14 December 2020

The Chief Executive Officer
NAMAF
Att.: Mr. Stephen Tjiuoro
Via email: corporatecomm@namaf.org.na
ceo@namaf.org.na

Cc: The Honourable Minister of Finance
C/o the ED, Ms Ericah Shafudah
Via email: ericah.shafudah@mof.gov.na
Ipumbu.Shiimi@mof.gov.na

Cc: The Registrar of Medical Aid Funds
Att.: Mr. Kenneth Matomola
Via email: kmatomola@namfisa.com.na

Dear Sir

REPRESENTATION on PROPOSED REGULATIONS - NAMAF

We refer to NAMAF's published invitation to provide representations / comments to NAMAF's proposed Regulations in terms of Section 44(1) (the "Regulations") of the Medical Aid Funds Act of 1995 (the "Act").

We obtained a copy of the said proposed Regulations document, comprising of 16 pages, from the NAMAF website, and the Namibia Private Practitioners Forum (the "NPPF") provides its representations / comments herewith.

We copy the Honourable Minister of Finance hereto, for reasons stated hereunder, and more specifically because of our past experience with NAMAF and NAMAF's unresponsiveness to enquiries on its statutory mandate and legitimacy of its actions. We fear that the Honourable Minister may not be fully informed should NAMAF attempt to proceed with these Regulations.

We further copy the Registrar of Medical Aid funds, as the Register / NAMFISA is often alluded to in these comments, specifically with regard to its regulatory functions, and NAMAF's attempts to become increasingly prescriptive outside of its statutory powers. Also

for the reason that NPPF has previously complained to NAMFISA about the lack of access to actual, nominal benchmark tariffs by members of medical aid funds, which NAMFISA, through its Manager: Medical Aid Funds, L'oreal Tjiueza, simply denied to be the case.

Background

The NPPF is a registered Section 21 company with the object of promoting the sustainability of the private healthcare industry.

In November 2017 the NPPF obtained a legal opinion from Advocate Tötemeyer (SC) (referred to as "SC" or "senior council") on the powers of NAMAF to set benchmark tariffs. This opinion was provided to you, and is available to you, or any party, on request.

In the opinion SC states that "*public administration can do only what it has statutory authority to do, and it must justify all acts by pointing to a statute*" (P.8). He proceeds to state: "*It is clear from the reading of Section 12 of the Act that the power to set or recommend benchmark tariffs is not expressly accorded to NAMAF in terms of Section 12.*" (P.13).

Turning then to NAMAF's powers to *"...generally, do anything that is conducive to the achievement of its objects ... whether or not it relates to any matter expressly mentioned ...*", SC, after assessment of several relevant case law, concluded inter alia that "*wide discretionary powers must be sufficiently clear, accessible and precise, contain express constraints or guiding measures, as it may otherwise be unconstitutional*." (P.16).

SC concludes further that: "*In the circumstances, even had section 12 (read with section 10) contained an express power to lay down or recommend benchmark tariffs, it was still required – in order to pass constitutional muster – to have contained guidelines as to how the discretion to determine said tariffs be exercised. All the more would provisions such as section 12 (read together with section 10), which allows NAMAF to determine any conceivable measure (without limitation or guide), which would in its opinion be conductive to achieve its objects (or be an action in connection with its object to control the functioning of medical aid funds), be unconstitutional*."(P.23).

We submit that the totality of the proposed Regulations is premised on the impugned section 12 assessed by SC above, and is in fact evidence of the actual extent NAMAF is prepared to go in asserting its unlimited discretion, to control not only medical aid funds, but also healthcare providers.

Although denied by NAMAF in the past, the ultimate intention of Part III of the Act is to establish a regulator of medical aid funds. So, for instance Section 18 states that NAMAF "*shall*" make rules *"... in respect of which the management may, in terms of this section, take disciplinary steps against any registered fund*".

