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**Parliament of South Africa**

National Council of Provinces: Select Committee on Finance

Chairperson: **Hon. Y I Carrim**

For Attention: Committee Secretary, Mr Nkululeko Mangweni

By email: [nmangweni@parliament.gov.za](mailto:nmangweni@parliament.gov.za)

**22 February 2024**

Dear Honourable Chairperson and Committee Members,

**Submission by Health Justice Initiative (HJI) on the Public Procurement Bill**

**[B18B – 2023]:**

**Introduction**

1. Thank you for the opportunity to make a written submission on the **Public Procurement Bill [B18B – 2023] (the Bill)**.
2. The [Health Justice Initiative \(HJI\)](#) is a dedicated public health and law initiative addressing the intersection between racial and gender inequality, with a special focus on transparency, fair pricing and addressing Intellectual Property (IP) and other forms of patent and pricing barriers, that prevent timely and affordable access to life saving diagnostics, treatment, and vaccines for everyone. We often draw on the expertise of researchers in law, public policy, economics, and public health, as well as on universities and scientific experts in and outside of South and Africa.
3. The HJI is a supporter of a unified health care system - and to that end, South Africa's commitment to Universal Health Coverage (UHC) which depends heavily on open, transparent and accountable procurement processes.

4. We believe that open and transparent procurement processes, and access to information, are key aspects and principles of our democracy that must be upheld in all legislation too.
5. A key health rights and health access issue for HJI is whether a rich and poor person can access the same life-saving medicine, at the same time, for the same condition, at a price that is affordable and transparent using the state's negotiating power.
6. As you are well aware, the public health sector serves about 85% of people living here, and under the proposed NHI Fund, this may increase – of a population of approximately 61 million people, only about 9 million people are beneficiaries of private Medical Schemes, including government employees – meaning that the majority of people living here already depend on the states procuring power – itself considerable.
7. Unfortunately, from the [budget information available](#) to the public, we cannot disaggregate the actual 'medicine or health products' spend within the overall health budget – but the latter, for 2023/2024 is considerable – at ZAR 62 billion (ZAR 58 billion is made up of Transfers and Subsidies to provincial Health Departments).
  - a. If one considers spending at the Programme level it reveals that the largest spending occurs within 3. *Communicable and Non-Communicable Diseases* and 5. *Health Systems Programmes* – with the former projected to spend ZAR 25.3 billion and the latter, ZAR 23.9 billion.
8. In this short submission, we want to draw the Committees attention to the example of COVID vaccine procurement in South Africa, that took place under a Disaster Declaration, and in a global pandemic, amounting to millions of rands. We share some of the concerns emanating from that secretive and one-sided procurement, now widely reported on too, and even acknowledged by the [Health Department](#).
  - a. This was in a time of supply scarcity, where the state was bullied by non-state actors into secrecy and one sided procurement and contractual terms. This should never happen again – and additional safeguards in this Bill, could prevent that.
9. The HJI Submission draws on the following, and we request the contents of the following to be incorporated into our submission:
  - a. HJI's September 2023 [Submission](#) on the NHI-B-Bill. Please also refer to pages 3 to 5 of that submission, it addresses the issue of health procurement under NHI.

- b. HJI's October 2022 public analysis of the NHI Bill entitled, '*South Africa's National Health Insurance Bill and the Future of Medicine Selection, Pricing and Procurement – Some Critical Questions for Affordable Patient Access*', National Health Insurance Series: [Issue Paper 1](#).<sup>1</sup> Please refer to pages 25 to 33 of that submission, it addresses health procurement.
- c. The contents and analysis of several COVID related vaccine contracts due to legal action initiated by HJI using PAIA in 2022 - which disclosure government resisted and refused until a Court ordered the unredacted disclosure in 2023, in a ground breaking case and [Judgment](#) of the Gauteng High Court [*Health Justice Initiative v The Minister of Health and Information Officer, National Department of Health* (Case no 10009/22); 17 August 2023].<sup>2</sup>
  - i. The contracts concerned substantial public funds, and the procurement and contracting process had been marred by allegations that the government procured vaccines at differential, comparatively inflated prices, and that the agreements contained onerous and inequitable terms, including broad indemnification clauses, export restrictions and non-refundability clauses. Opening them through a Court mandated process was significant for the public interest.
  - ii. The case and judgment were widely reported both locally and globally.
    - i. The legally mandated disclosure led to shocking and scandalous revelations about the "bullying" terms and conditions included in health procurement contracts for South Africa, which amounted to hundreds of millions of rands. It also gave a glimpse into the phenomenal negotiating power (one sided) of -in this case- the pharmaceutical industry.
    - ii. So far, we are one of the few countries in the world to have had sight of the unredacted procurement contracts, where disclosure was ordered by a Court. Similar efforts are underway in other jurisdictions.
    - iii. The case, judgment and analysis of the contracts was also extensively covered in local and international media outlets. A Geneva Health File

