SUBMISSION BY:

THE SOUTH AFRICAN MEDICO-LEGAL ASSOCIATION;

(and request on behalf of :

THE COALITION FOR THE SOUTH AFRICAN PRIVATE HEALTHCARE SECTOR);

IN RESPECT OF:

THE STATE LIABILITY AMENDMENT BILL (B16 – 2018)

Please note:

1. **We request the opportunity to make oral representations to the Parliamentary Portfolio Committee.**

2. **Although every effort has been made to prepare a comprehensive submission, this has simply not been possible in the allocated time. We accordingly reserve the right to supplement this submission in due course.**

Summary

The Organisations making this submission express concern that the Bill makes no provision to address or deal with the incidents, and frequency, of medical negligence in State institutions. The Organisations would strongly encourage a comprehensive programme which would introduce measures to promote both "upstream" interventions (that is, provisions dealing with treatment of patients before an adverse incident occurs), and "downstream" interventions (that is, provisions dealing with the resolution of disputes after an adverse incident has occurred).

This Bill is distinguishable from other measures taken by the State to reduce its liability for negligence – for example, in respect of Road Accident Fund legislation – in that the cause of liability in this Bill is by definition the negligence of the State. For that reason, statutory measures aimed at indemnifying the State for its own negligence must not be a primary response, but part of a comprehensive and coherent response to the prevailing medical negligence crisis in South Africa, with indemnity for the State being a measure of last resort.

The Organisations are concerned further that the effect of the measures in the Bill will be to create a budgetary time-bomb in that the delayed payments will lead to an even greater financial crisis in time. Added to this is the disincentive which the Bill will cause for the State to address the underlying cause of the State's liability – the number of medical negligence incidents in State health institutions.

The Organisations are of the view that the proposed limitation of the liability of the State where treatment is to be provided at a private health establishment to the potential costs that would be incurred if such care was provided in a public health establishment, is unconstitutional, as held in the matter of *The Law Society of South Africa and Others v The Minister for Transport and Another*[1].

Introduction

1.

This is a submission by the South Africa Medico Legal Association ("SAMLA") and request on behalf of the Coalition for the South African Private Healthcare Sector ("the Coalition"). SAMLA and the Coalition will be jointly referred to as "The Organisations".

2.

The Organisations subscribe to the view that our Constitution was inspired by a particular vision of a non-racial and democratic society in which government is based on the will of the people. We associate ourselves with the goal as set out in the Preamble to the Constitution of establishing "a society based on democratic values, social justice and fundamental human rights".

[1] CCT 38/10; [2010] ZACC 25

3.

We take justifiable pride in the protection of socio-economic rights in the Constitution, and in particular the right of access to healthcare services. We take the view that the provision of acceptable healthcare services is a crucial requirement for the realisation of the society which is visualised by our Constitution, due to the enormous influence the provision of such services have on the well-being of the people of South Africa.

4.

We also endorse and place a high priority on the importance of access to healthcare services for all South Africans and, in particular, the provision of such services through the organs and institutions of the State, which bear the responsibility of providing healthcare to the majority of South Africans, including the most disempowered and marginalised members of our society.

5.

The Organisations therefore make this submission with the intention of offering their assistance in addressing the complex and far-reaching challenges currently facing those who provide healthcare services, and in a spirit of constructive engagement on those issues in order to achieve a workable, effective solution to those problems through the development of a systematic, comprehensive programme that is designed to progressively realise the right of access to acceptable quality of healthcare services within the available resources.

The South African Medico-Legal Association

6.

The South African Medico-Legal Association ("SAMLA") is incorporated as a non-profit company with non-share-holding members.

7.

The main object and business of SAMLA is the arrangement and organisation of activities to advance the interaction between medicine and law within the health professions and legal professions; and to advance the inter-relationship between medicine and law in the medico-legal field of study and practice of health professionals, legal professionals and academics.

8.

SAMLA currently has a membership of approximately 1 000. SAMLA's membership is made up to a large extent of health professionals, legal professionals and academics who practice and/or study in the medico-legal field.

9.

SAMLA has a long involvement in the medico-legal sector. It was established in 2000 by Dr/ Adv Anton van den Bout as the South African Medico-Legal Society. The name was changed under the direction of Judge Claassen in 2015 to the South African Medico-Legal Association.

The Coalition for the South African Private Healthcare Sector ("the Coalition")

10.