NAMAF has acknowledged that since its inception it has never made any rules to regulate the conduct of medical aid funds.

Note that the Act does not allow NAMAF to make rules to which healthcare providers must comply with. If that was the intention of the Legislature, the Act would have expressly stated so.

Also note that the Act does not allow for NAMAF to be funded by healthcare providers, or in any way raise fees against healthcare providers. As per Section 12(c) it is the registered funds, only, to fund NAMAF. If the Legislator intended for NAMAF to be funded by healthcare providers, it would have expressly stated so in the Act. We are aware that NAMAF has been opportunistically charging fees for practice numbers for years, without statutory authority to do so. We raised this with NAMAF in writing many years ago but received no reply. NAMAF was able to do so as funds, who control NAMAF, cooperate with NAMAF in this requirement. We contend that although the club, being NAMAF and its controlling funds, was able to introduce this system, it remains lawful.

NAMAF has recently categorically denied that it provides any regulatory protection to healthcare providers who claim unfair treatment at the hand of medical aid funds. This is especially important, given the fact that the proposed Regulations aim to force healthcare providers to fund NAMAF, and also allow NAMAF to set rules, unguided and unlimited, to be applicable to healthcare providers.

A recent survey conducted by NPPF, amongst close to 1,000 healthcare providers in private sector, shows that 35% of respondents reported that they are becoming worried that NAMAF is becoming increasingly prescriptive on how they should practice their professions and exercise clinical discretion, while 45% reported that they are becoming extremely worried about this trend at NAMAF.

Only 17% of respondents agree that NAMAF should set benchmark codes, descriptors and tariffs as opposed to 33% who disagreed that NAMAF should be the body setting benchmark codes, descriptors and tariffs. 47% reported that it is an outrage and probably unlawful for NAMAF to set benchmark codes, descriptors and tariffs.

This survey was conducted before the private healthcare industry was made aware of the proposed Regulations on which these comments are based.

Never before these proposed Regulations has NAMAF taken such a bold step to become an omnipotent regulator of parties over which it has no statutory jurisdiction, apart from the setting of benchmark tariffs for many years, which actions too is unlikely to pass constitutional muster.

The proposed Regulations cannot accord NAMAF powers greater than those circumscribed by the Act. We submit that NAMAF has, with respect, failed to properly apply its mind to the proposed Regulations and has not considered the governing provisions in the Act.

Against this background, and for the reasons as stated in detail below, the NPPF notes its objection to the entire proposed Regulations.

Nothing contained herein should be construed as an acceptance of any of the proposed Regulations.

On the proposed Regulations

General

The Regulations are a textbook example of why our courts declare the do-anything type of provisions, which provide broad discretionary powers, as unconstitutional. The Regulations are further an example of just how far NAMAF will go to recreate itself as regulator of healthcare providers and protector of medical aid funds, the exact opposite of the intention of the Legislator, as is clear from the Act.

Ad Section 44 of the Act

All Regulations issued under the Act are limited to the empowering Section 44 of the Act. The relevant part of Section 44 reads as follows: "

"*The Minister may, after consultation with the Association, make regulations relating to-*

(a) the administration of the affairs of registered funds;

…

(d) all other matters which are by this Act required or permitted to be prescribed,

and generally relating to all matters which he or she considers it necessary or expedient to prescribe in order that the objects and purposes of this Act may be achieved.

(2) A regulation made under subsection (1) may in respect of any contravention thereof or a failure to comply therewith prescribe a penalty not exceeding a fine of N$2 000 or imprisonment for a period not exceeding six months."

From Part III of the Act as well as Section 44, it is clear that NAMAF's powers can only be exercised over registered funds. The Regulations now attempt to expand NAMAF's powers, to prescribe to, and regulate healthcare providers. If that was the Legislator's intention it would have made specific provision therefore. Powers, which are not expressly conferred in the Act, cannot be created through regulations. Similarly, obligations which are not expressly placed on a party through the Act cannot be created through regulations. In this regard the Regulations are materially flawed.

