

REPUBLIC OF SOUTH AFRICA

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# NATIONAL HEALTH AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 76); explanatory summary of  
Bill published in Government Gazette No. 31114 of 2 June 2008)  
(The English text is the official text of the Bill)*

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(MINISTER OF HEALTH)

**[B 65—2008]**

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## GENERAL EXPLANATORY NOTE:

[                      ]      Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_      Words underlined with a solid line indicate insertions in existing enactments.

# BILL

To amend the National Health Act, 2003, so as to insert certain definitions; to provide for the appointment and functions of a Facilitator for Health Pricing; to provide for support and remuneration of the Facilitator; to regulate conflicts of interest; to provide for collective and individual bargaining on prices and resolution of disputes; to provide for the limitation of liability of certain persons; and to provide for the exemption from the said Act of certain medicines; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

## Amendment of Table of Contents of Act 61 of 2003

1. The Table of Contents of the National Health Act, 2003 (hereinafter referred to as the principal Act), is hereby amended by the insertion after “89. Offences” of the following: 5

### “CHAPTER 10A

|   |    |
|---|----|
| 89A. Definitions                              |    |
| 89B. Object of Chapter                        |    |
| 89C. Appointment and functions of Facilitator | 10 |
| 89D. Determination of schedule of fees        |    |
| 89E. Inspectors                               |    |
| 89F. Health Pricing Tribunal                  |    |
| 89G. Tribunal proceedings                     |    |
| 89H. Contracts with other persons             | 15 |
| 89I. Limitation of liability                  |    |
| 89J. <u>Disclosure of information</u> ”.      |    |

## Insertion of Chapter 10A in Act 61 of 2003

2. The following Chapter is hereby inserted in the principal Act after Chapter 10:

### “Chapter 10A

#### Definitions

- 89A.** In this Chapter, unless the context indicates otherwise— 5
- “**assistant facilitator**” means any person appointed as such in terms of section 89C(1);
- “**Facilitator**” means the person appointed as facilitator in terms of section 89C(1);
- “**prescribed minimum benefits**” means prescribed minimum benefits provided for in the regulations made in terms of the Medical Schemes Act, 1998 (Act No. 131 of 1998); 10
- “**prices**” means tariffs, fees or any form of reimbursement for health services rendered, procedures performed and consumable and disposable items utilised by health establishments, health care providers or health workers; 15
- “**RPL**” means the reference price lists contemplated in section 90(1)(v).

#### Object of Chapter

- 89B.** The object of this Chapter is to create a framework that—
- (a) enables health care providers, health establishments and medical schemes, on an annual basis, to— 20
- (i) negotiate collectively on prices; and
- (ii) bargain individually on prices; and
- (b) ensures transparency and fairness in the determination of prices.

#### Appointment and functions of Facilitator and assistant facilitators 25

- 89C.** (1) The Minister must—
- (a) by notice in the *Gazette*, invite nominations for the appointment of a Facilitator;
- (b) after receiving nominations contemplated in paragraph (a), appoint a Facilitator and two or more, but not exceeding five, assistant facilitators from such nominations; 30
- (c) if a suitable person, or the required number of suitable persons, are not nominated, the Minister may call for further nominations in the manner set out in paragraph (a), or on his or her own accord appoint the Facilitator and assistant facilitators contemplated in paragraph (b); and 35
- (d) ensure that persons appointed as Facilitator and assistant facilitators, have qualifications, proven skills and experience in mediation, dispute resolution, health, economics, law, commerce, health or public administration. 40
- (2) The Facilitator must—
- (a) be appointed on a contract basis, for a fixed term; and
- (b) must not have a direct interest, financial or otherwise, in the affairs of any of the parties taking part in the negotiations or bargaining processes contemplated in section 89F. 45
- (3) The Facilitator must—
- (a) in the prescribed manner—
- (i) coordinate the collective negotiations contemplated in section 89F(2)(a);
- (ii) record and submit to the Minister for publication any agreement reached at collective negotiations; and 50
- (b) if called upon by any party to individual bargaining, assist that party during the bargaining process.
- (4) The Facilitator may at the request of a party to collective bargaining, require any other party to furnish the party requesting information with any 55

specified information to assist the latter party to make informed choices during the bargaining process.

