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LEGAL OPINION
[Confidential]

TO: Mr MB Goqwana, MP
Chairperson of the Portfolio Committee on Health

COPY: Mr M Coetzee
Acting Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Adv G Rhoda – Parliamentary Legal Adviser]

DATE: 30 May 2012

SUBJECT: The independence of the Office of the Health Standards
Compliance as envisaged in the National Health
Amendment Bill

REFERENCE: /2012



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INTRODUCTION

1. The Portfolio Committee on Health (the Committee) is currently considering the National Amendment Bill (the Bill) introduced in the National Assembly by the Minister of Health, Mr Aaron Motsoaledi (the Minister).
2. The Bill deals with the creation of the Office of Health Standards Compliance (OHSC) that aims to advise the Minister on the development and implementation of enforceable norms and standards for quality and safety for the entire health system; ensure compliance with the prescribed norms and standards; and deal with complaints relating to norms and standards against the entire health system.
3. The Committee held public hearings on the 13th and 16th March 2012 at which various organisations and individuals presented their submissions to the Committee.
4. One of critical issues that emerged during the public hearings related to the independence of the OHSC in delivering its objectives as envisaged in the amendment bill.

5. This legal opinion will seek to address the concerns regarding whether the OHSC established in terms of the National Health Amendment Bill is adequately independent. Firstly, it will set out the legal meaning of independence and then assess whether the OHSC in its current structure conforms to these criteria.

PART 1: GENERAL OVERVIEW

Assessing Independence

6. There is no objective or pre-defined criteria of what constitutes an independent body. An entity may be as independent as Parliament intends for it to be. However, we submit that once the mandate of the entity is determined, the level of independence given to it must enable the entity to fulfill its mandate.¹ Hence if an independent entity is established, the structure; powers and functions of the body must give effect to the envisaged independence. Some factors that may be considered in determining whether an entity is adequately independent to fulfill its mandate include: context, form and structure and public perception.

Context

7. Independence is contextual and depends on the mandate and purpose of the body. The degree of independence required by the Judiciary differs² immensely from the independence required of a presiding officer in a disciplinary hearing.³
8. In *the First Certification Judgment* the Constitutional Court noted that, in respect of the independence of the Chapter 9 institutions, independence tested against the relevant constitutional principle was contextual to the mandate of that body. The Court stated:⁴

¹ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC). While the fact of the Glenister matter differ greatly from the consideration before the Committee the Court's conclusion must be taken into account. The Court found that there was a constitutional obligation on Parliament to create an independent anti-corruption entity. However the Act that created the DPCI was invalid as it failed to secure adequate independence for the DPCI.

² *Van Rooyen v The State* 2002 (5) SA 246 (CC). In this case the Constitutional Court ruled against the applicants' contention that Regional Magistrate's Courts lacked the necessary institutional independence required by section 165(2) of the Constitution.

³ *Ouyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C). This case dealt with the independence of Refugee Officials. Declaring the decision by the first respondent to appoint, in terms of s 10(2) of the Refugees Act 130 of 1998 (the Refugees Act), the members of the Standing Committee for Refugee Affairs, established in terms of s 9(1) of the Refugees Act, to be unlawful, as being *ultra vires* and inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 and invalid. ss 9 and 10 of the Refugees Act. These sections read: B

'9. Standing Committee for Refugee Affairs

(1) There is hereby established a Standing Committee for Refugee Affairs.

(2) The Standing Committee must function without any bias and must be independent.

Now, it is alleged by the first applicant, and not denied by the respondents, that the third, fourth, fifth and sixth respondents are all employees of the Department of Home Affairs. It is contended by the applicants that the committee as presently B constituted cannot function without bias and cannot be regarded as independent. The appointment of the third, fourth, fifth and sixth respondents to it by the first respondent was consequently *ultra vires* the Act, unlawful and inconsistent with the Constitution, and should be reviewed and set aside as invalid, they argue.

⁴ *First Certification Judgment*. para 160.

The functions and powers of each institution need to be understood to determine whether the particular provisions governing its independence and impartiality meet the test in CP XXIX. Factors that may be relevant to independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, tenure and removal as well as those concerning institutional independence. Against the background of the nature of the particular institution, these factors must, when considered together, ensure independence and impartiality.

9. We therefore submit that in considering whether or not the OHSC is adequately independent, the mandate and the context in which it operates must be complemented by its form and structure. This evaluation will enable the practical level of independence that the entity will enjoy to be measured.

Form and Structure

10. As stated above, independence is also determined by form and structure of the entity.

11. Independence and impartiality although closely related, have different meanings.⁵ To be impartial means to act without bias, prejudice or unfairness⁶ and refers to the "a state of mind" of the officials performing a mandate.⁷ To be independent means to act free of control in action or judgment or to act autonomously.⁸ Independence refers to both the independence of the officials and the institution.