This is exactly what the proposed Regulations attempt to do. For this reason alone, the Regulations are ultra vires the Act in material if not all respects, and will thus be null and void.

Ad Regulation 1 - Definitions

The definition of "*supplier of health services*" includes every medical professional registered with the respective health regulatory councils under the HPCNA, and more specifically, it is not limited to healthcare providers registered with NAMAF to claim directly from registered funds.

It is assumed this was an oversight, but if not, it is submitted that there is no legal basis on which NAMAF can place any obligations on healthcare providers who elect not to register with NAMAF, even if NAMAF could place obligations on healthcare providers at all.

Ad Regulation 2 – Application of Regulations

The wording of this section creates an absurdity. "*Any person*" includes every natural and legal person in the world, while the phrase "*intends to interact*" firstly, causes a mere intention of such person to already be subject to the regulations, and secondly, results in a person becoming subject to the regulations for any imaginable interaction.

For example, a member of a registered fund (the person) intending to make any enquiry with the fund (which will be regarded as an interaction with that fund), becomes subject to the Regulations.

This cannot possible the intended scope of the Regulations, and if so, it will be irrational and ultra vires the Act.

Ad Regulation 3 – Practice number

The Act does not confer any obligation on healthcare providers, and also does not give NAMAF the powers to create such obligations. So, also it does not place an obligation on healthcare providers to apply to or obtain a practice number from NAMAF. Although this practice has been accepted by the private sector healthcare industry for some time, as a practical arrangement, it must be clear that NAMAF has no statutory powers in the Act to confer any obligations on healthcare providers in this regard. Obligations cannot be created through regulations if not expressly stated so in the Act. The current as well as the proposed Regulations are thus ultra vires the Act in this regard.

Regulation 3(2)(a) must state sub-regulations (i), (ii) and (iii) in the alternative, or at least state "whichever is applicable", for as it stands now every "individual" applicant must comply with all three these sub-regulations, which could not have been the intention.

The documents required under sub-regulations 3(2)(a), 3(2)(b) and 3(2)(c) are inconsistent.

Sub-regulation 3(2)(d) again creates unlimited discretion for NAMAF, without any guidance or clarity as to how this discretion may be exercised, to prescribe any requirement it may dream of. This is both ultra vires the Act and unconstitutional.

The Act does not contain any provision whereby NAMAF may raise an "*application fee*" or any fee for that matter, against healthcare providers. On 28 February 2014 the NPPF requested NAMAF to explain on what basis it charges such fees, in the absence of any powers in the Act to do so. NAMAF replied by stating their legal practitioner is attending to the enquiry. No further reply was received.

We maintain that the current charging of fees for practice numbers, as well as the "*application fee*" contained in the Regulations, has no legal basis. The Regulations cannot create such obligation on healthcare providers, in the absence of an empowering clause in the Act, and thus the Regulation will be ultra vires in this regard as well.

The unlimited powers to simply "*publish*" any fee from time to time is unconstitutional.

It should not be forgotten that the Act clearly states that NAMAF will be funded by registered funds (Section 12(c) of the Act). As per Section 12 of the Act, NAMAF's powers clearly does not include the raising of any fees against healthcare providers. Apart from NAMAF now unlawfully charging fees from healthcare providers, it is rather arrogant of NAMAF to attempt to expand its regulatory jurisdiction to include healthcare providers, and then also expect healthcare providers to fund its operations; this while NAMAF is supposed to regulate registered funds, which it clearly does not do, and which duty it has denied.

Even if NAMAF would start to comply with its statutory mandate and actually regulate registered funds, there is no basis in law which can justify that healthcare providers must pay for same. If the this was the Legislator's intention, the Act would have expressly stated that.

Regulation 3(3) refers to regulation 12(1)(a), which sub-regulation does not exist.

