JOINT SUBMISSION BY SECTION27 AND THE TREATMENT ACTION CAMPAIGN ON THE NATIONAL HEALTH INSURANCE BILL B11B-2019

A. Introduction

1. This is a joint submission by SECTION27 and the Treatment Action Campaign in accordance with the Select Committee on Health and Social Services' call for written submissions on the National Health Insurance B11B-2019 ("the Current Bill"). This submission is endorsed by the Cancer Alliance, the South African Depression and Anxiety Group, South African Non-communicable Diseases Alliance, and the People's Health Movement.

2. SECTION27 is a public interest law centre that seeks to achieve substantive equality and social justice in South Africa. Guided by the principles of the Constitution, SECTION27 uses litigation, advocacy, legal literacy, research, and community mobilisation to achieve access to health care services and basic education.

3. The Treatment Action Campaign ("TAC") is a membership-based activist organisation that seeks to ensure the realisation of the right of access to health care services across the country. It has 8,000 members across 287 active branches in 35 districts in the country. The organisation works in 8 out of 9 of the country's provinces. In accordance with its Constitution, one of its aims is to campaign for access to affordable and quality health care for all people in South Africa.

4. SECTION27 and TAC have made a comprehensive written submission ("our Earlier Submission") to the National Assembly in respect of the National Health Insurance Bill B11-2019 ("the Old Bill"). For the purposes of convenience, we annex our Earlier Submission hereto as **Annexure "A"**. We were also invited to make oral submissions in the National Assembly in respect thereof.

5. Although some of the recommendations from our Earlier Submission were heeded, most remain unaddressed. Accordingly, the purpose of this submission is to highlight some of the key issues that remain in the Current Bill, which we believe the National

Council of Provinces ("the NCOP") is well-placed to address through the amendment of the Current Bill. For the purposes of convenience, and where it is necessary, we will refer the NCOP to the relevant paragraphs of our Earlier Submission.

6. We state at the outset our unequivocal support of the notion of Universal Health Coverage ("UHC") given the pressing need to move towards its achievement in a deeply unequal society such as ours. Having said that, we believe that the legislative process of the Bill, which is purportedly aimed at moving towards UHC, is occurring in a manner that is leaving gaps in the Bill that could undermine its implementation and in turn access to health care services, in breach of constitutional and statutory rights of access. We therefore implore the NCOP to give due consideration to our Earlier Submission, this and other submissions pointing towards unresolved issues in the Current Bill.

7. We further note that the health system is at a point of particular weakness. This has recently been illustrated by the widely-reported alleged corruption and fraud that occurred at Tembisa Hospital, which resulted in the siphoning off of nearly R1bn from an ailing hospital that services some of the most vulnerable. In the 2023/24 financial year, national spending on health was projected at a whopping R259.2 bn, which was second only to education. With the implementation of the National Health Insurance ("NHI"), it is envisaged that much of this budget would fall into the National Health Insurance Fund ("the Fund").

8. Legislating to initiate the implementation of NHI when so many questions remain unanswered risks not only further damaging the already frayed trust between various stakeholders in health, but also putting in harm's way the elements of the health system that work. We draw attention in this regard to our report *Health Systems Reform: Perspectives and Proposals*, which highlights the areas of agreement and disagreement between health system stakeholders. We attach this report as **Annexure "B"**. There is ample opportunity for health system reform that in fact achieves the equity and quality goals that we should be targeting, has wide ranging support, and does not put the system at further risk. We would encourage the NCOP to consider these alternatives.

9. We do, however, wish to raise three key points related to the Current Bill in this submission.

    9.1. The first is the uncertainty of the roles of the national and provincial spheres of government in the implementation of the scheme, including in the transitional period.

    9.2. The second is the concern over the governance of the Fund, and particularly the centralisation of power in the Minister of Health.

    9.3. The third is the population coverage, which is not universal as it excludes certain categories of migrant person from accessing health care services through the Fund.