12. Institutional independence is a question of what form and structure an entity takes in its relationship to the Executive.⁹ Institutional independence also refers to the quality of this relationship between the OHSC and the Executive.¹⁰ Hence, it is submitted that while an individual appointed to

⁵ The Constitution, in reference to both the Judiciary and the Chapter 9 institutions, refers to both 'independence' and 'impartiality' as separate criteria. Section 165(2) and section 181(3). *Ruyobeza And Another V Minister Of Home Affairs And Others* 2003 (5) SA 51 (C) at p60 cited the following Canadian case regarding the distinction between independence and impartiality. Canadian case of *R v Valente* (1986) 19 CRR 354 (SCC) ((1986) 24 DLR (4th) 161) at 361:

'Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial", connotes absence of bias, actual or perceived. The word "independent" in s 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, A particularly to the executive branch of Government, that rests on objective conditions or guarantees.'

⁶ See Collins English Dictionary

⁷ *R v Valente* (1986) 19 CRR 354 (SCC) ((1986) 24 DLR (4th) 161) at 361:

⁸ See Collins English Dictionary

⁹ Van Rooyen footnote 22. Chaskalson J referring to the Canadian judgment of Le Dain J in *Valenete* (at page 169-170) wherein a contrast was drawn between individual independence with institutional independence: According to Le Dain J, judicial independence "connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees."

¹⁰ Van Rooyen. para 31. Discusses institutional independence in respect of the judiciary.

this office may conduct their investigations impartially and independently, the institutions may not enjoy institutional independence.

13. Consideration to the manner of appointment and removal of the head of the entity, the appointment of staff to the entity, the security of tenure of the head, financial security, conditions of service, the reporting lines and mechanism of funding the entity¹¹ determine whether it has real institutional independence in its functioning.¹²
14. Bodies such as the OHSC may be established in accordance with divergent forms and be structured according to different criteria depending on the context within which it operates. However, we are of the opinion that the test remains that the form and structure of an entity must ensure that it is adequately independent to fulfill its mandate.¹³
15. An appointment by the Executive of a person to a body does not automatically imply that the appointee will not act independently or impartially.¹⁴ The Constitutional Court commented that 'there is a difference between being nominated by the executive to perform a duty which calls for an independent decision and being chosen by the executive to perform that duty in accordance with its wishes.'¹⁵
16. In our constitutional scheme no branch of government, and by implication no public body, exists completely independently of the other branches of government. The doctrine of separation of powers is premised on a system of checks and balances. This means that one branch will impose restraints, within the parameters of the Constitution, on the exercise of power by another branch.¹⁶
17. Therefore adequate independence does not mean 'insulation from political accountability' but a degree of insulation from 'management by political actors' that may threaten the 'independent functioning' of the entity.¹⁷ It is hence our view that the greater the need for an entity to be institutionally independent, the greater the need for protection from political management that may interfere with this independence.
18. We are further of the view that the form and structure of the entity must be such that it ensures protection from potential political interference in

¹¹ *Financial Services Board and Another v Pepkor Pension Fund and Another* 1999 (1) SA 167 (C) 1999. p174 quotes *Bryan v United Kingdom* (1995) 21 EHRR 342 with approval. Here the European Court of Human Rights notes when it was considering the right vouchsafed by art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms to 'a fair and public hearing by an independent and impartial Tribunal. 'In order to establish whether a body can be considered to be independent, regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.'

¹² *Van Rooyen v The State*. para 17

¹³ *Glenister*. para 197

¹⁴ With regard to the appointment of Judges, see *First Certification Judgment*. para 123 -124

¹⁵ *Van Rooyen v The State*. para 92

¹⁶ *First Certification Judgment*. para 108-109

¹⁷ *Glenister*. para 216

proportion to the adequate level of independence required for the functioning of the entity.¹⁸ Therefore, where the Executive does appoint the head or members of the entity, there must be counter-balancing safeguards that prevent any real or perceived threats of interference with the operations of the entity.

Public Perception

19. While the actual functional independence (form and structure) of the body is important, the public's reasonable perception of an entity's independence is also of great importance.¹⁹ The Constitutional Court has stated that the test to determine the public perception of the independence of an entity is an objective test.²⁰ The Court also cautioned the any objective test for institutional independence must bear in mind the diversity of our society.²¹

20. The Constitutional Court has stated that: 'appearance or perception of independence plays an important role in evaluating whether independence in fact exists.'²² There must be 'reasonable perception of impartiality.'²³

21. The Constitutional Court in the *Glenister* case²⁴ made the following comments regarding public perception of how independent a body is:²⁵

By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.

22. The public's perception of independence therefore plays an important part in determining if an entity is independent.

¹⁸ *Glenister*. para 208

¹⁹ *Van Rooyen v The State*. para 32. Discusses the public perception of the independence in respect of the judiciary. The Court quoted *Valente v The Queen* where Le Dain J held that: "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."

