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Mr. V Ramaano
Portfolio Committee on Justice and Correctional Services
3rd Floor 90 Plein Street
Cape Town
8000

VIA EMAIL: vramaano@parliament.gov.za

Dear Mr Ramaano

RE: COMMENTARY ON THE STATE LIABILITY AMENDMENT BILL [B16 – 2018] AS PUBLISHED IN THE GOVERNMENT GAZETTE NO. 41658 OF 25 MAY 2018

Please find attached commentary from the Occupational Therapy Association of South Africa (OTASA) on the State Liability Amendment Bill [B16 – 2018] as published in the Government Gazette No. 41658 of 25 May 2018.

1. Introduction to OTASA and Occupational Therapy

OTASA is a non-profit professional association representing the interests of Occupational Therapists and Occupational Therapy Technicians/Assistants across South Africa. OTASA supports, promotes and represents the profession of occupational therapy (OT) as a key element of the health service provision in South Africa and positions itself as an integral, evidence-based and relevant force meeting society's health and occupational needs in partnership with key stakeholders and the public.

2. Introductory comments

The State Liability Amendment Bill, as stated in its preamble, pursues the amendment of the State Liability Act, Act 20 of 1957, by seeking to "provide for structured settlements for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State". The Bill aims to reduce the impact of lump sum payments on the already thinly stretched budgets of Provincial Departments of Health, by introducing structured settlement and periodic payments for compensation to persons in respect of claims against the State exceeding R1 million.

OTASA asserts that litigation costs and payments of compensation for medical malpractice should not be paid from operational budgets of State health establishments as this severely limits the resources available to ensure quality service delivery for all patients. Funding for litigation and medical malpractice compensation must be sourced from a separate budget and manged by a separate entity to that of provincial hospitals, to limit the administrative burden, which will allow for the successfully administration of payments.

OTASA also urges government to be diligent in the assessment of gross negligence by health care professionals. The system should allow for the State to be able to recoup costs from a health care professional who has been found to be grossly negligent. This will alleviate the burden on the State and may improve on service delivery where practitioners know that they cannot hide behind a State hospital in instances where they acted grossly negligent. This system should be able to differentiate between instances where the State is liable by having placed unqualified personnel in charge of establishments or patient care, having ineffective infrastructure, lack of equipment, etc.

3. Specific commentary on the Bill

3.1 Wrongfulness

In the Preamble and clause 2A, the Bill refers to "wrongful medical treatment". It is not clear whether the concept of negligence is covered in the scope of "wrongful", as the latter normally implies that medical treatment was provided in instances where it is not needed. Clarity is therefore required as to what, in the context of this Bill, would constitute "wrongful" and/or "negligent". Wrongfulness is one of the five elements that must be present in the law if delict for one party to be found liable towards another for their actions or omissions. Wrongfulness is established if there was a legally recognised interest and if that interest was wrongfully infringed. This reference may therefore create confusion given the fact that it is only one of the elements used to prove liability and it cannot be expected for any court to make a finding based on this one

element alone. We propose that an appropriate term be utilised that will not limit decision makers. For example, in medicine, sometimes healthcare providers such as surgeons inflict harm in order to heal, such as cutting a patient open to perform surgery.

3.2 "Creditor"

Clause 2A (1) details the categories of compensation that can be paid to the "creditor" in terms of structured and periodic payments, while clause 3 (a) and (b) defines the term "creditor" as including "injured party who suffers damages". It is unclear if the inclusion of the words *"injured party who suffers damages*" as detailed in the Bill is intended to include family members of patients who suffered injury or who have died while in the care of the State, such as in the case of mentally ill patients and the Life Esidimeni tragedy and their compensation for pain and suffering and what was termed constitutional damages as a result of loss of life of a family member while in the care of the State. Therefore, the definition of creditor must include people other than the patient who are affected by the injury or death of the patient i.e. loss of support, pain and suffering etc. The uncertainty is brought by the inclusion of the words injured.

3.3 Structured payments

Although it appears to be in the interest of the society and the State for the payments to be structured as opposed to a lump-sum as well as of interest of the creditor, in cases where financial management of large sums of money is lacking, this may result in the creditor running out of funds and this responsibility will be left back in the care of the State. The proposed Section 2A does provide that the creditor and State can approach a court to amend the frequency of payment and/or amount should there be a substantial change in the condition of the injured party. This has a potential to increase the financial burden on the State, but the situation caters for an increase or decrease in support, so the pendulum could swing either way. This therefore, entails that the way the funds are administered becomes of great importance. Further, what would the costs for this administration be on the State visa vis lump-sum payments? Is there proof of long-term affordability?