B. The role of the national and provincial government

10. In the Current Bill, the power in determining the distribution of allocated financial resources shifts, to a great extent, from the provincial to the national sphere of government. The precise nature of the shift, however, stands over for determination until the legislation contemplated in section 3(4) of the Bill comes into force. As such, we echo the call we made in our Earlier Submission where 'we recommend that the function shifts are dealt with extremely carefully and planned and undertaken with the support of provinces and health care users so that both services and intergovernmental relations are not disrupted' (para 99).

11. Once the Current Bill becomes law, the first phase is to be implemented. Under this phase, there are several uncertainties that remain unresolved. The primary and overarching uncertainty pertains to the precise role of the provinces (specifically the provincial health department) in the implementation of the Current Bill.

12. In terms of section 32(2)*(a)* of the Current Bill, the Minister of Health may introduce a Bill in Parliament proposing to amend the National Health Act 61 of 2003 ("the NHA") to centralise the funding of health care services under the Current Bill. In so doing, the Minister *may* delegate to provinces as the management agents. It is not clear from this section what specifically is envisaged to be the role of the province in the implementation of the Bill, and what functions or duties are capable of being delegated.

13. The Memorandum on the Objects of the Current Bill provides that the phased approach is intended to be described in greater detail by the implementation plans of the National Department of Health. This again centralises the implementation of the NHI to the national government, in the absence of a clear role for provincial government. It also then defers such determinations to future and undetermined dates, again in the absence of a defined role for the provinces.

14. The NCOP is constitutionally mandated by section 42(4) of the Constitution to represent the provinces to ensure that provincial interests are considered in the national sphere of government. This it does in two principal ways: (1) by participating in the national legislative process; and (2) by providing a national forum for public consideration of issues affecting the provinces. Accordingly, it is imperative that the NCOP use this legislative process to consider and interrogate the uncertainties that exist in the Current Bill and their impact on the province's shifting role. A failure to do so would mean that the NCOP has likely failed in fulfilling its constitutional obligations.

C. Governance

Independence of the Board

15. In terms of section 9 of the Current Bill, the Fund is to be established as an autonomous public entity as contemplated in Schedule 3A of the Public Finance Management Act 1 of 1999, which makes it a national government component. The reference to autonomy intimates that the Fund is intended to be a separate and functionally and substantively independent entity. This independence, however, is not legislatively carried through to the governance level as the Bill, in substance and in form, does not provide that the Board nor its members are independent.

16. Section 12 of the Current Bill provides for the establishment of a Board of the Fund, which is accountable to the Minister. Although the Memorandum on the Objects on the Bill provide that this clause makes 'provision for the establishment of an independent Board' (emphasis added), nothing in the wording of section 12 reflects this. As we pointed out in our Earlier Submission, the independence of the Board 'is critical for ensuring that the Board can objectively fulfil its functions openly, with integrity and without fear or favour' (para 20).

17. In the circumstances, we reiterate our recommendation that the word 'independent' be inserted into section 12 so that it reads as follows:

'**12. Establishment of Board**

An independent Board that is accountable to the Minister is hereby established to govern the Fund in accordance with the provisions of the Public Finance Management Act.'

Centralisation of power in the Minister

18. Another aspect that threatens to undermine the independence of the Board and the scheme is that certain powers are centralised in the Minister. In our Earlier Submission, we noted how the concentration of health financing in the Fund, necessitates 'the establishment of strong governance and improved accountability structures' (para 14). We raised concern about the centralisation of power in the Minister (para 16) and noted that it constitutes a threat to the independence of the Fund and its proper functioning (para 19). To ameliorate the threat posed, it is necessary to include statutory checks and balances on the Minister's exercise of such powers.

19. In our Earlier Submission, we focused our recommendations on improving the procedural aspects of the appointment and discharge of individual Board members as well as on the dissolution of the Board. Below, we expand on our submissions and recommendations in respect of each.

Appointment of Board members

Advisory *ad hoc* panel

20. The Current Bill gives the Minister the power to appoint an *ad hoc* advisory panel to publicly interview shortlisted candidates and make recommendations to the Minister for the approval of Cabinet (section 13(3)). In our Earlier Submission, we pointed out that the Bill is silent on the criteria for selecting members of the *ad hoc* advisory panel, and whose responsibility it is to shortlist candidates to interview (para 22).

