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To Ms B Mbete
Speaker of the National Assembly
Per e-mail: speaker@parliament.gov.za

And to: Ms D Carter
COPE MP
Per e-mail: dcarter@parliament.gov.za; dcarter@copesa.org.za

Re: **Health Amendment Bill, 2018: FOR SA's Written Submissions**

Date: 24 August 2018 (Deadline for submissions: 24 August 2018)

Dear Ms Mbete,

1. We refer to the invitation for written submissions on **Health Amendment Bill, 2018** ("the Bill").

SUMMARY OF SUBMISSIONS:

2. We commend the intention of the (Private Member's) Bill as per the Memorandum on its Objects, namely to provide for legal recognition, certainty and enforceability regarding living wills and durable power of attorney.¹
3. Our major concern regarding the Bill is that it does not specifically cater for the situations where treating medical doctors have a conscientious objection to withholding potentially life-sustaining medical treatment or procedures, thus overriding said doctors' Constitutional rights to:

¹ P 7 of the Memorandum on the Objects of the National Health Amendment Bill, 2018 (the "Memorandum").

- a. Freedom of religion, belief and opinion (s 15);
 - b. Their concomitant right to human dignity (s 10); and
 - c. Not to be (directly or indirectly) unfairly discriminated against on grounds of their religion, conscience or belief (s 9(3)).
4. The State has a duty – both in terms of the Constitution, and in terms of international covenants² the Republic is signatory to, or to which the Republic is bound in terms of customary international law³ - to respect, protect, promote and fulfil the above rights.
 5. We propose that the Bill solve this problem by specifically catering for such situations by stating that doctors with a conscientious objection must inform the patient and/or the holder of the durable power of attorney of their objections, and that they will transfer treatment and management of the patient's care to another practitioner in such circumstances.
 6. We would appreciate the **opportunity to make verbal submissions** regarding the Bill, if and/or when such opportunity presents itself.

FREEDOM OF RELIGION SOUTH AFRICA'S INTEREST IN THIS MATTER:

7. *Freedom of Religion South Africa (FOR SA)* is a non-profit organisation working to protect and promote religious freedom in South Africa, and representing over 6 million people across denominations, churches and different faith groups.
8. As such, and because the constitutional right to freedom of religion, belief and opinion (s 15) is directly affected by the proposed amendment, we (and indeed our constituency) have a direct interest in this matter.

COMMENTS RELATING TO PROCEDURE:

Consultation and time frames:

9. *FOR SA* is concerned that the process for public consultation on the Bill is seriously flawed and as a result, potentially open to judicial review, due to:

² Freedom of religion is protected under the following international covenants: Article 18 of the Universal Declaration of Human Rights (UDHR); Article 18(1) of the International Covenant of Civil and Political Rights (ICCPR); and Article 8 of the African Charter on Human and Peoples' Rights (the "Banjul Charter").

³ S 232 of the Constitution of the Republic of South Africa, 1996.

- a. In terms of a Notice published in the *Government Gazette* on the 24th July 2018, the Bill could be obtained upon request, and would be open for public comment for 30 days from publication, i.e. until 24th August 2018. (We point out that this period in fact amounts to 21 working days only).
 - b. Members of the public do not generally read the *Government Gazette*, as a result of which the general public in South Africa – who potentially stand to be directly or indirectly affected by the Bill - are not aware of the Bill. (The fact that the Bill itself was not published in the *Government Gazette*, but specifically has to be requested, makes it even more difficult!).
 - c. FOR SA itself only became aware of the Bill's existence on 14th August 2018 via an e-mail from a fellow stakeholder, leaving only 10 days before the deadline for submissions.
 - d. In the result, critical stakeholders are completely unaware of the Bill's existence, have not had an opportunity to thoroughly consider this very controversial Bill and make appropriate and helpful submissions thereon that will assist Parliament. (In terms of the PMG website, the Bill was not even published on their site and they were completely unaware of it until we shared it with them.)
10. In view of the foregoing, FOR SA addressed a letter to Ms Carter (and copied to the Speaker of the National Assembly) on the 17th of August 2018, requesting an extension of the deadline for comment to 31 October 2018. This request was refused by Ms Carter, who explained that publishing the Bill in the *Government Gazette* again, would mean “*extra time and costs*”. We submit that the alleged “*extra time and costs*” involved, do not outweigh the public's right to have knowledge of, and meaningfully participate, in a Bill which directly affects them and their constitutional rights – and could have been avoided, if proper information and timelines had been given in the first place.
11. With all due respect, we submit that the current process falls far short of the acceptable standard for public participation (see for e.g. *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 CC) and is open to judicial review.

COMMENTS RELATING TO THE SUBSTANCE OF THE BILL:

12. The Bill provides that a person may appoint an agent with a durable power of attorney, and also draw up a living will (also known as an “advanced health care directive”), to cater for the event of that person no longer being able (competent, or able to communicate) to express their refusal for any future potentially life-sustaining medical treatment or procedure.⁴
13. The Bill however does not address and/or cater for the situation where the treating medical doctor has a conscientious objection – based on his/her conscience, religion or belief⁵ - to withholding potentially life-sustaining medical treatment or procedures.
14. We propose that the Bill solve this problem by specifically addressing this situation through the insertion of the following provisions as sections 7A(7) and 7B(8) respectively:

“In the event that the treating medical doctor has a conscientious objection to giving effect to the living will, inter alia by withholding potentially life-sustaining medical treatment or procedures, such doctor must inform the patient and/or the holder of the durable power of attorney of:

- (i) their objections; and***
- (ii) that they will transfer treatment and management of the patient’s care to another practitioner who is able to give effect to the living will.”***

CONCLUSION:

15. It is our view that the insertion of the aforesaid clauses will give effect to the treating medical doctor’s constitutional right to freedom of conscience, religion, thought, belief and opinion, allowing the Bill to pass constitutional scrutiny as well as cater for otherwise complex practical situations.

Kind regards,


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⁴ S 2 of the Bill.

⁵ S 15 of the Constitution.