(5) In coordinating the collective bargaining process, the Facilitator must ensure that the process is conducted in a manner that—

- (a) is fair and transparent to the parties involved;
- (b) enables the parties to share information that is necessary for them to make informed decisions; and
- (c) encourages competition on prices.

(6) The Facilitator must confirm in writing to the Minister at the end of collective negotiation and at the end of an individual bargaining process that such negotiation or process, as the case may be, was conducted in a transparent manner and was fair to all the parties involved.

(7) Assistant facilitators must assist the Facilitator in the performance of his or her functions.

### Support and remuneration

**89D.** (1) The Director-General must, with the concurrence of the Facilitator, designate staff of the national department as the secretariat for the Facilitator.

(2) The Minister must, in consultation with the Minister of Finance, determine remuneration and allowances for the Facilitator and assistant facilitators.

### Conflict of interest

**89E.** Any person nominated for the position of Facilitator or assistant facilitator must, before his or her appointment, submit to the Minister a written statement in which that person declares whether or not he or she has any direct or indirect interest, financially or otherwise, which, if appointed—

- (a) may constitute a conflict of interest in respect of his or her functions; or
- (b) could reasonably be expected to compromise himself or herself in the performance of his or her functions.

### Negotiations and bargaining

**89F.** (1) The Minister must, within 60 days of publication of the RPL, by notice in the *Gazette*, invite health care providers, health establishments and medical schemes (hereinafter jointly referred to as ‘the parties’) to negotiate and bargain on prices.

(2) The parties may—

- (a) negotiate collectively in instances where the parties are represented by respective organisations or associations; or
- (b) bargain individually in instances where the parties represent themselves as individual entities.

(3) The parties to both collective negotiations and individual bargaining—

- (a) may conduct such negotiations or bargaining separately according to their specific area of interest; and
- (b) must use the RPL as a source of reference for negotiations and bargaining.

### Prescribed minimum benefits

**89G.** (1) Where the parties have reached an agreement, health care providers and health establishments may not charge prices in excess of the prices agreed upon, if the prices are in respect of prescribed minimum benefits.

(2) Health establishments and health care providers may not charge prices in excess of those appearing on the RPL, if—

- (a) negotiation contemplated in section 89F(2)(a) fails and the parties are unable to reach agreement on prices; and
- (b) such prices are in respect of prescribed minimum benefits.
- (3) Subsection (2) also applies in respect of users who are not members or dependants of members of medical schemes.

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### Arbitration and resolution of disputes

**89H.** (1) Any party to the bargaining process or the Facilitator may in the prescribed manner refer a dispute arising from the bargaining process to the Minister.

(2) (a) The Minister must, within 30 days of receipt of the notice of the dispute, refer the dispute to an arbitrator.

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(b) The Minister must appoint the arbitrator if both parties agree to the appointment.

(c) An arbitration in terms of subsection (2) must be subject to the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965).

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(3) If the parties fail to agree on the appointment of the arbitrator, the Minister must, after consultation with the Minister for Justice and Constitutional Development, appoint another arbitrator.

(4) The arbitrator must make a determination on the dispute within 30 days from his or her appointment and must inform the parties, the Facilitator and the Minister of the determination, in which case the provisions of section 89 applies, with the changes required by the context.

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(5) The decision of the arbitrator is final and binding.

### Limitation of liability

**89I.** Neither the Facilitator, assistant facilitators nor the secretariat is liable for any damage or loss caused by—

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(a) the performance of the functions or a duty imposed under this Act; or

(b) the failure to perform a function or a duty imposed under this Act.

### Exemption in respect of certain products

**89J.** This Chapter does not apply to the sale of products regulated in terms of the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965).”.

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### Amendment of section 90 of Act 61 of 2003

**3.** Section 90 of the principal Act is hereby amended by the substitution of subsection (1)(v) for subparagraph (ii) of the following subparagraph:

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“(ii) by health establishments, health care providers or health workers in the private health sector as a reference to determine their own fees[, **but which are not mandatory**]; and”.