NAMAF does not have the powers in the Act to make rules, or in any way regulate healthcare providers. The Regulations cannot create such powers outside of the Act. An attempt to create such powers in the Regulations will render the Regulations ultra vires the Act. The vague purpose for such rules, i.e. "*the correct use of a practice number by a supplier*", is open for arbitrary discretion and abuse by public power, and will for at least that reason alone not pass constitutional muster.

<u>Ad Regulation 4 – Validity of practice numbers</u>

In 2014 already the NPPF enquired with NAMAF as to the legal basis on which NAMAF requires annual renewal of practice numbers. NAMAF never provided a reply to explain such authority. If the Legislator intended to give NAMAF powers to issue practice numbers, and to make such practice numbers a requirement to claim directly from registered funds, and to have such practice numbers lapse annually, the Legislator would have stated so expressly. This Regulations, in this regard, are therefore ultra vires the Act.

Ad Regulation 5 – Suspension and withdrawal of a practice number

The comments with regard to rules pertaining to practice numbers and the renewal requirements under regulations 3 and 4 supra is also applicable under this regulation, and repeated.

Sub-regulation 5(1)(c) does not make logical sense. Practice numbers are used for claims lodged with registered funds by the healthcare provider directly, and not for claims lodged by a member. Also, a fund cannot lodge a claim against a fund. It is unclear what "*suspended as such*" means. One can only be suspended from being a healthcare professional, i.e. from practice. "*As such*" can therefore not refer to the actual conduct which resulted in such suspension. If that was the intention, it should be clearly stated, i.e. "*suspended from practicing as healthcare provider on the grounds of ...*". This will in any event be superfluous as a suspension from practice will in any event result in such person not being able to practice, and thus not fulfil the requirement under, for example regulation 3(2)(a)(i) any longer. Such person cannot provide healthcare services for which claims can be lodged directly with a registered fund.

Sub-regulation 5(1)(f) is unclear. The Act does not contain any provision which places an obligation on healthcare providers, and similarly a healthcare provider cannot "*contravene*" anything contained in the Act. As stated several times herein, any obligation placed on healthcare providers through these Regulations are ultra vires the Act. So also will any rules which place obligations on healthcare providers be ultra vires the Act. As such attempt to create obligations for healthcare providers will be null and void, for same being ultra vires the Act, they cannot be "*contravened*" by healthcare providers.

Sub-regulation 5(1)(g) cannot pass a constitutional test for reason of vagueness and unlimited discretion placed in the hands of public power. What will be the test for conducting a practice which is to be regarded as "*seriously prejudicial to patients or the public*"? How can NAMAF have the discretion to assess such conduct, which assessment falls squarely within the regulatory domain of the different healthcare councils. Again, NAMAF intends to overreach on its actual statutory powers, to the extent of usurping the statutory regulatory powers of the Councils under the HPCNA.

The attempt by the registered funds to regulate healthcare providers, through NAMAF, is not only completely unlawful, it is becoming a worrying trend in practice, which healthcare providers need to take seriously if they wish to preserve their professionalism, clinical independence, quality healthcare and the sustainability of the private healthcare industry.

Sub-regulation 5(2)(a) is a further example of NAMAF usurping the statutory powers and duties of the actual regulators of healthcare providers. NAMAF is a regulator of registered funds. The protection NAMAF was supposed to be providing is to the members of the funds, against the conduct of the funds. Not the conduct of healthcare providers.

It is very unfortunate that NAMAF, in essence being the funds themselves, have never executed its statutory mandate in providing such protection to the members of the funds. This is clear from the fact that NAMAF has since its inception in 1995 never issued any rules

applicable to the funds. It is deplorable that NAMAF now, through these Regulations, wants to extend its regulation over healthcare providers instead. In short, the "members" referred to are patients of healthcare providers, and they already enjoy full regulatory protection against wrongful conduct by healthcare providers, through the different professional regulators. NAMAF has no role to play in that regulation, and its attempt to do so is worrisome and unlawful.