The Coalition for the South African Private Healthcare Sector is an initiative hosted by SAMLA with the purpose of creating a forum for organisations with knowledge, capacity and goodwill to address the issue of the clinical negligence crisis in South Africa. The Coalition has operated on an informal basis over the past two years. It is currently in the process of formally establishing itself and is presently drafting a Memorandum of Incorporation and investigating the appropriate structure to pursue its objectives.

11.

Organisations which have participated in the activities of the Coalition, in addition to academics and mediators, include representative associations of healthcare practitioners, lawyers and actuaries; as well as providers of professional indemnity cover to healthcare practitioners. A list of these organisations will be provided on request.

12.

Insofar as this submission is concerned, we regrettably advise that there was insufficient time in which to canvass the views of the organisations which have participated in the Coalition, and it is accordingly not possible for the Coalition to make a submission on the substance of the Bill. However, the Coalition would invite the opportunity to make contributions both to this Bill, and in respect of any future developments. Considering the range and scope of organisations who have participated in the Coalition, we are of the view that its contribution would be extremely beneficial to this Committee.

13.

SAMLA and the Coalition are broad churches. Together, they represent a wide range of interests, with a multi-faceted constituency which allows those organisations to draw on a wealth of experience and expertise. The Organisations subscribe to the view that, like South Africa itself, the organisations' greatest strength lies in their diversity. The Organisations jealously guard their neutrality and independence. Due to the diverse membership of the organisations, they do not represent the narrow interests of any particular perspective. The organisations are mindful of their independence from the narrow interests of any group or organisation. For this reason, the organisations have a privileged, objective perspective on clinical negligence issues.

Public participation and the value of written and oral submissions

14.

The presenters wish to state that we welcome the opportunity to make written submissions. We subscribe to the view expressed by the Constitutional Court that written and oral submissions are an essential component of the notion expressed in the Preamble to the Constitution that the Constitution lays *"the foundations for a democratic and open society in which government is based on the will of the people"*, and that the ability to make written representations accords with Constitutional provisions that require National and Provincial legislatures to facilitate public involvement in their processes.

Submissions by other organisations

15.

We acknowledge the important contributions made by other organisations who have made written submissions. We would indicate that at this stage, due to the extremely short time constraints, the Organisations have not had the opportunity to properly reflect on and digest all written submissions.

16.

We are in agreement with many points made in those submissions, and do not seek to repeat those submissions. We therefore restrict our submissions to a number of specific points regarding the Bill.

17.

However, it is quite evident from the variety and the nature of the submissions made, that further public participation is essential. In this regard, we respectfully refer to the following comments by the Constitutional Court regarding public participation:

> *"The idea of allowing the public to participate in the conduct of public affairs is not a new concept. In this country, the traditional means of public participation imbizo/ lekgotla/ bosberaad. This is a participatory consultation process that was, and still is, followed within the African communities. It is used as a forum to discuss issues affecting the community. This traditional method of public participation, a tradition which is*

> *widely used by the Government, is both a practical and symbolic part of our democratic processes. It is a formal participatory democracy."*[2]

18.

We are of the view that such public participation would prove to be of tremendous benefit in addressing the issues at stake. The Coalition, in particular, is supportive of the idea of an imbizo/lekgotla/bosberaad and would be willing to participate in such an initiative.

Comment on specific points made by other organisations

19.

We take note of the submissions made by other organisations. Although we do not intend repeating submissions made by those organisations, we would like to highlight a number of issues:

19.1 The process being followed by the South African Law Reform Commission should be incorporated into the process in dealing with this Bill. It appears to us that the insights and work done by the Law Reform Commission would be of tremendous value in

[2] Paragraph 101 of Doctors for Life International v Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11.

achieving a proper understanding of the issues involved, and in constructing a coherent and comprehensive scheme into which the initiatives dealt with in the Bill could be appropriately accommodated.

19.2 We would also support the involvement of the National Treasury on the financial costing of implementation of payments, particularly regarding contingency liability. We would in particular refer to the submissions made by the Actuarial Society in this regard.

19.3 We would also emphasise the importance of properly considering the implications of Section 66 of the PFMA.

19.4 We also make particular reference to the submissions made on behalf of the South African Medical Malpractice Association which, in our view, is a well informed and thought through submission, and is especially informative regarding the right of access to the courts.

Comment on Specific Provisions of the Bill

20.

We turn now to discuss specific provisions of the Bill as it currently stands. In doing so, we at times place a particular interpretation on such provisions. We do not seek in doing so to adopt

a dogmatic approach to our interpretation, but state our views in the interests of contributing to a fuller understanding of the Bill.