<sup>1</sup> South Africa's National Health Insurance Bill and the Future of Medicine Selection, Pricing and Procurement – Some Critical Questions for Affordable Patient Access.' National Health Insurance Series: Issue Paper 1, October 2022, available [https://healthjusticeinitiative.org.za/wp-content/uploads/2022/11/National-Health-Insurance-Series\\_Issue-Paper-1\\_FINAL-14\\_11\\_2022.pdf](https://healthjusticeinitiative.org.za/wp-content/uploads/2022/11/National-Health-Insurance-Series_Issue-Paper-1_FINAL-14_11_2022.pdf)

<sup>2</sup> The case and Judgment relate to the recent Court ordered disclosure of all vaccine procurement contracts in an unredacted form, (previously, they were a "secret"). The case was brought by the HJI, and Millar J's Judgment in the Gauteng High Court has paved the way for the HJI to share and open up the secret COVID-19 vaccine procurement contracts that the SA Government entered into with pharmaceutical companies and COVAX. The Judgment is attached in pdf form for ease of reference and the legal papers, case materials and Judgment are available here: <sup>2</sup> Available for download at: <https://healthjusticeinitiative.org.za/pandemic-transparency/#contracts> - the Judgment can also be directly accessed here: <https://healthjusticeinitiative.org.za/wp-content/uploads/2023/08/F-1000922-the-health-justice-vs-min-of-health-judgm.pdf>

[interview](#) explains the rationale of the case. A list of media reports' is attached for your information.

- iii. More importantly, when the four contracts were disclosed, the HJI, with other groups, reviewed the contracts and issued a [Multi-stakeholder Joint Analysis](#) and with that, shared the contracts publicly. The analysis was released in early September 2023, and found that, inter alia:<sup>3</sup>

*In all four Contracts/Agreements, the pernicious nature of pharmaceutical bullying and GAVI's heavy-handedness are evident: the terms and conditions are overwhelmingly one-sided and favour multinational corporations. This placed governments in the Global South, and in turn, the people living in these countries, in an unenviable position of having to secure scarce supplies in a global emergency (2020-2022) with unusually hefty demands and conditions, including **secrecy, a lack of transparency, and very little leverage against late or no delivery of supplies or inflated prices resulting in gross profiteering. Moreover, SA's sovereignty was bartered for scarce supplies. This should never happen again. It is unconscionable, imperial, and unethical.** [emphasis added]*

10. The key elements of these one-sided vaccine procurement contracts which are of relevance to this submission relate to five key aspects – which we hope lawmakers will address in its deliberations on this Bill:

- a. Broad Non-Disclosure Agreements (NDAs) imposed on the SA government (Health Department, as the proxy);
- b. Broad secrecy clauses, especially on price;
- c. Secrecy and non-disclosure of the Contracting Parties details (the parties bizarrely alleged that even their legal name/address and details were confidential, in addition to the terms and conditions'. We note that the Court ruled otherwise and stated at Para 50: "...there is a public interest in the disclosure of the records".<sup>4</sup>
- d. Indemnification provisions and demands without which supplies would not be released (Pfizer, J&J, Serum II);

<sup>3</sup> Multi-stakeholder Analysis: "One-sided" The big pharma bullies: Secrecy for Vaccine Supplies in a Pandemic", Health Justice Initiative, Analysis, 5 Sept 2023, available: <sup>3</sup> Available for download at: <https://healthjusticeinitiative.org.za/pandemic-transparency/#contracts>

<sup>4</sup> Available for download at: <https://healthjusticeinitiative.org.za/pandemic-transparency/#contracts>

- e. Provisions relating to undertakings extracted from the SA government to benefit third parties - enabling unfettered discretion on imports and exports, benefiting European customers and governments, not people in South Africa or Africa (J&J).

11. The multi-stakeholder analysis referred to above, also found that (at page 3):

*...“the pernicious nature of pharmaceutical bullying and GAVI’s heavy-handedness are evident: the terms and conditions are overwhelmingly one-sided and favour multinational corporations. That placed governments in the Global South, and in turn, the people living in these countries, in an unenviable position of having to secure scarce supplies in a global emergency (2020-2022) with unusually hefty demands and conditions, including secrecy, a lack of transparency, and very little leverage against late or no delivery of supplies or inflated prices resulting in gross profiteering. Moreover, SA’s sovereignty was bartered for scarce supplies...*

*The most egregious example of this in our review has been a multinational pharmaceutical company (J&J) trading scarce or very delayed supplies for extractionist terms and conditions that undermine national sovereignty. This was mainly to benefit their bottom line or patients in Northern countries first: in Europe, not Africa. This relates to approximately 30 million vaccines filled in East London by Aspen, BUT [exported to Europe](#), while SA was facing the Delta wave and had no meaningful access to vaccines, affecting the national vaccination programme, in 2021).*