NAMAF does not have the statutory powers to prescribe to any registered fund what payments to make and not to make, as is the intention under sub-regulation 5(2)(e)(ii). Registered funds are autonomous entities managed by member elected trustees, and they always have full discretion to make payments within the ambit of their registered rules. So, for instance, any fund which elects to manage its own system of registering healthcare providers is free to do so, and NAMAF has no statutory powers to dictate to such fund, or worse, prohibit it from applying its own system, or to make payments, which would otherwise be perfectly legal.

At the risk of belabouring this point, we reiterate, NAMAF is at best completely confused about its statutory mandate, and at worst, wilfully arrogant in its attempt to expand its powers and transform itself into a regulator, and establish a regulatory regime which the Legislator clearly never intended.

The prohibition against applying for a practice number in sub-regulation 5(2)(g) is unconstitutional. NAMAF is an administrative body, and an administrative body may at no time refuse anybody access to it, or refuse to properly assess any application made to it. Should NAMAF's practice number regime be lawful, which NPPF contends, NAMAF must receive any and all applications, and properly assess each. It can then, on proper, lawful grounds, refuse such application.

Ad Regulation 6 – Statement of account for suppliers of healthcare services

Section 30(1)(e) of the Act states that the rules of each fund, which must be approved by and registered with the Registrar of Medical Aid Funds, shall make provision "*for the manner in which contracts and other documents binding the fund shall be executed*". Section 30(1)(m) of the Act states that the rules of each fund shall make provision "*for the payment of such benefits according to a scale or specific directives, set out in the rules*".

Again, NAMAF seeks to usurps regulatory powers. NAMFISA must register the rules of each fund, and such rules must inter alia deal with the method in which and the system used by each fund to comply with its liabilities towards members.

Section 30(3) of the Act states that *"[t]he rules of a registered fund and any amendment thereof shall be binding on the fund as well as the members and their dependants and the trustees, principal officer and other employees of the fund*." A healthcare provider claiming directly from a registered fund is not a party to these rules, nor are they subject to the regulation of NAMAF (who must regulate funds, but does not). The healthcare provider

merely acts as an agent of the member in the administration of a claim against the fund, on behalf of the member of the fund.

NAMAF has no statutory powers to intervene in this relationship, nor to prescribe any liabilities on the agents of the members, the healthcare providers, in processing claims.

The extend of such absurdity becomes especially clear in sub-regulation 6(2)(f) in terms of which healthcare providers must now also provide an ICD code in order for a claim to be valid. There is no statutory obligation on a member to provide such code in order to be eligible for a claim against the fund, and there can therefore be no statutory obligation on a healthcare provider for a member's claim to be valid. NAMAF wants to become a Legislator in own right, which is unconstitutional, and poses a substantial threat to the principles of the Rule of Law, with the private healthcare industry bearing the brunt of its expansionist regulatory ambitions.

The requirement of a NAPPI code, and "*procedure code*" is a further example of the medical aid funds, through NAMAF, prescribing to the healthcare industry, without any statutory authority to do so. There is no doubt that such prescriptions stem from the do-anything clause contained in Section 12 of the Act, which NAMAF was informed will not pass constitutional muster. The inclusion of these requirements in the Regulations is nothing but an attempt to legitimise NAMAF's unconstitutional setting of benchmark codes, descriptors and tariffs.

The procedural descriptors accompanying the codes is forced by the financial services industry, which medical aid funds form part of, upon the healthcare industry. The undesirability of this must be clear. We are not aware of any country in the world which follows this system, apart from the fact that such practice is also not sanctioned in our law.

Sub-regulation 6(2)(j) is yet another example of NAMAF's overreaching of its regulatory powers, not only in its attempt to prescribe to healthcare providers, over which it has no statutory powers, but also in its prescription to healthcare providers in a matter which falls completely outside of the ambit of medical aid funds, and particularly the regulation of medical aid funds.

