

# No mandatory requirement for South Africans to join NHI

The publication of the National Health Insurance Bill has resulted in much public comment as to the future of healthcare in South Africa.



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The NHI Bill, proposes a fund to purchase healthcare services on behalf of those persons eligible to join the fund. The question that must be asked is whether or not all South Africans are compelled to become members of the fund as it is proposed in the NHI Bill?

There are also important implications for purposes of applying the Bill of Rights to the fund, more particularly, the provisions of section 18 of the Constitution of the Republic of South Africa which provides that "everyone has the right to freedom of association."

Therefore, on the face of section 18, all South Africans have the right to choose with whom to associate including whether or not to belong a National Health Insurance Fund.

## Definition of user

In terms of the NHI Bill, a "user" is simply defined as "a person registered as a user." The NHI Bill also deals with the persons who are eligible to join the Fund. The list includes South African citizens, permanent residents, refugees, inmates and certain categories of individual foreigners as determined by the minister of home affairs after consultation with the ministers of health and finance.

Importantly however, the NHI Bill does not contain a clause that compels any persons to belong to the fund. Therefore, on the face of the NHI Bill as currently proposed, there is no mandatory requirement for South Africans to join the fund.

This is a departure from previous iterations of the NHI Bill in which an express requirement existed both to become a member of the fund as well as to make a payment in respect of that membership. On that basis, there would be an argument to be made that the fund is to be established only for those who wish to join it and those who wish to continue with current funding models for obtaining their healthcare services would be entitled to do so.

But is that position both tenable and viable for purposes of maintaining the fund where only, potentially, a few members of the population elect to join the fund?

Perhaps the fact that the NHI Bill is silent as to mandatory membership of the fund is not necessarily an indication of the manner in which the NHI Bill intends to operate, which, once again, implicates the freedom of association provisions in the Bill of Rights.

Therefore, two sections of the NHI Bill may provide us with an indication of what, actually, is intended in respect of membership of the fund, being –

- clause 33, which purports to limit the benefits available from a medical scheme in so far as "medical schemes may only offer complementary cover to services not reimbursable by the Fund"; and
- clause 49, which outlines the chief sources of income of the fund, including general tax revenue, payroll tax and a surcharge on personal income tax.

Currently, medical schemes are able to provide a range of medical benefits to members as determined in the Medical Schemes Act. In so far as the NHI Bill prohibits medical schemes from offering benefits otherwise provided by the fund, this will mean that members of a medical scheme who currently enjoy particular benefits from that medical scheme, more particularly primary healthcare benefits, will mean that in order to obtain such benefits, one would have to be a member of the fund.

Therefore, and indirectly, clause 33 of the NHI Bill operates on the basis of a mandatory membership of the fund (for those persons eligible to join the fund).

## **Funding**

In addition, due to the funding of the fund, as contemplated in clause 49, all South Africans, in one form or another, make payment for the establishment and maintenance of the fund.

Therefore, while a "membership fee" will not be levied, amounts will be deducted from tax-paying South Africans in order to provide income for the fund. Therefore, indirectly, tax-paying South Africans, at least, will be paying a membership fee or contribution to the fund.

Whether or not mandatory membership of the fund is desirable, will have to be tested against section 18 of the Bill of Rights. There are important Constitutional considerations to take into account when evaluating the overall impact and effect of the NHI Bill on the current architecture of, at least, the private healthcare sector in South Africa.

The overall implications of the NHI Bill, from a membership point of view, will have to be understood in the fullness of time and through the process of obtaining public comments on the NHI Bill as is currently envisaged through the Parliamentary process through which the NHI Bill must pass in order to become law.

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