*For the SII, it is also likely that SA overpaid compared to European countries by at least more than two and a half times! In the UK and EU, Astra Zeneca charged £2.17 and £2.15, respectively.*

*The Contracts require SA to seek permission from said companies to divert or donate or sell doses which have already been paid for by the SA public, despite the benefit to other poorer countries or buyers.*

*In particular, J&J, Pfizer, and COVAX did not commit themselves to supply volumes and dates making it increasingly difficult to plan and run a timely and proper vaccination programme. ... this type of “take it or leave it” contracting signals a dangerous precedent for future pandemic readiness measures and systems, and [shows] why this level of bullying, secrecy, and lack of transparency has no place in any democracy.*

*The lack of timely public access to these Contracts created mistrust and limited public accountability action towards these corporates during a global pandemic. It created opportunities for price variations and enabled these multinationals to negotiate on an unequal footing with Government, which defeats the purpose of signing a supply agreement.*

*The point of a contractual purchase agreement is to have a minimum certainty for SA to order and purchase vaccines or medicines. These Contracts belie that purpose. And regrettably, this is not a once-off Covid-related modus of operating:*

*At present, even more pharmaceutical corporations are insisting on Non-Disclosure Agreements (NDAs – with broad confidential information clauses) and including them more aggressively in supply agreements to suppress the disclosure of pricing and supply terms, particularly in negotiations covering monopoly products such as HIV medicines.”*

Thus, HJI calls on law makers to ensure that this Bill outlaws the above worrying practices as in the next pandemic, we cannot have a repeat of the above.

12. We appreciate that industrial policy is connected here, but procurement using public resources must be for the benefit of the public, not private companies, and it should prioritise the cheapest version of a medicine even if it is manufactured elsewhere.

- a. Preferential procurement for health products, will have to grapple with the reality that often preferential procurement – if possible – could limit manufacturers and supplies unintentionally, affecting the supply chain and medicine access, and also add to the financial health bill burden.
- b. In any event, our view is that health preferential procurement is not often feasible especially where generics or substitutable medicines are NOT available for use (again, because of patent periods, medicine registration submissions and clinical eligibility) – this does not preclude the state from considering other forms of incentives that could encourage a preference for local procurement where local production is possible (example: fund the research and commercialisation costs in full, or provide financial incentives for local production that result in a net reduction in the *price* of a medicine offered to the state, to enable price competitiveness).

13. We also draw the Committees attention to the Rural Health Advocacy Project (RHAP) [Report](#) entitled *Procurement and Audit Outcomes in the South African Health Sector*.<sup>5</sup>

- a. The report sheds light on the critical gaps in South Africa's health sectors procurement and spending.
- b. It also offers valuable insights into the factors affecting audit outcomes, the potential challenges associated with procurement under the NHI Bill, institutional arrangements and the potential for reform through this Bill.

14. In relation to medicine selection, procurement, pricing and access, while the provisions of the [NHI B-Bill](#) are confusing and at times unclear – it provides that in respect of medicines selected by the state under NHI, the *Health Products Procurement Unit* (the NHI B-Bill changed the name - originally called the "Office of Health Procurement") will procure medical products including medicines, on the advice of multiple Advisory Committees, including the advice of a NHI *Benefits Advisory Committee* and a NHI *Health Care Benefits Pricing Committee* (s 25 and 26). One imagines that the NHI *Health Products Procurement Unit* will be regarded as a "procurement institution" by the [Procurement] Bill.

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<sup>5</sup> Procurement and Audit Outcomes in the South African Health Sector, March 2020. Geo Quinot, Professor, Department of Public Law, Stellenbosch University Director: African Procurement Law Unit. Prepared for the Rural Health Advocacy Project (RHAP). *PDF version Attached for ease of reference.*

**In this submission, we recommend that:**

15. The legislative process that shapes procurement has a vital opportunity – and Constitutional responsibility - to ensure that procurement under NHI is better managed, is fully transparent, includes minimum norms on “open procurement”, even in health emergencies to avoid a repeat of the secrecy, bullying and one-sided terms that we saw during COVID.
16. But, we should add that even with *procurement reform*, if medicine *pricing reform* is not urgently attended too, the former could be not as affective: without - *price benchmarking* for medicines; *passage of the Patent Amendment Act* (which surprisingly has not yet been tabled in Parliament, despite Cabinet<sup>6</sup> approving a new IP framework in 2018); a suit of policies to bring the high prices (often unjustified) of medicines down - the national fiscus often wastes and will waster valuable health resources (South Africa is overpaying for medicines when compared to certain middle income countries). This should not be news to lawmakers – it has been raised by the NPC and the Competition Commission<sup>7</sup> previously.
17. Regrettably, government seems unable to address this glaring gap in our law for two decades now. Thus, there will be complex price demands in health products negotiations which this Bill will have to prepare itself for.<sup>8</sup>
18. For this reason, the real and immediate intersection between *health care and medicine access, health product and medicine pricing, IP reform, pharmaceutical sole supplier negotiating power, procurement processes, and procurement rules* in South Africa, require greater consideration and could be partially addressed with additional safeguards in this Bill.
19. So, while the Bill addresses emergency situations, it needs increased safeguards for same:

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<sup>6</sup> <https://www.ip-watch.org/2018/05/27/south-africa-approves-new-ip-policy-guidance-un-agencies/>

<sup>7</sup> See: <https://www.compcom.co.za/healthcare-inquiry/>

<sup>8</sup> Government reports including the *National Planning Commission (NPC)* and the *Competition Commission's Health Market Inquiry (HMI)* indicate that there are serious gaps in medicine pricing transparency regulations and laws in our country; and that, due to, among others, multiple legal challenges by industry role players, and government delays in passing key laws on Patent reforms (Patent Amendment Bill) and regulations on at a minimum, benchmarked pricing - that often South Africa needlessly *pays more* for the same medicines than other countries; and at times, *pays different prices* for the same medicine in the state when compared to the non-state sector- and for no good reason. This is why procurement legislation could be a critical level to save scarce financial resources.

See: <https://www.compcom.co.za/wp-content/uploads/2020/01/Final-Findings-and-recommendations-report-Health-Market-Inquiry.pdf>  
[https://www.nationalplanningcommission.org.za/assets/Documents/Pharmaceutical%20Pricing%20Policy\\_%20Report%20February%202020.pdf](https://www.nationalplanningcommission.org.za/assets/Documents/Pharmaceutical%20Pricing%20Policy_%20Report%20February%202020.pdf)



- a. Should there be another global pandemic or health emergency, during a state of disaster or state of emergency, it is imperative that even with emergency procurement, the basic principles of open procurement are not flouted, meaning that the legislative room for companies in the health industry and similar to dictate procurement that flouts the basic principles included in the Constitution – openness and transparency – should be dealt with in the Bill and not permitted.
  - b. NDAs, secrecy on price and other terms including about contracting parties legal and address details, and bullying clauses on imports and exports should not be permitted.
20. Health related procurement structures that are subject to fewer competitive bids because of patent monopolies and the lack of generic competition (often there is only one supplier, the Department of Health and its Essential medicines Division should provide historical medicine procurement data to the Committee in this regard) must be legally mandated and required under this Bill in no uncertain terms to be open, transparent in its dealings, accountable, so that general procurement terms and conditions, especially price, are publicly accessible. With respect, this does not flout the requirement for commercially sensitive information to be protected.
21. Because the Bill intends to provide an overarching framework and norms for public procurement across all state departments –it should at least consider how it will include, protect and ensure now, and under the NHI:
- a. Specific measures to enable and promote *public transparency* related to medicine selection, procurement, and contracting processes.
  - b. Improved transparency and *mandated sharing of all deliberations* of procurement institutions, officers and related advisory committees.
  - c. That the *public disclosure of* any conflicts of interest between professional work, paid consultancies, and duties on respective Boards and Committees especially related to health products procurement is legally required and mandated, across all procurement related legislation.
  - d. That broad NDAs and secrecy clauses are not permitted, nor the bartering of secrecy for scarce supplies.

Given the scale of public resources being used for health procurement, and under the NHI, this is critical. It must be made clear that no private company, can enter or



be in South Africa, and bid for a health tender, while *it alone* determines the terms, conditions, and price, whilst imposing broad NDAs that go against the public interest and our law.

We welcome an opportunity to engage further on these issues should the Committee deem it necessary. Attached for your convenience, are various pdf versions of key documents referenced in this submission.

***Yours sincerely,***

*Fatima Hassan*

**Health Justice Initiative**

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**Annexures:**

1. HJI NHI B-Bill Submission. September 2023.
2. Judgment issued in the Gauteng High Court on 17 August 2023 in Health Justice Initiative v The Minister of Health and Information Officer, National Department of Health (Gauteng High Court, South Africa, Case No 10009/22).
3. HJI Multi-stakeholder Analysis: "One-sided" The big pharma bullies: Secrecy for Vaccine Supplies in a Pandemic", Health Justice Initiative. 5 September 2023.
4. RHAP Procurement and Audit Outcomes in the SA Health Sector. March 2020.
5. HJI National Health Insurance Series Issue Paper 1. October 2022.
6. HJI Media Articles on Procurement PAIA case and High Court Judgement. September – December 2023.