A registered fund has a legal obligation towards its members limited to the benefits contained in its rules. The charges by a healthcare provider which are not covered by a medical aid fund is of no concern to either NAMAF nor the funds. To force healthcare providers to include the "*net payable by the member*" on a statement to funds, before such statement may be accepted by the fund, is not only a prescription ultra vires the Act, but a further example of the prescriptive arrogance of NAMAF to meddle in the affairs of parties over which it has no statutory jurisdiction.

The above comments also apply to sub-regulation 6(3).

Ad Regulation 7 – Manner of payment of claims

There is no justification for allowing funds up to six weeks, from date of receipt of a claim, to pay legitimate claims as stated in sub-regulation 7(5). Given the systems already employed by funds there should be no reason why funds cannot assess and pay claims within two weeks. To allow funds to pay legitimate claims only after six weeks is nothing more than a forced credit system whereby healthcare providers are required to carry the financial burden associated with providing services and products on credit. The funds benefit from the delayed payment of expenses incurred by the healthcare provider at date of treatment already.

Ad Regulation 8 – Coding structures and billing guidelines

This regulation is ultra vires the Act, and if based on the do-anything clause contained Section 12 of the Act, or a similar do-anything clause contained in Section 44 of the Act, it will not pass the test of constitutionality. This was clear from the legal opinion from senior council as described above. It is unfortunately clear that NAMAF shows no regard for this opinion and has no intention of stopping its practice of setting codes and procedural and product descriptors. The inclusion of such powers in Regulations cannot cure the lack of such powers in the Act. The Regulations can simply not give NAMAF more powers than the Legislator intended in the Act itself, and insofar as the Act provides seemingly unlimited powers to NAMAF, same is unconstitutional.

Deplorably, the Regulations attempt to perpetuate the current practice of hiding the codes, procedural descriptors and nominal tariffs from the public, and more particularly, members of medical aid funds. They are only available to funds and healthcare providers as per their profession. Thus, members of medical aid funds do not have access to the actual nominal benefits they are entitled to, but only a benefit guide in which benefits are described as a percentage of (an unknown) NAMAF tariff is expressed. This matter was reported to NAMFISA, but no amount of explaining could persuade NAMFISA that this is the actual reality, and NAMFISA thus took no action on the matter. NAMFISA still believes that members have access to the actual nominal benchmark tariffs, even though NAMFISA was provided with written proof from at least one fund that members do not have access to such information, even from their own fund.

Sub-regulation 8(4) again makes provision for the charging of a prescribed fee. The comments supra on the raising of a fee, which is not sanctioned by the Act, is repeated. NAMAF simply has no powers to prescribe a fee payable by any person other than a registered fund. NAMAF also does not have the powers to create “guidelines” (and on top of that charge a fee to obtain same), which, although labelled a “guideline” can, after non-compliance with same, as per the wording of this sub-regulation, be regarded as unreasonable and unfair.

Ad Regulation 9 – Benchmark tariffs

The comments on NAMAF's unconstitutional setting of benchmark tariffs above are repeated. NAMAF's attempt to disguise its setting of tariffs as a mere "*guideline*" is futile given the fact that these tariffs are widely used by funds to set and describe their benefits. This has been confirmed in the legal opinion from senior council alluded to above.

Members know their benefits are solely dependent on these tariffs, although they may never know what exactly these tariffs are. Members are however seldom aware that these tariffs only serve to curtail their benefits.

Few members will appreciate the risk these tariffs pose to the sustainability of the private sector healthcare industry, until it will be too late. Until access to private healthcare services become very limited, and as a result, extremely expensive.

Also, few members are aware just how the tariffs limit the provision, and expansion of quality healthcare. Unfortunately, policymakers also seem to be unaware of this.

