Are the demarcation regulations unconstitutional?

A consequence of the demarcation regulations coming into force is that up to two million policyholders using insurance products to access healthcare are now uninsured, meaning they have been deprived of their section 27 right to healthcare and their section 25 right to property.

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Michael Settas of KaeloXelus and Patrick Bracher of Norton Rose Fulbright argue that the final demarcation regulations show a blatant disregard for the right of ordinary people to access healthcare and are based on the unsubstantiated claim that health insurance products are harmful to the medical schemes industry.

The demarcation regulations, that draw a line between medical insurance products and medical schemes, came into force on 1 April 2017. Existing policies will be eliminated from1 January 2018. Limited “gap cover” and “hospital cash plans” are allowed, but primary healthcare insurance policies are banned, says a statement by the Free Market Foundation (FMF)

“Drip by toxic drip, government is destroying the private healthcare sector to prepare the ground for the full introduction of National Health Insurance (NHI). With the demarcation regulations, government is making a concerted effort to attack the medical insurance sector by marginalising the funding vehicles as a means of removing lower income earners’ access to insurance,” it says.

Health products amount to property

“Accident and health products amount to ‘property’ under section 25 of the Constitution, making these regulations potentially unconstitutional. No-one should be deprived of property except in terms of the law of general application – not by a law targeted at some medical insurance policyholders. And no one should be deprived of property arbitrarily without compensation – there is no recourse for anyone who has paid a short-term premium for the last 15 years and is now deprived of their existing cover,” says Bracher,

The FMF maintains that the demarcation regulations are government interference in mutually-agreed private contracts between freely-consenting adults and insurers to minimise their risks of huge medical bills when catastrophe strikes. “Despite clear evidence that South Africa cannot afford NHI and that government infrastructure, sufficient numbers of medical practitioners, and the ability to effectively manage NHI are badly lacking, health minister Aaron Motsoaledi is pressing ahead in the face of opposition. Treasury struggled to raise R28bn in this year’s budget, so the estimated price

tag for the NHI of R369bn (in 2017 prices) is pure fantasy. Yet, the private sector continues to be marginalised."

Low-cost medical scheme benefit options

The Department of Health has requested that the Council for Medical Schemes (CMS) grant a limited two-year exemption period for primary healthcare providers who submit themselves to regulation under the Medical Schemes Act before existing primary healthcare insurance policies are banned so that the department can conduct further research into the development of low-cost medical scheme benefit options (LCBOs). However, the proposals contained in the NHI policy paper restrict medical schemes to merely providing "complementary cover" and each medical scheme will be permitted to provide only one benefit option. This raises serious doubt as to whether an LCBO will ever be developed and contradicts the government's stated objective of removing the so-called "two-tiered" healthcare system.

If actuaries are allowed to develop policies that are economically sound, however, it will not only increase access to quality healthcare for low-income individuals but also relieve a large burden on the state so that it can concentrate scarce taxpayer resources on the truly destitute.

Settas poses fundamental questions for the architects of NHI, including why is the right to private healthcare being abolished and why is NHI being driven through without waiting for the outcomes of the Competition Commission's healthcare market inquiry?

For Settas, NHI does not only face a formidable challenge in funding, but there is a severe shortage of healthcare providers, a massive disease burden, and a blundering healthcare bureaucracy. By extrapolating the existing, very poor dentist-to-patient ratios in the state sector, a dentist will have capacity to see the same patient only once every 16 years.

"Government should not attempt to provide free cover for all citizens but should focus on those who cannot afford medical insurance and leave those who can afford it, to pay for their own healthcare arrangements," he says.