21. As we emphasised in our Earlier Submission, 'It is important that the appointment of board members and executives is done in a transparent manner that instils public confidence' (para 23). For such public confidence to be fostered, it is necessary for the persons who sit on *ad hoc* advisory panels to be properly qualified to determine the suitability of candidates. In that regard, we recommended that the Bill be amended to provide that the *ad hoc* advisory panel be composed of at least the following persons: administrative heads of National Treasury, the National Department of Health; and members of the Portfolio Committee on Health (National Assembly); and persons with experience in governance and health care financing (para 23).

22. For the purposes of certainty, we reiterate the need for the Current Bill to stipulate whose responsibility it is to shortlist candidates.

Governing principles

23. In addition to fortifying the provisions on the appointment of *ad hoc* advisory panels, it is necessary to set out the underlying principles upon which appointments to the Board are based. In our Earlier Submissions, we referred to the Media and Development and Diversity Agency Act 14 of 2002, which establishes a Scheule 3A entity in the form of the Media and Development and Diversity Agency. We argued that similarly to the Act, it is necessary to stipulate in the Bill that the following principles underpin the appointment of Board members: transparency and openness, public participation in the nomination process and publication of shortlisted candidates (para 24).

24. To entrench such principles in the Bill, we recommend that the published list of shortlisted candidates contain the names of nominees and nominators; that mechanisms be put in place to allow the public to make submissions on recommended candidates (which must be considered when shortlisting candidates); and the names of shortlisted candidates be published.

25. In this regard, we recommend that section 13(2) of the Current Bill be amended as follows:

'Whenever it is necessary to appoint a member referred to in subsection 13(1) to the Board, subject to subsection [13(11)], the Minister shall –

(a) issue in the Gazette and national news media a call for the public nomination of candidates who comply with the criteria in subsection 13(5), to serve on the Board;

(b) publish a list of nominees received in response to such invitation, which list shall include the names of the nominators; and

(c) publish the process by which members of the public may make submissions on nominees, which submissions will be considered by the ad hoc advisory panel.'

Criteria for the appointment of Board members

26. Section 13(5) of the Current Bill sets out the criteria for the appointment of Board members. As we recorded in our Earlier Submission, the composition of a governing

structure is of critical importance to the performance of an entity (para 25). We therefore recommended that this subsection include a requirement that a Board member 'be a person of honesty and integrity' (para 25).

27. Although adding this criterion does not in and of itself guarantee that the appointed candidates are in fact persons of integrity or honesty, it does affirm that this is a requirement to which they are held. It could also serve as a ground to impugn a candidate's suitability or appointment.

Dissolution of the Board

Parliamentary oversight

28. The dissolution of the Board is a drastic measure which needs to be accompanied by the appropriate safeguards. We have raised concerns in our Earlier Submission that the provisions on the dissolution of the Board should be examined carefully to ensure that the Fund is not subject to political influence (para 30).

29. In terms of section 9 of the Current Bill the Minister may dissolve the Board only after an inquiry is conducted into the Board and Cabinet approves the dissolution. In our Earlier Submission, we had recommended parliamentary oversight (para 30). The basis for the recommendation stems from, among other things, how Parliament's powers and functions are in line with the performance of an oversight role. For instance, section 55(2)*(b)* of the Constitution provides that the National Assembly must provide for mechanisms to maintain oversight of any organ of state. To this end, section 56 of the Constitution vests in the National Assembly or any of its committees, the power to summon any person to appear before it to give evidence under oath or affirmation or to produce documents; require any person or institution to report to it; compel any person to comply with summons; and receive petitions, representations, or submissions. The NCOP has similar powers in terms of section 69 of the Constitution.

30. The type of oversight envisaged by the Constitution, which is to be exercised by the National Assembly, extends to its committees too, which are smaller units that monitor and oversee specific areas of the work of national government and hold them accountable. In the circumstances, it would be more rational and more appropriate for the National Assembly to exercise such oversight as is intended by the Constitution.