Another aspect to consider is the state's track record as relates to the COIDA Fund, which also does not inspire confidence on the credibility of this envisaged structural payment system. Care should be taken to prevent the potential of "rigging" the system to receive lump-sums. This will not be in the interest of the patient, as their long terms needs will not be met. These potentials should be catered for. The State may be liable for future costs, however there are instances where such future costs are definite, e.g. over 10 years, and this should be differentiated from costs of care over the lifetime of the creditor.

3.4 State or Private Health Establishment

Clause 2A 2(b) and 2A 2(c) mentions that the State should "provide such treatment to the injured party at a public health establishment" which "must be compliant with the norms and standards as determined by the Office of Health Standards Compliance established in terms of section 77 of the National Health Act, 2003 (Act No. 61 of 2003)". OTASA believes that this will disadvantage patients with respect to their right to choose a healthcare provider as detailed in the National Health Act No. 61 of 2003 and further infringe on the rights of citizens to access healthcare services of their choice as enshrined in the Bill of Rights in the Constitution of the Republic of South Africa, 1996. OTASA also notes that not all public health establishments are compliant with the norms and standards of the Office of Health Standards Compliance, particularly in rural areas and questions what impact this will have on patients living in rural or under resourced areas, where access to facilities that meet these norms and standards are often lacking. These patients may require accommodation to be able to be close to such institutions and this will place a further financial burden on the patients. Alternatively, the Bill should make provision for this expense which will result in an increase on the financial burden on the State.

Of particular concern, is also the possibility that patients may face, with having to return to the very institutions where the negligence occurred, if their choice to access health care services are restricted to public health establishments. Further, there is already a burden on the State and insisting that patients be treated by the State will add further to this burden, which in most instances results in long waiting periods, long distances travelled, patients sleeping in queues in undignified conditions, because of not having funds to travel back the next day. These conditions lead to some patients being untreated or negatively affects therapeutic outcomes such as in the case of hip replacements. Emergency patients are often prioritised, and elective surgery delayed. In addition, the treatment of certain conditions is not well established or not offered at all in public establishments, as is the case in the Western Cape, where lymphoedema services are currently treated predominantly at Groote Schuur Hospital, Tygerberg Hospital and four other hospitals in the provinces and not available at all levels of care or in the rural areas. Patients accessing lymphoedema services in the State are therefore often subjected to long waiting lists.

OTASA would also like to point out that it is unclear if the definition of a public health establishment as ascribed to in this Bill includes "care and rehabilitation centres" which is defined as "health establishments for the care, treatment and rehabilitation of people with intellectual disabilities", according to the Mental Health Care Act 17 Of 2002. The definition of public health facilities should explicitly include "care and rehabilitation centres", which will extend liability to patients with mental

health concerns, such as intellectual disability. This includes the need to cover non-hospital/establishment treatment, such as out-of- facility/home treatment.

Clause 2A (d) further declares that "in circumstances where future medical treatment has to be delivered in a private health establishment, the liability of the State shall be limited to the potential costs that would be incurred if such care was provided in a public health establishment". OTASA does not support the restriction on patients to utilise public facilities as stated above. OTASA notes with concern the fact that this provision provides that patients will be liable to pay the shortfalls of accounts exceeding the public sector rates, as this will place an additional burden on patients and will negate the compensation received, which is intended to pay for additional compulsions imposed as opposed to the day to day care that patients may be required to fund when accessing care at a private health establishment. For the reasons stated in the pre-ceding clause, patients should not be restricted to either public or private facility and must be allowed to elect a facility that is convenient for them.

Specific commentary on the Memorandum on the objects of The State Liability Amendment Bill, 2018

Objects of Bill

Paragraph 2.2 states that the "proposed new section 2A finally makes provision for any party to apply to the court for a variation of the periodic payment order if a substantial change in the condition or the circumstances of the injured party necessitate such a variation". Further, the actual proposed section 2A, does not refer to 'any party' it refers to 'the state or creditor'. These two sections should be reconciled.

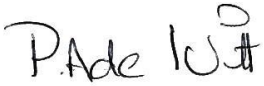
Implications for Provinces

The Bill requests for proper administrative systems to be in place to ensure effective and efficient claims processing and payments to patients. The administrative burden to enforce effective and efficient payments continues to reside with patients, who are often subjected to lengthy processes to ensure that payments are honoured by the State, as is the experience of patients awaiting compensation from the Road Accident Fund (RAF) and Workman's Compensation Fund. OTASA notes with concern the impact this will have on the patients, should a similar system be employed as with the RAF and Workman's Compensation Fund where access to immediate compensation which ought to ensure optimal quality life and well-being is potentially compromised due to ineffective systems.

Provision of necessary capacity will increase the burden on the State and on the hospitals. Although the Bill recognises the need for capacity which should include infrastructure and additional qualified human resources, there is no indication how this will practically work, and this should be clarified. This must also take into consideration the cross-movement of patients across provinces and the implications on the more well-resourced provinces.

This report is respectfully submitted by the OTASA Executive Committee.

Kind regards,



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