²⁰ *Van Rooyen v The State*. para 33 - 34

²¹ *Van Rooyen v The State*. para 34. The Court stated that 'Bearing in mind the diversity of our society this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts.'

²² *Glenister* para 201, quoting *S v Van Rooyen* 2002 (5) SA 245 (cc). This case dealt with the appointment of magistrates.

²³ *Financial Services Board and Another v Pepkor Pension Fund and Another* 1999 (1) SA 167 (C). p175

²⁴ This case dealt with the establishment of the Directorate of Priority Crimes Investigations.

²⁵ *Glenister*. para 207

PART 2: NATIONAL HEALTH AMENDMENT BILL AND THE OFFICE OF HEALTH STANDARDS COMPLIANCE

23. As has already been mentioned, the Bill seeks to create the OHSC and an Ombudsman, that will be located within the OHSC.²⁶
24. There exists no constitutional duty to make the OHSC or the Ombudsman independent. The level of independence of the OHSC and/or the Ombudsperson is a policy decision and as such must be made together by the Department of Health and Parliament.
25. However, in relation to the proposed Ombudsperson, the Bill contains specific provisions that seek to secure its independence. This is not the case with the OHSC. It is therefore necessary to look at the various provisions of the Bill that relate to the OHSC in order to establish whether the office is sufficiently independent. Given that the Ombudsman is located within the OHSC, only provisions relating to the OHSC will be discussed.

Objects and Functions of the OHSC

26. Clause 78 of the bill states that the objective of the OHSC is to 'protect and promote the health and safety of users of health services by (a) monitoring compliance by health establishments with norms and standards prescribed by the Minister in relation to the national health system; and (b) ensuring consideration, investigation and disposal of complaints relating to non-compliance with prescribed norms and standards in a procedurally fair, economical and expeditious manner.' The clause does not include independence and impartiality as objects of the office.
27. The Bill does not specifically define 'complaint', but it is assumed that it relates to complaints received from users of various health establishments. However, the OHSC is empowered in clause 79 to investigate individual complaints and this power reflects a certain degree of independence from the Minister in being able to initiate investigations of their own initiative.
28. Further factors which reflect the independence of the OHSC are that it ***must*** (my emphasis) both inspect and certify health establishments as compliant (or non-compliant) with norms and standards, as set by the Minister; and monitor indicators of risk as an early warning system relating to serious breaches of the norms and standards (and then report these directly to the Minister for intervention).
29. The OHSC also has certain prerogative powers in that the OHSC ***may*** (my emphasis) issue guidelines for the benefit of health establishments; collect or request information in relation to prescribed norms and standards from health establishments and users; and publish information relating to

²⁶ Clause 81(2)(b) of the National Health Amendment Bill.

prescribed norms and standards. These prerogative powers reflect independence of the OHSC from the Minister.

Appointment and Removal of the head of the OHSC

30. The OHSC shall be headed by a Chief Executive Officer (CEO) who is appointed directly by the Minister for a renewable period of 5 years. It is also proposed that the CEO concludes a performance agreement with the Minister which may be amended from time to time.
31. The CEO may also be dismissed by the Minister on the grounds of ill-health, gross misconduct and the inability to perform the functions of the Office effectively.
32. The fact that the CEO is appointed and dismissed directly by the Minister does not necessarily mean that the OHSC is any less independent, but in our view does create the perception that the CEO might have a bias towards to the Minister. It may be more appropriate for the Committee to consider appointing a Board that might oversee the functioning of the OHSC. The nature and function of this board will remain a policy decision for the Committee and Department.

Accountability of the CEO

33. While the Bill proposes that the CEO possesses responsibilities and functions in terms of the Public Finance Management Act No. 1 of 1999, the CEO is still accountable to the Minister as he/she is required to 'furnish the Minister with information or a report in respect of any case, matter or subject dealt with by the Office; and provide the Minister with reasons for any decision taken by the CEO, an inspector or any other employee of the Office.'
34. This provision might create the impression that the Minister might have an undue political influence over decisions made by the CEO, an inspector or any other employee of the Office in relation to inspections and/or certificates of compliance or non-compliance with norms and standards.
35. In this regard, the Committee might consider the recommendation made in paragraph 32.

Funding of the OHSC

36. It is proposed that the OHSC shall be funded by money appropriated by Parliament as well as fees received for services rendered. This means that the OHSC is able to retain fees which reflects positively on the independence of the OHSC.

CONCLUSION / LEGAL ADVICE

34. The Bill in its current form seeks to create an OHSC that will monitor the compliance of norms and standards by health establishments. The level of independence of this office, while not expressly stipulated in the Bill, might play an important factor in the ability of health establishments to comply with those norms and standards. While the OHSC possesses a degree of independence from the Minister, the Committee might seek to entrench that independence by choosing to establish a Board that would replace the CEO as head of the OHSC or by providing for a role by Parliament in the appointment of the CEO.

Adv G Rhoda
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