

# BUSA and B4SA challenge "unconstitutional" NHI Bill

Business Unity South Africa (BUSA) and B4SA are gearing up to formally petition President Ramaphosa. They are urging him to send the NHI Bill back to the National Assembly for amendment.



Source: [Ixxabay](#)

The business groups believe that the Bill, in its current format, is not only unworkable, unimplementable, and unaffordable, but also unconstitutional, both on substantive and procedural grounds.

This follows the adoption of the Bill by the National Council of Provinces (NCOP) without any amendments on 6 December 2023.

The South African Constitution, under Section 79, provides that once a Bill is adopted, the president must either assent to and sign the Bill or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

Martin Kingston, B4SA steering committee chair, said: “BUSA and B4SA have, throughout the entire NHI Bill legislative process, highlighted the deficiencies in the Bill, including those unconstitutional provisions that required clarification and amendment.

“Our concerns, recommendations, research, data and inputs, as well as those made by a wide range of experts and

affected stakeholders, have been summarily ignored by the Parliamentary Portfolio Committee on Health and the NCOP, which are legally mandated to ensure that the NHI Bill passes constitutional muster and is properly configured to give healthcare the best possible chance of success.

“No amendments were made at all, including those suggested by the Department of Health itself, which is deeply concerning for our country and democracy.

“The consequence of passing this Bill, unamended, is devastating. It will materially delay access to universal health coverage, lead to disinvestment in the healthcare sector, further damage our already fragile economy, and create significant risks for the country in terms of the quality, management and governance of healthcare.”

BUSA/B4SA will, in its petition to the President, specifically raise flaws in areas of the legislative process and substance of the Bill that it believes are unconstitutional.

### **Procedural constitutional points:**

Procedurally, it notes that parliament’s socio-economic impact assessment process was inadequate, that the Nedlac process in respect of the Bill was not followed through, that public-participation inputs were not properly considered and that multiple constructive inputs from business and other stakeholders have been ignored.



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Parliament’s Portfolio Committee on Health also ignored an opinion by Parliamentary Legal Services, which highlighted several areas of the Bill that are unconstitutional. Busa/ B4SA also highlighted the fact that the process conducted by the NCOP Select Committee on Health and Social Services was rushed, inadequate in terms of its mandate, and that it failed to properly deal with reports submitted by provinces.

Importantly, the NCOP Committee failed to incorporate amendments, provincial public submissions and technical flaws noted by several provinces and even the Department of Health itself.

### **In terms of the substantive constitutional flaws in the NHI Bill:**

- BUSA/B4SA notes that Section 33 is unconstitutional in giving the Health Minister unfettered power to determine the restricted role for medical schemes, especially as this power is unnecessary for achieving the policy objectives of the Bill.

This is damaging to the private health sector as a whole and there is no rational basis for this approach. This clearly introduces significant concentration risk due to the single fund model and adverse impacts both on people’s ability to seek care in the private sector, and overloading of the public sector.

The proposed amendments only seek to allow for the role for medical schemes to be determined in a consultative process, in measured phases in a manner that is consistent with the policy objectives. It is bewildering that this constructive and supportive approach has been rebuffed.

The processes for accessing healthcare, and making appeals when the NHI refuses access to treatment, are foreseeably inadequate to the point where they are more likely to frustrate or even deny the right of access to health services.

Even though this is a very practical concern, it was totally ignored by both houses of parliament and their specialist committees.



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- Sections 48 and 49 of the Bill refer to introducing new taxes and making tax changes, which should be decided and proposed by National Treasury in a Money Bill, in accordance with the Constitution. The Bill also breaches the separation of powers by granting the Minister judicial discretion.
- The business groups also believe that the contracting provisions in Sections 11 and 26 of the Bill are unsustainable and inconsistent with the principles of value-based care and strategic purchasing, which is the global trend for sustainable healthcare contracting that is patient-centred.

They focus on price in an unsophisticated manner which contradicts the Constitution's criteria for lawful procurement.

- The roll-out envisaged in Section 57 of the Bill needs to be linked to milestones that are workable and relevant to South Africans having reasonable access to quality healthcare services rather than dates which are arbitrary and unrealistic, and already outdated. Parliament has effectively accepted rollout dates that are already in the past.
- The legislative changes included in Section 58 of the Bill appear to be immediate in effect, which is in conflict with the provisions of Sections 31 and 32 of the Bill and results, for example, in the immediate removal of health functions from the provinces, impacting around R196bn of funding which currently forms part of Provincial Equitable Share allocations and Conditional Grants allocated to Provinces. The changes to the Medical Schemes Act are also in conflict with Section 33.
- There are conflicts with the Competition Act and the Protection of Personal Information Act which are unnecessary to give effect to universal health care. These conflicts are easily addressed as business inputs have consistently demonstrated, but were still ignored by Parliament.

Cas Coovadia, chief executive officer of BUSA, says: "We need to be clear. We have not rejected the Bill in its entirety, and have consistently supported its policy direction towards universal health coverage. Our inputs have been intended to remedy the constitutional, funding and practical deficiencies in the Bill.

"We believe the Portfolio Committee on Health and the NCOP have conducted themselves unconstitutionally in pushing through the Bill without due consideration of these concerns. It also used a simplistic yes or no opinion poll on the desirability of universal health coverage, which was never in question, as the determinant of support for the NHI Bill. For these reasons, it is our strong belief that the president must refer it back to the National Assembly for amendment.

"The private sector's participation in the NHI is critical to its success, not only in terms of funding, but also in the expansion and delivery of quality healthcare services. As a country, we have consistently seen that when the public and private sectors work together, pooling our substantial resources, expertise, skills and technical know-how, we are able to achieve far more than when we work in isolation of each other.

"We worked together to address a global pandemic, we are working together now to tackle our country's infrastructure, energy, transport and crime challenges, and we must work together to ensure that the healthcare system we land with is practical, affordable and implementable," concludes Coovadia.