Comment on Paragraph 2A(1): "A Court must …"

21.

We respectfully express our reservation regarding the peremptory language of this provision. We take due cognisance of the polycentricity of the rights of access to healthcare services, and the related rights which are dealt with in the Bill. We also acknowledge that Courts typically resolve disputes between two (or a small number of) parties, and that the "winner takes all" resolution of a dispute is not suited to the resolution of such polycentric issues. The issues raised and dealt with in the Bill entail the coordination of mutually interacting variables: a change in one variable will produce changes in all of the others. With regard to the provision of access to healthcare services, the degree of polycentricity is extremely high.

22.

Nonetheless, we submit that the fact of the matter is that socio-economic rights are, in terms of our Constitution, justiciable. It is submitted that the justiciability of those rights requires an appropriately deferent but also appropriately transformational judicial role within a reconceptualised doctrine of separation of powers.[3] For this reason, we are concerned that the

[3] See esp Marius Pieterse "*Coming to terms with judicial enforcement of socio-economic rights*" (2004) 20 SAJHR 383.

structure of the Bill, through the peremptory obligation of the Courts to order that compensation be paid to the creditor in terms of a structured settlement in any claim against the State that exceeds the amount of R1 000 000.00, when read with the narrow scope of the Bill in that it does not seek to address the underlying issue (being the negligent treatment of patients by the State) imposes an inappropriately deferential role by the Court's towards the payment of compensation at the expense of an appropriately transformative judicial role in supervising and, if needs be, enforcing the progressive realisation of the right of access to healthcare services.

23.

We would comment further that it is regrettable that the Bill has not sought to implement an appropriate form of dispute resolution process which would, in our view, be more suitable to the resolution of disputes in which the polycentricity of interests is extremely high.

Comment on Section 2A(1):

"A structured settlement which may provide for –

- **(a) past expenses and damages;**
- **(b) necessary immediate expenses;**
- **(c) the cost of assistive technology or other aids and appliances;**
- **(d) general damages for pain and suffering and loss of amenities of life; and**
- **(e) periodic payment for costs referred to in sub-section (2)"**

24.

This sub-section will oblige a Court in any successful claim against the State resulting from wrongful medical treatment with a value in excess of R1 000 000.00 to order that compensation be paid in terms of a structured settlement.

25.

However, the contents of the structured settlement are not prescribed to the Court. That much is apparent from the words *"may provide for*". This will allow the structured settlement in question to have a degree of flexibility insofar as the structured settlement is concerned.

26.

Moreover, in respect of past expenses and damages, necessary immediate expenses; the cost of assistive technology or other aids and appliances; and general damages for pain and suffering and loss of amenities of life, it is notable that the sub-section makes no provision for periodic payments. The only items in respect of which periodic payments is dealt with is that "*for future costs referred to in sub-section (2)"*. It accordingly seems to us that the structured settlement in Section 2A(1) does not contemplate a postponement of payment in respect of the heads of damages itemised in 2A(1)(a) - (d).

27.

Comment on Section 2A(2)(a):

"where the state is liable to pay for the cost of future care, future medical treatment and future loss of earnings of an injured party, the Court must, subject to sub-section (4) order that compensation for the said costs…"

28.

This sub-section correlates with the provisions of 2A(1)(e) and identifies the future costs referred to. What is of particular concern is that these provisions include the future loss of earnings of an injured party. Our concern arises from the consideration that a substantial number of injured parties would be breadwinners. When one has regard to the provisions of section 2A(2)(a)(ii), it is our view that the Bill seeks to preclude a Court from ordering that loss of future earnings would be compensable, notwithstanding the fact that the loss of future earnings was caused by the negligent medical treatment by the State.

29.

In our view, this would have far-reaching adverse consequences for the dependants of a breadwinner. Of importance is the distinction between the costs of future care and future medical treatment, on the one hand, and future loss of earnings on the other.

30.

The former two categories (costs of future care and costs of future medical treatment) can be rationally justified on the basis that, where the person receiving the care and/or treatment passes away, there is no requirement for any further such care or treatment. The right is, in this sense, personal to the injured party. However, where the payment by the State relates to future loss of earnings of an injured party (as assessed at the time of judgment), the right is not restricted to that of the injured party, but vests in the dependants of the injured party as well. It is our view that the deprivation of the dependants' benefits by way of compensation for the loss of future earnings of the injured party represents an unacceptable deprivation of rights, and we have considerable reservation as to whether it will pass Constitutional muster in its present form.

31.

