specifically related to the role and powers of the Minister of Health (MoH). In total, 123 clauses in the Bill refer to the MoH. The Bill makes the MoH responsible for the overall governance and stewardship of the National Health Insurance Fund (the Fund) (clause 31(1)), requiring the Fund to 'account to the Minister for the performance of its functions and the exercise of its powers' (clause 10(1)(m)). Considering the governance failures plaguing national and local government,^[3] the Department of Health and the MoH,^[4] and state-owned enterprises and public entities,^[5] if National Health Insurance (NHI) is to be successfully implemented it is imperative that the Bill establishes robust governance and accountability mechanisms.

The PCH has three high-level options:^[6] (i) pass the Bill unchanged or with only minor amendments; (ii) make substantive amendments to the Bill to address the concerns raised; or (iii) reject the Bill. In this article we examine the MoH-related governance concerns raised by respondents, their proposals for addressing them, and the challenges and options for the PCH if it is prepared to make substantive changes (option (ii)).

Approach

Information on the PCH hearings was obtained from the website of the Parliamentary Monitoring Group (PMG),^[7] which provides information on all parliamentary committee proceedings in the form of detailed, unofficial minutes and documents and sound recordings of meetings. This article draws on PMG meeting summaries and the presentations and submissions of 82 respondents between 18 May and 10 September 2021. Although the hearings were not completed by this date, the presentations over the analysis period were from a wide range of organisations and sectors, arguably providing a reasonable indication of the concerns likely to be tabled. Where submissions included concerns regarding the role of the MoH, the nature of these concerns and proposals for addressing them were analysed.

Concerns

The central concern of respondents commenting on the role of the MoH was that the Bill vests too much power in the MoH. The South African Human Rights Commission (SAHRC)^[8] (among others) was concerned that by making the Board accountable to the MoH (section 12) and giving the MoH powers to appoint and remove members of the Board or dissolve the entire Board (section 13), the proposed governance structure concentrates power on the MoH, lacks separation between the political and operational spheres, weakens the role of the Board, and does not adequately ensure its independence. The SAHRC also raised concerns regarding the relationship between the CEO of the Fund and the MoH (section 21), even though

the CEO is accountable to the Board. The Board of Healthcare Funders (BHF)^[9] argued that ‘the Bill gives the Minister the power to potentially veto every significant decision that the board can make. This means that the board cannot be held accountable for its decisions. This is contrary to well-established principles of corporate governance. The board must not be able to escape accountability because of a decision by the Minister.’ The Public Health Association of South Africa (PHASA)^[10] has pointed out that ‘The Bill establishes the Fund as a Schedule 3A autonomous public entity, yet the powers of the Minister are heavily concentrated throughout the structure of the Fund, likely undermining its autonomy. The Bill provides for significant centralisation of decision-making power with the Minister, including for very technical issues, raising the question of accountability and transparency.’

Proposed amendments, challenges and options for addressing them

The proposed amendments can be grouped into three categories: (i) those that call for Fund reporting and accountability to shift from the MoH to Parliament; (ii) those that accept that the Fund and Board have to account and report to the MoH, but call for amendments to limit the manner and extent to which the MoH can exercise the vested powers; and (iii) those that call for the Board appointment/removal processes to be reviewed.

Changing accountability from the MoH to Parliament

A number of respondents, such as those from Stellenbosch University (SU),^[11] the University of Cape Town (UCT),^[12] the Dullah Omar Institute^[13] and the Cancer Association of South Africa,^[14] propose this shift.

SU raises the concern that the extensive powers assigned to the MoH in the Bill ‘may undermine the purpose and effective implementation and independent functioning of the Fund’ and proposes that ‘the Fund reports to Parliament and that the Minister’s powers are reduced.’^[11] The Dullah Omar Institute argues that ‘Parliament is the constitutional site for public involvement’ and consequently ‘must play a bigger role in the NHI than currently envisaged.’^[13]

The recommendation to shift accountability to Parliament would pose significant challenges for the PCH. Section 9 of the Bill establishes the Fund as ‘as an autonomous public entity, as contained in Schedule 3A to the Public Finance Management Act’. By law, schedule 3A public entities are accountable to the relevant executive authority, which in the case of the Fund is the MoH. The Fund can therefore not be made accountable to or report directly to Parliament.