Ad Regulation 10 – Healthcare claims

This sub-regulation completely ignores the legal duty of all healthcare providers to keep confidential all medical information pertaining to patients. A patient may agree to such records being made available to another party, i.e. to a medical aid fund. The Regulations may however not force such funds to make such records further available to another party, i.e. to NAMAF.

The fact that NAMAF should keep such records privileged does not cure the unlawful, forced obtaining of such information in the first place. It is understood that health statistics, and the analysis thereof may be of benefit in policymaking, but the provision of data by funds must be properly regulated, and be expressly limited to statistical data only. Under no circumstances may any party receive any information from which any individual patient could be identified, either by name, a number, or otherwise, without the express written consent of each such member/patient.

Ad Regulation 11 – Subscription fees payable by registered funds

It is not advisable that a fee be set and then only be adjusted annually "*based on inflation*". The fee must be based on capacity requirements to regulate registered funds. As NAMAF currently does many other things, except to regulate medical aid funds, it may find itself completely incapacitated if it would actually decide to regulate funds.

It is however unlikely that this will happen given the structural impossibility which currently, effectively requires medical aid funds to discipline themselves, as NAMAF management consist of representatives of these funds only. This is the likely reason why NAMAF never

fulfilled its statutory mandate, and also why NAMAF has always been used to push the agenda of medical aid funds, instead of regulating them. This may also explain why NAMAF refuses to assist healthcare providers who were illtreated by medical aid funds.

Ad Regulation 12 – Election of Management Committee

We have no comment on the procedure proposed for electing the Management Committee. We do however record that NAMAF has, in 25 years, not fulfilled its statutory mandate to regulate medical aid funds. Instead, it elected to protect the interest of medical aid funds, and to become prescriptive of persons over whom it has no statutory jurisdiction.

The main cause for this failure must be the fact that NAMAF is nothing else but the medical aid funds coming together under one statutory body. We submit, and this is a matter for the Legislator, that in its current format, managed by the funds themselves, NAMAF cannot possibly be expected to effectively regulate funds.

It has no other statutory mandate, and the bulk of its past and current activities are not sanctioned by its empowering legislation, as is again evident in the proposed Regulations.

We thus submit that NAMAF's empowering legislation must be repealed, and an inclusive Medical Advisory Board must be established to set ethical tariffs on a prescribed, scientific, inclusive and well-regulated manner.

Also, a statutory Medical Aid Funds Ombud must be stablished to ensure proper regulatory protection to members and healthcare providers when it comes to the actions / unfair decisions of medical aid funds. Currently this protection does not exist, which leaves members and healthcare providers in an appallingly exposed and vulnerable position.

Ad Regulation 13 – Fees payable

The various comments on NAMAF's lack of statutory powers to set fees, other than prescription fees for registered funds, is repeated. An attempt to obtain powers to set fees through these Regulations is ultra vires the Act, and thus null and void. NAMAF has in the past ignored all advice and enquiries on the legitimacy of its actions. It is unfortunate that NAMAF, being nothing more than an umbrella of funds, abuse its "control" over funds to deny direct claims against funds in the absence of a practice number. This is the unfortunate and unintended consequences of the system created by the Legislator whereby NAMAF came to control healthcare providers, through a requirement of practice numbers, while this is not required in any law, but a dictation from NAMAF, i.e. the funds themselves.

It is further unfortunate, given the strong position NAMAF has by the funds "cooperating" with such dictation, that the unlawfulness of NAMAF's actions and requirements will probably only be rectified through a court of law. We can only hope that, through the Honourable Minister and by extension, the Attorney General, sense may prevail before

litigation becomes necessary; not only in respect of this regulation, but our comments on all the regulations as contained herein.

Ad Regulation 14 – Matters affecting members of funds

NAMAF has never set rules of conduct applicable to registered funds, although it was its express statutory duty from day one. It is thus unlikely that NAMAF will now suddenly change its colours and become the protector of members of funds. We submit that NAMAF can in any event not protect members of funds, given that NAMAF is nothing more than an extension of the funds themselves.

