

Advocate urges litigation over PMBs

Advocate Isabelle Ellis, from the Pretoria Society of Advocates, has said that medical schemes in South Africa are under threat and the enforcement of Prescribed Minimum Benefits (PMBs), which most affect their sustainability, is unconstitutional.

She was speaking on the first day of the Board of Healthcare Funders' southern African Conference, currently underway at Champagne Sports Resort in the Drakensberg.

The conference, which has as its theme "The power of now: Into the changing future" brings together leaders in the private health-care sector, service providers and public sector representatives.

As the starting point of her address, Advocate Ellis referred to Section 27 (1) (a) of the Constitution, which states that everyone has a right to health-care services. This, she contends, places an obligation on the state to create effective policies to benefit the whole population.

This obligation is underpinned by Section 7 (2) of the Constitution, which provides that the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each social security right enshrined in the Bill of Rights.

The state must be seen to be acting

The term "progressive realisation" is important, the Advocate said. It shows that the right may not be realised immediately, but that the state must be seen to be taking steps to achieve this goal.

This means, she said, that the state must recognise the responsibilities of other actors by enabling them to make the required provision.

It is here that the medical schemes come in. When it comes to the realisation of the basic right to health, the Medical Schemes Act works in conjunction with the Constitution to fulfil the government's obligations. This form of assistance is known as complementarity.

Section 7 (1) (b) explains that medical schemes have a role to play that is complementary to the national health policy.

"Without medical schemes, health policy won't go anywhere," she said.

The same section defines the functions of the Council for Medical Schemes. The CMS is charged with the protection of the interests of beneficiaries at all times and to control and co-ordinate the functioning of medical schemes in a manner that is complementary with the national health policy.

Ellis believes that the purpose behind the PMBs is just and reasonable. They were set up to help members who had exhausted their medical scheme cover due to serious or chronic illness.

The problem is that, according to Ellis' interpretation of the Act, PMBs should be made up of essential or primary health care effectively giving medical scheme members the same rights as those who make use of public health services. Instead, PMBs are disease-based, covering more than 270 diseases and chronic conditions. These interventions are mostly high cost and if a member does not have one of these conditions they may not get cover.

Disease-based model questioned

Ellis questioned the disease-based model, saying: "Three autoimmune diseases are not listed at all, even though their

treatment is similar to other diseases that are listed; termination of pregnancy is listed, but sterilisation is not; and otitis media is a PMB, but sinusitis is not."

"That is discrimination," she said. "Picking and choosing of various diseases is not primary health care. It is unconstitutional. It is discriminatory."

An additional problem, according to Ellis, is that Annexure A of the Medical Schemes Act provides for a review of PMBs, including monitoring of their effectiveness, every two years. In the 10 years since the PMBs were established, this has not happened.

"A review of PMBs would also take into account the affordability to members. We know that medical schemes are under threat. We must do something now. We must not wait for medical schemes to disappear. It is up to us to act," she said.

She said that medical schemes could amend their rules to provide for PMBs paid at the Uniform Patient Fee Schedule (UPFS) basis. If there are objections, they can be taken to court. The government offers citizens free health care based on the UPFS. That fee schedule can also apply to medical scheme members.

"It is unfair to expect a member of a medical scheme to pay more than the state would for the same treatment," she said.

Ellis urged BHF members to continue their fight against Regulation 8. She said that the unconstitutionality of legislation must be challenged.

"We cannot wait. Medical schemes and members are at risk so we have to act now," she concluded.

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