Enshrined in the Constitution is the principle of ‘separation of powers.’^[15] The state comprises ‘three different but interdependent components or arms, namely the executive (Cabinet), the legislature (Parliament) and the judiciary (Courts of law)’ (<https://www.parliament.gov.za/about-parliament>). In South Africa, only Chapter 9 Institutions (organisations established to safeguard constitutional democracy) are directly accountable to Parliament.^[15] NHI is not being established as an entity to safeguard democracy, and it would therefore be difficult to justify Chapter 9 status.

Shifting reporting and accountability lines to Parliament would require a significant change in the constitution and objectives of the Fund, in turn requiring further public participation and comment. This ‘back to the drawing board’ approach would effectively negate the lengthy process of engagement, drafting and re-drafting initiated with the release of the Green Paper on NHI in 2011^[16] and probably cause discord among supporters of the Bill. The PCH would also need

to consider the effectiveness of this approach. Direct parliamentary oversight of public organisations such as Eskom, the SABC, Telkom, the Public Protector’s office and SARS has proved to be inefficient and/or ineffective. Parliament has been slow to act, unable to decide on or effect the corrective measures required in these organisations.

Retain accountability to the MoH but delegate greater powers to the Fund

A number of respondents, such as those from the PHASA,^[10] the BHF,^[9] the Free Market Foundation (FFM)^[17] and Business Unity South Africa (BUSA),^[18] propose this shift. The PHASA has argued that the duty of governance and stewardship of the Fund should be assigned to the Board and where relevant to the CEO. They point out that ‘while Section 19 (1) indicates that a transparent and competitive process will be undertaken to appoint the CEO, Section 19 (2) indicates that the Board, which was appointed by the Minister, will conduct interviews and that the Minister will approve the recommendation of the Board ... this represents a potential conflict of interest, with the Minister having excessive influence, and could undermine the autonomy of the CEO.’^[10]

Others, like the BHF,^[9] have called for a review of the rules, arguing that ‘The board of the fund must be autonomous and independent of political influence in its decisions. The board must have complete authority over and responsibility for the Fund. The board must run the Fund – not the Minister.’ They further argue that ‘it [the Fund] is accountable to the Minister in terms of the Public Finance Management Act (PFMA) but this does not mean it should have to obtain the Minister’s input on every decision it makes. Indeed, it can only be accountable to the Minister under the PFMA if it can make decisions independently of the Minister regarding the fund.’ The BHF proposes three levels of accountability for the Fund: to Parliament at a macro level, to the MoH in accordance with the PFMA,^[19] and to the Prudential Authority for financial institutions created by the Financial Institutions Regulation Act 9 of 2017, which is based in the Reserve Bank.

The potential for the PCH to amend the Bill to devolve more power to the Fund is greater and more feasible, as these changes could be made by relatively minor wording changes to the Bill. At a high level, it would make sense, as suggested by the SAHRC, that direct accountability to the MoH be retained on issues related to policy formulation (political governance), but that amendments be considered for clauses related to operation and administration (Board governance). Treasury’s Annual Report Guide for Schedule 3 and 3c Public Entities^[20] could be used to guide this demarcation of powers. Section 52 makes provision for the Minister to delegate functions to the Fund. The PCH could consider delegation of functions to the Board, and the Board in turn could delegate functions to the CEO.

Review appointment/removal processes to institutionalise processes that are transparent, fair and entrench public participation

The third group of proposed amendments focuses on reviewing the appointment processes for Fund office bearers (CEO, Board, Advisory and Appeals committees, etc.). Among others, the SAHRC,^[8] the BHF,^[9] the PHASA,^[10] SU,^[11] UCT,^[12] the FFM^[17] and BUSA^[18] have proposed these amendments.