In this regard, we wish to emphasise the "ripple effect" of negligent medical treatment. The physical and mental impact of the injuries to the patient causes a series of knock-on effects not only for the patient, but for the patient's family, friends and wider society. The more serious injury, the more far-reaching these negative consequences are. Since, by definition, the Bill deals with successful claims which exceed the amount of R1 000 000.00, the effects of the negligent medical treatment are far-reaching for our society.

32.

Comment on paragraph 2A(2)(b):

"The Court may –

(i) **in lieu of the amount; or**

(ii) **at a reduced amount, of compensation that would have been paid for the future medical treatment of the injured party, or to the State to provide such treatment to the injured party at a public health establishment."**

33.

We must express considerable reservation regarding this proposed section. We take due cognisance of the provisions of Section 2A(2)(c) that

> *"Where the State is ordered to provide future medical treatment at a public health establishment, the public health establishment concerned must be compliant with the norms and standards as determined by the Office of Health Standards Compliance established in terms of Section 70 of the National Health Act, 2003 (Act no 61 of 2003)"*.

34.

We acknowledge that the reference to the Office of Health Standards Compliance ("the OHSC") is a commendable attempt at safeguarding the quality of care which would be provided at a public health establishment. We would like to indicate that we are much encouraged by the initiatives of the OHSC, and support the important work upon which they have embarked. We must however express grave concern about the unacceptably low standards of compliance at public health establishments as assessed by the OHSC.

35.

Regarding this sub-section, in the final analysis we are left with a sense of dismay at the level of care provided at State health establishments. An important plank of the Bill – the provision of future medical treatment at a public health establishment in lieu of a portion or the entire amount of compensation - is therefore seriously undermined by this state of affairs. Had the level of care provided at public health establishments been at an acceptable standard, then this would play an important role in leading us to reconsider our reservations in respect of this sub-section.

36.

However, as things stand, it seems to us that this sub-section effectively relegates the injured persons back to the clutches of institutions which are demonstrably underperforming. We would add to this observation that, should the quality of treatment and care at public health establishments improve to meet the accepted norm set by the OHSC, then that would have the primary benefit of reducing incidents of clinical negligence in the first place. We would therefore urge the drafters of the Bill to incorporate into the proposed scheme measures aimed at achieving the progressive realisation of access to adequate healthcare services by all South Africans. It seems to us that by addressing not only the financial consequences of the prevailing clinical negligence but the cause of the crisis - namely, the widespread clinical negligence at public health institutions, that the constitutional imperative of the provision of adequate healthcare services would be achieved.

37.

In respect of Section 2A(2)(d), we would refer this Honourable Committee to the decision of *The Law Society of South Africa and Others v The Minister of Transport and Another* (Case CCT38/10 [2010]) ZACC 25, in which the Constitutional Court considered a constitutional challenge to amendments to the Road Accident Fund Act, 1996 (RAF Act). The proposed tariff in that instance (the UPFS tariff) was found by the Court to be such that no competent medical practitioner in the private sector with the requisite degree of experience would consistently treat victims at UPFS rates.

38.

The Court held at [91] that "*[this] simply means that all road accident victims who cannot afford private medical treatment will have no option but to submit to treatment at public health establishments*" and at [94] "*A quadriplegic or paraplegic is constantly at risk in a State Hospital as a result of the chronic lack of resources, paucity of staff and inexperience in dealing with spinal cord injuries.*"

39.

At [99] the Court held:

"*I am satisfied that the UPFS tariff is incapable of achieving the purpose which the Minister was supposed to achieve, namely a tariff which would enable innocent victims of road accidents to obtain the treatment they require. UPFS is not a tariff at which private healthcare services are available; it does not cover all services which road accident victims require with particular*

reference to spinal cord injuries which lead to paraplegia and quadriplegia. The public sector is not able to provide adequate services in a material respect. It must follow that the means selected are not rationally related to the objective sought to be achieved. That objective is to provide reasonable healthcare to seriously injured victims of motor accidents."

40.

It is our submission that the remarks of the Constitutional Court would apply with equal force to the provisions of this sub-section. We would simply add that the particular reference to spinal cord injuries which lead to paraplegia and quadriplegia made by the Constitutional Court on the facts of the LSSA case would apply with equal force to a wide range of injuries and, as is evident from the report of the OHSC, to the overwhelming majority of public health establishments in the country.

Conclusion

We therefore recommend that further public participation be held regarding the Bill.

Judge Neels Claassen

John Mullins SC

Dr Herman Edeling

Ian Dutton