Furthermore, there is no benchmark, for instance in the form of rules, against which NAMAF will be able to assess a complaint and thus to justify a dismissal or "*finding*" pursuance to a complaint. Essentially members are complaining against the funds, with the funds. The lack of any clear obligations or rules to which funds must comply with only leaves space for arbitrary rulings, which provides no meaningful regulatory protection to members.

It is telling that NAMAF never issued any rules pertaining to the conduct of funds, which is its statutory duty in terms of the Act, and instead now wishes to provide for some disciplinary process, in the vacuum of any such rules. There is thus still no sincerity in complying with its original statutory objective, the regulation of medical aid funds.

Also, although NAMAF attempts to establish extensive prescriptions applicable to healthcare providers, it does not offer any regulatory protection to healthcare providers injured by medical aid funds.

The CEO is appointed, and reports to "management". "Management" consists of representatives of funds and the affairs of NAMAF is "*controlled by management which shall exercise and perform the powers, duties and functions of [NAMAF]*" (Section 13 of the Act). "Management" is the only authority which can suspend or dismiss the CEO. As per the Regulations, the CEO must make rulings against funds, i.e. against the same entities represented at management. There is thus no independence or unfettered discretion in the assessment of complaints, and this regulatory regime was flawed from the onset.

To make matters worse, even the Appeals Committee is appointed by "management", i.e. by the funds complained against. There are several structural flaws in the sub-regulations dealing with the Appeals Committee, which we shall not deal with in detail, as the mere establishment of an Appeals Committee through the Regulations is ultra vires, save to state that Regulations can never be used to create a criminal offence outside of empowering legislation (refer to sub-regulations 14(18), 14(19) and 14(20)).

We reiterate that NAMAF must be disbanded, for the numerous reasons set out before, and its actual intended mandate, to protect those dealing with medical aid funds, must be vested in a statutory, independent Medical Aid Funds Ombud.

Ad Regulation 15 – Penalties

NAMAF's blatant and arrogant disregard for its empowering legislation, and apparently all legal principles in general, is again displayed in this regulation, whereby NAMAF attempts to establish a penalty clause reaching far beyond the penalty limit expressly stated in Section 44(2) of the Act.

Although the Act clearly states that a penalty may not exceed N$2,000 or six months' imprisonment, NAMAF wants to introduce a maximum penalty of N$20,000 or three years' imprisonment through regulation. Regulation must always adhere to the Act in terms of which they are made, and can thus never exceed the limits stated in the Act.

This regulation is clearly ultra vires the Act, and thus null and void.

Conclusion

We humbly submit that the proposed Regulations are ultra vires the Act, and for the numerous reasons provided herein, undesirable and unlawful.

We hope that the occasion of these proposed Regulations again highlights the substantial lack in regulatory protection awarded to those dealing with medical aid funds, and the flawed regime originally put in place to do so.

We hope that this time at least NAMAF starts to appreciate its statutory limitations, and actual statutory objectives, and stop its prescriptive policies and regulatory overreaching over healthcare providers. We do however, given our many years of communicating with NAMAF on the legitimacy of its actions, not trust NAMAF to do so, and also not to be transparent in the process going forward.

For this reason, we urge the offices of the Registrar of Medical Aid funds as well as the Honourable Minister of Finance (and by extension, the Attorney General) to exercise care in assessing not only these proposed Regulations, but NAMAF's current statutory mandate, and failure to comply with such mandate.

We can only hope NAMAF shows accountability in the process, and obtain the opinion of a senior legal council to assess the proposed Regulations, together with this and all other comments provided, to avoid costly and unnecessary legislation going forward.

We thank you for the opportunity to provide these comments.

Regards

Dr Dries Coetzee (CEO)