The BHF has argued that the Board should be appointed by Parliament and not the MoH, on the grounds that this would guarantee a more open and democratic process.^[9] The SAHRC has similarly recommended that the appointment and removal processes should be similar to those in Chapter 9 Institutions, which involve

the National Assembly.^[8] They further suggest that to avoid a conflict of interest, the ministerial representative on the Board should not be allowed to be chairperson or deputy chairperson. They also call for committees to be appointed by the MoH in consultation with Parliament. BUSA has argued that ‘The appointment of the Board should include assurances of independence, transparency and relevant technical expertise independently adjudicated. The sheer size and significance of this fund once fully implemented warrants dual accountability to both the Minister of Health and Minister of Finance. Both Ministers should have a representative on the Board.’^[18] BUSA further argues for the chairs of the Board and the various committees to be appointed by their members rather than the MoH, and for the discretion of the MoH in the appointment of committee members to be reduced.

The PHASA has called for amendments to the process for appointing the CEO, arguing that ‘mechanisms should be specified beyond the public interview process, defined in Section 13 (3), in order to ensure that appointments are not politically motivated, and there should be an open process of appointment, such as that used for appointing the SARS commissioner.’^[10] They further suggest that the appointment of the CEO should be confirmed at a higher level, either by Parliament or by the Presidency, on the grounds that ‘Section 19 (1) indicates that a transparent and competitive process will be undertaken to appoint the CEO. However, Section 19 (2) indicates that the Board, which was appointed by the Minister, will conduct interviews and that the Minister will approve the recommendation of the Board. This presents a potential conflict of interest, with the Ministers having excessive influence, and could undermine the autonomy of the CEO.’

For reasons summarised above, it would be difficult for the PCH to move control over the appointment/removal processes directly to Parliament. The PCH could, however, consider amendments that shift the appointment and removal processes from the sole oversight of the MoH into a more ‘institutionalised’ process. For example, the PCH could consider amendments requiring the MoH to establish public appointment processes, publishing guidelines as to who may serve and ensuring civil society representation. In the event of disagreement, the matter could be referred to the committee for re-evaluation and recommendation. The PCH could incorporate these types of changes relatively easily via wording changes to the Bill. Where the involvement of the MoH is deemed unnecessary, clauses can be removed, and where it is deemed necessary, amendments could be made requiring the MoH to follow processes that are transparent and fair, and entrench public participation.

Accountability within democracy

In response to concerns related to the powers of the MoH currently contained in the Bill, the members of the PCH have responded by pointing out that political parties publish their policy goals and objectives in their manifestos and campaign for support based on these manifestos. The Constitution gives democratically elected political parties the right to pass legislation they deem necessary and to appoint people to certain roles in government to advance their policy goals and objectives.

However, section 2 and section 44(4) of the Constitution state that in exercising its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled’. In addition, section 167(4)(b) confers exclusive jurisdiction on the Constitutional Court to decide the constitutionality of any parliamentary or provincial bill.

Conclusion

A common omission in the discussion on Universal Health Coverage^[21] is the need for strong and robust governance structures. Institutional structures and governance have a direct impact on quality of care: when they are weak, not only does quality drop but health service delivery fails, and this can ultimately determine whether reforms succeed.

Given the broader constraints within which the amendments would have to be made, there is limited scope for the PCH to address concerns regarding the powers of the MoH by shifting accountability and reporting lines directly to Parliament, as has been recommended by some stakeholders. However, the scope to amend the Bill to devolve more power to the Fund, constrain the MoH’s power and/or amend the process for appointments/removals is greater and more feasible, as these changes could be made by relatively minor wording changes to the Bill.

In conclusion, concerns regarding the extent and scope of the powers accorded to the MoH feature prominently in responses to the Bill, and these concerns are shared across a wide range of stakeholders, including some who support the Fund. Broader governance failures in the country and recent events regarding improprieties related to the conduct of the MoH have served to heighten these concerns.^[3-5] Given the scale of the NHI reforms, the approach taken by the PCH in responding to the legitimate concerns raised will have a profound impact not only on the future health system but also on the broader trajectory of social, societal and economic wellbeing.^[6]

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