31. In the Current Bill, there has been an attempt to introduce oversight through the involvement of Cabinet. Together with the President, Cabinet is responsible for

exercising executive authority by, among other things, implementing national legislation in terms of section 85(2)*(a)* of the Constitution. Their role is therefore executive in nature, rather than administrative. Cabinet is not the appropriate oversight structure in the circumstances.

Grounds for dissolution

32. Section 13(9) of the Old Bill provides that the Board may be dissolved on good cause shown after affording the Board a reasonable opportunity to make representations and affording the Board a hearing. Section 13(9) of the Current Bill, however, provides that the Minister may dissolve the Board after an inquiry is conducted and Cabinet approves the dissolution. In the most recent iteration, the procedural fairness protections of the subsection have been removed.

33. The Old Bill's emphasis on procedural fairness is supported by grounds for board dissolution of analogous Schedule 3A entities such as the Board of the South African Health Products' Regulatory Authority ("SAHPRA"). Section 2I(1) of the Medicines and Related Substances Act sets out that the Minister may dissolve the SAHPRA Board if the Minister, on good cause shown, loses confidence in the ability of the Board to perform its functions effectively and efficiently. The Minister may dissolve the board only after having given the Board a reasonable opportunity to be heard and after having afforded the Board a hearing on any submissions received. We therefore recommend the reinstatement of the procedural fairness provisions of the Old Bill.

34. In our Earlier Submission, we suggested that the dissolution of the Board should require an inquiry and 'must be based on specified, objective grounds' (para 30). We recommended that section 13(9)*(a)* be amended to read as follows:
'The Minister must, after due inquiry and the adoption of a resolution by the National Assembly, dissolve the Board on account of any of the following:
(i) failure to discharge its fiduciary duties;
(ii) poor or non-performance of its duties as contemplated; or
(iii) abuse of power.'

35. In the Current Bill, there is no greater certainty on the grounds for the dissolution of the Board. We therefore reiterate the recommendations of our Earlier Submission.

Discharge of Board members

36. The provisions on the dissolution of the Board and the discharge of Board members are critical to the maintenance of the Board's independence. As we set out in our Earlier Submission, the absence of sufficient safeguards on the exercise of the powers to dissolve the Board and to discharge individual members 'would render Board members unlikely to express views which may not align with that of the government or the majority of the Board members' (para 26). In this regard, it is important for the Current Bill to deal as comprehensively as possible with these provisions to avoid uncertainty.

37. In the Current Bill the procedure and grounds for the discharge of a Board member are minimal. In our Earlier Submission, we recommended that provision be made for an inquiry (and a recommendation of the Board) and that there be additional grounds for the discharge of a Board member.

38. We reiterate our recommendation that, in addition to the grounds in the Current Bill, section 13(8) be amended as follows:

'The Minister may, <u>after due inquiry</u>, and <u>upon recommendation by the Board</u>, remove a board member on account of any of the following:

(i) <u>misconduct</u>;

(ii) failure or inability to perform the duties of his or her office efficiently;

(iii) absence from three consecutive meetings of the Board without the permission of the Chairperson, except on good cause shown; and

(iv) failure to disclose an interest contemplated by section 16 or voting or attendance at, or participation in, proceedings of the Board while having an interest contemplated in section 16(2)(b).'

D. Population coverage

39. Universal and equitable access to health care services are the cornerstone of the Current Bill. This is evident from section 2 where the purposes include to achieve universal access to quality health care services. This is also supported by its preamble, where the aims include 'to achieve universal access to quality health care services in the Republic in accordance with section 27 of the Constitution'; and the equitable use of the resources of the Fund 'to meet the health needs of the population' based on principles of universality and social solidarity. The preamble recognises the need to

establish a society based on social justice and fundamental human rights, it accordingly reinforces the State's international and domestic human rights obligations.

40. Although there have been amendments addressing some of the concerns we raised in our Earlier Submission, regrettably, we maintain the position that the Bill constitutes 'a significant and unlawful regression in access to health care services by asylum seekers, undocumented migrants and their children which will be subject to legal challenge on constitutional grounds' (para 64).