### Short title and commencement

**4.** This Act is called the National Health Amendment Act, 2008, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

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## **MEMORANDUM ON THE OBJECTS OF THE NATIONAL HEALTH AMENDMENT BILL, 2008**

### **1. PURPOSE OF BILL**

The purpose of the Bill is to introduce a new Chapter in the National Health Act, 2003 (Act No. 61 of 2003) (the Act), in order to provide for a framework for health pricing.

### **2. CLAUSE-BY-CLAUSE ANALYSIS OF BILL**

**2.1** Clause 1 of the Bill amends the Table of Contents, to include Chapter 10A.

**2.2** Clause 2 of the Bill seeks to introduce Chapter 10A in the Act, consisting of the following new proposed sections:

**2.2.1 Section 89A**

This section seeks to insert definitions of certain words used in Chapter 10A.

**2.2.2 Section 89B**

Section 89B makes provision for the object of the Chapter, which is to provide for a framework to enable health care providers, health establishments and medical schemes to negotiate and bargain on prices.

**2.2.3 Section 89C**

This section provides for the appointment of the Facilitator by the Minister from nominations by interested persons. The Facilitator must be a person who is experienced in dispute resolution. The section further provides for the functions of the Facilitator. The functions include coordinating collective bargaining by stakeholders, recording and submitting to the Minister the agreements reached on prices, assisting the parties during the negotiation and bargaining process, ensuring that negotiation and bargaining are conducted in a transparent and fair manner and confirming to the Minister that such negotiation and bargaining were indeed conducted in a transparent and fair manner.

**2.2.4 Section 89D**

This section proposes that the Director-General must designate staff of the Department to serve as the Secretariat of the Facilitator and that the Facilitator's remuneration must be determined by the Minister in consultation with the Minister of Finance.

**2.2.5 Section 89E**

This section deals with conflict of interest and proposes that the Facilitator should make a declaration to the Minister in respect of any interest that may constitute a conflict of interest in respect of his or her functions.

**2.2.6 Section 89F**

This section provides for negotiation and bargaining on prices. Parties may bargain collectively as organisations or associations or individually as individual entities. The section proposes that bargaining must start after the publication by the Department of the reference price lists and that these lists must serve as a price reference for the parties during the bargaining process. The section further proposes that if parties have reached agreement on prices, health care providers and health establishments may not charge prices in excess of those agreed upon.

**2.2.7 Section 89G**

This section provides for an eventuality where the parties fail to agree on prices, in which instance, if the services rendered relate to

prescribed minimum benefits, health care providers and health establishments may not charge prices in excess of those appearing on the reference price lists. This requirement also extends to patients who are not members of medical schemes.

#### **2.2.8 Section 89H**

Section 89H provides that any party to the dispute or the Facilitator may refer a dispute arising from the bargaining process to the Minister. The Minister must appoint an arbitrator agreeable to both parties to resolve the dispute. If the parties cannot agree on the arbitrator, the Minister may appoint one after consultation with the Minister for Justice and Constitutional Development.

#### **2.2.9 Section 89I**

This section provides for limitation of liability for the Facilitator, any assistant facilitator and the secretariat for acts performed in good faith in the performance of their functions.

#### **2.2.10 Section 89J**

This section seeks to exempt medicines from the provisions of the new Chapter because the prices of medicines are already regulated in terms of other legislation.

- 2.3** Clause 2 seeks to amend section 90(1)(v) of the Act by omitting the qualification that preference price lists are not mandatory.

### **3. CONSULTATION**

The Bill resulted from a consultative process between the National Department and the provinces. The Social Sector Cluster was also consulted.

### **4. FINANCIAL IMPLICATIONS**

The financial implications have been estimated and the necessary budget will be allocated.

### **5. PARLIAMENTARY PROCEDURE**

- 5.1** The State Law Advisers and the Department of Health are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 76(1) or (2) of the Constitution since it falls within a functional area listed in Schedule 4 to the Constitution, namely “Health services”.
- 5.2** The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.