41. The categories of migrant persons who are currently entitled to access health care services in South Africa are grossly undermined by the provisions of the Current Bill. The persons whom the Current Bill excludes from registration and accessing health care services are the following:

    41.1. Asylum seekers and undocumented persons are excluded from accessing free health services including HIV health services (which are currently available) in terms of section 4(3) of the NHA (paras 65-66).

    41.2. Nationals from SADC states who enter South Africa illegally have been stripped of access to services to which they currently are entitled (para 62), this includes: access to emergency medical treatment, HIV health care services, and free health services in terms of section 4(3) of the NHA.

    The exclusions are below expanded upon.

42. Section 27(1)*(a)* of the Constitution provides that everyone is entitled to access health care services, which expressly includes reproductive health care services. The Constitutional Court has affirmed that 'everyone' in the Bill of Rights includes every person. Section 4(3) of the NHA provides that the State must provide free health services to pregnant and breastfeeding women and children under six (subsection *(a)*), primary health care services for all persons (subsection *(b)*), and abortion services to women under the Choice on Termination of Pregnancy Act 92 of 1996 (subsection *(c)*).

43. On 14 April 2023, the Gauteng Division of the High Court, Johannesburg handed down a court order that affirmed that section 4(3)*(a)* applies to <u>all</u> pregnant and breastfeeding women and all children under the age of six <u>irrespective of nationality and documentation status</u>. The only persons excluded from accessing these free health

services are those who are on medical aid and those who come to South Africa specifically for the purposes of accessing health services. This court order is annexed as **Annexure "C"**.

44. By parity of reasoning, the court order would entrench the same principle in respect of primary health care services (section 4(3)*(b)*) and abortion services (section 4(3)*(c)*). This would mean that, except if on medical aid or if a person comes to South Africa to access health care services, everyone is entitled to the free health services in terms of section 4(3) of the NHA, including asylum seekers, undocumented persons, SADC nationals, and non-SADC nationals.

45. Insofar as HIV health care services are concerned, screening and testing services are currently available to all persons, including 'asylum seekers with or without a permit'. This accords with the reality that South Africa has the highest prevalence of HIV, and the southern African region (from which most migrant populations to South Africa originate) is disproportionally burdened by HIV (Statista).

46. With this reality in mind, the National Strategic Plan on HIV, TB, and STIs (2023-2028) identifies migrant persons as a priority population in the response to HIV. Goal 2 provides that it is necessary to maximise equitable access to HIV services and solutions, which for migrant persons and undocumented persons, includes to promote the uptake of sexual and reproductive health services and to increase the availability of migrant-friendly facilities for prevention, screening, testing and treatment of HIV and STIs, and to offer a comprehensive package of HIV prevention services.

47. The Current Bill would undermine the efforts to effectively respond to the HIV pandemic. This would also place the public health at unnecessary risk. In the light of the current access, the introduction of the Current Bill would result in regression in access, which could be subject to constitutional challenge.

48. In the circumstances, we affirm the recommendations of the Earlier Submission (para 71) to the effect that section 4 of the Bill be amended as follows:

    48.1. Section 4(1) be amended to include a sub-section (f), (g) and (h) as follows:

    (f) asylum seekers;
    (g) undocumented migrants from SADC states;
    (h) all children, regardless of their citizenship or immigration status;

48.2. Section 4(2) be amended as follows:

(2) An undocumented migrant who is not from a SADC state is entitled to –

(a) primary health care services;
(b) emergency medical treatment;
(c) services for notifiable conditions of public health concern;
(d) sexual and reproductive health care services; and
(e) services related to HIV.

49. We also record that SECTION27 and TAC have also endorsed the submission of the Collective Voices for Health Access, which expand on the barriers that are experienced by different categories of migrant persons.

E. Conclusion

50. We trust that this submission will be of assistance to the NCOP in its deliberations on the Current Bill. We request that we be granted an opportunity to make oral submissions should there be oral hearings at the sitting of the NCOP. We repeat our request that the NCOP consider the contents of the report *Health System Reform: Perspectives and Proposals* in its deliberations on the Current Bill.

51. Should you require any further information, please contact us on the following:

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